

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

FILED

April 13, 1982

William F. Clayton

mec

Clerk

Elroy Wabasha, et al.,

Plaintiffs

vs.

Herman Solem, Warden, South Dakota
State Penitentiary,

Defendant

CIV79-4064

Page 169

MEMORANDUM DECISION AND ORDER

The plaintiffs, inmates at the South Dakota State Penitentiary, commenced a class action challenging the constitutionality of certain practices of the defendant warden in the operation of that portion of the South Dakota State Penitentiary known as the Adjustment Center. The plaintiffs are seeking declaratory and injunctive relief pursuant to 42 U.S.C. sections 1983, 1985, and 1986.

The following issues were presented at trial for resolution by the Court:

1. Whether the action is properly maintained as a class action pursuant to Rule 23(a) of the Federal Rules of Civil Procedure
2. Whether conditions of confinement in the Adjustment Center of the South Dakota State Penitentiary constitute cruel and unusual punishment in violation of the Eighth Amendment.
3. Whether the disciplinary and classifications procedures of the South Dakota State Penitentiary used to place and keep inmates in the Adjustment Center violate the due process

CLASS CERTIFICATION

On June 2, 1980, the Court certified the class pursuant to Rule 23 of the Federal Rules of Civil Procedure to include all prisoners who have or will be confined in the Adjustment Center of the South Dakota State Penitentiary and a subclass of all Native American inmates who have or will be confined in the Adjustment Center. The Court, however, reserved ruling on whether the named plaintiffs fairly and adequately protect the interests of the class.

The plaintiffs claim that the conditions and procedures relating to confinement in the Adjustment Center violate the Eighth and Fourteenth Amendments to the United States Constitution. Further, they contend that penitentiary officials discriminate against Native American inmates on the basis of race in that Native American inmates are sent to the Adjustment Center more often and for longer periods of time than non-Indian inmates.

Civil rights actions challenging prison conditions are traditionally brought as class action suits. See *Finney v. Hutto*, 410 F.Supp. 251 (1976), affirmed 548 F.2d 740 (8th Cir. 1977), 437 U.S. 678, 57 L.Ed.2d 522, 98 S.Ct. 2565 (1978); *Battle v. Anderson*, 564 F.2d 388 (10th Cir. 1977); *Jones v. Diamond*, 519 F.2d 1090 (5th Cir. 1975); *McCray v. Bennett*, 467 F.Supp. 187 (1978); *Hardwick v. Ault*, 447 F.Supp. 116 (M.D.Ga. 1978).

The total number of inmates at the South Dakota State Penitentiary is approximately six hundred. The average total number of Native American inmates is approximately twenty-five percent.¹ Approximately eighty-five percent of the inmates in the general population never see the Adjustment Center. Of the small percentage of inmates who are sentenced to the Adjustment Center, the majority are there for a

relatively short period of time as single offenders. The plaintiffs, Dale Clark and Elroy Wabasha, have been charged with numerous infractions of the prison rules and consequently have been sentenced on numerous occasions to the Adjustment Center. As multiple offenders of the prison rules both plaintiffs have also been classified as major disciplinary problems and have at times been confined to Close Custody II. Richard Rist, the Associate Warden (Custody), testified that only twelve or thirteen inmates, including Wabasha and Clark, had ever been classified administratively to Close Custody II. The defendant argues that the named plaintiffs, because of their unique status in the general prison population and the Adjustment Center population, are not representative of the total population and therefore cannot adequately protect the interests of the class. The Court does not agree.

This action challenges the procedures employed by prison officials to confine inmates to the Adjustment Center and the conditions of confinement in the Adjustment Center. Admittedly the named plaintiffs have spent a good share of their prison time in the Adjustment Center, but the procedures followed by the Disciplinary Board and the Classification Board are equally applicable to every inmate. Once an inmate is sentenced to the Adjustment Center the conditions of confinement are the same for all inmates within the Adjustment Center. The questions of law raised by the plaintiffs in this case are applicable to all inmates equally. The claims of the representatives of the class, Dale Clark and Elroy Wabasha, are based on their constitutional rights and those claims are typical of the claims that any individual member of the class would have if he were to pursue these issues. The Court is not interested in litigating the numerous individual complaints that would inevitably result if this action did not proceed as a class action.

respect to any such actions by the defendant should rise to the benefit of all inmates and not simply the named plaintiffs. Finally, prosecution of separate actions by individual inmates would create the risk of inconsistent and varying adjudications with respect to individual members of the class. The purpose of this action is to insure all inmates that their constitutional rights are protected and that uniform and consistent procedures are employed and followed.

Although the plaintiffs, Clark and Wabasha, may not be the most typical people within the class or subclass, the Court finds that the questions of law common to the members of the class predominate over any questions affecting only individual members, that the rights of all members of the class will be protected, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. In conclusion, the Court holds that this action is properly maintained as a class action under Rule 23(a) and (b) of the Federal Rules of Civil Procedure.

CONDITIONS OF CONFINEMENT IN THE ADJUSTMENT CENTER

Facts

There is one state penitentiary in South Dakota. The original building was constructed in 1881. In approximately 1967 the Adjustment Center was built within the walls of the penitentiary. The Adjustment Center is a two-story building which is physically separated from the buildings housing the general cell blocks. The Adjustment Center is designed to serve as a maximum security unit, a prison within a prison, and is colloquially referred to as the "hole". The purpose of the Adjustment Center is to house those inmates who have committed serious rule infractions or who are administratively segregated from the general population because they pose a threat to themselves, other

Segregation is the most restrictive level of confinement at the penitentiary. Segregation is only used to house inmates who, while housed in other sections of the Adjustment Center, continue to violate prison rules and regulations. (Exhibit 7, Policy Statement #3.26). Segregation is considered reclassification within the Adjustment Center, and consequently an inmate may be placed in Segregation at the discretion of the prison officials, without a due process hearing. The minimum stay in Segregation is five days, and the maximum stay is thirty days. An inmate, however, may secure an early release from Segregation by sending a written statement (kite) to the Associate Warden - Custody, indicating that he desires to be released and that he will comply with the rules and regulations of the institution.

There are nine cells in the Segregation Unit, two of which are restraint cells or "dark cells". The dark cells contain only a commode, and a diagonal bar that may be used to restrain an inmate who is attempting self-mutilation. There is an unwritten policy that an inmate is not to remain in a dark cell for more than twenty-four hours.

An inmate in Segregation is provided with two blankets, a hand towel, a bar of soap, a partial roll of toilet paper, a pair of coveralls, a handkerchief, and a pair of socks. The inmate also receives his toothbrush and stamped envelopes and stationery if he has them. Inmates in Segregation receive first class mail, attorney visits, one shower per week, and no recreation.

Third Grade is housed in the lower East cell block in the Adjustment Center. There are nine cells in Third Grade. An inmate spends the first five days of punishment for a serious rules infraction in the Third Grade. Privileges in Third Grade are restricted, but in addition to the privileges afforded to the inmate in Segregation, the inmate in

Disciplinary Board. In addition to the privileges afforded the inmate in Third Grade, the inmate in Second Grade is allowed a mattress, two sheets, a pillow and pillowcase, commissary privileges, Class II visits², four law library books per week, and fifteen minutes of recreation per day in the corridor of the cell block.

The maximum stay in the Adjustment Center for any one Disciplinary Board conviction may not exceed ninety days. (Exhibit 7, Policy Statement #3.36). An inmate who commits an additional infraction while in Second or Third Grade may be administratively transferred to Segregation without a due process hearing. The only way an inmate will serve more than the original ninety days, however, is if he is charged with a new infraction, in which case he must receive a due process hearing before the Disciplinary Board. The Board may order the second sentence to run either consecutively or concurrently.

An inmate is transferred from the general population to either Second or Third Grade in any one of the five following ways. (1) The inmate is convicted of a major rule infraction and sentenced to the Adjustment Center by the Disciplinary Board. (2) An inmate who commits a major or minor rule infraction while serving a conditional suspended sentence may be sent to the Adjustment Center to serve out the earlier sentence. (3) An inmate may be detained in the Adjustment Center pending investigation of a serious major rule infraction. (4) An inmate may be detained on a detention order pending the Disciplinary Board hearing. In such cases the detention order must be reviewed every twenty-four hours. (5) An inmate may request to be housed in the Adjustment Center.

The Close Custody Unit (CCU) is also housed in the Adjustment Center. Close Custody II is a nonpunitive administrative classification

and is the maximum security section of the institution. Close Custody is designed to provide "more secure housing and control of those few inmates who have not responded to counselling or conventional disciplinary sanctions and who are flagrantly or chronically disruptive of good order and security." (Exhibit 7, Policy Statement #2.28). Placement in CCU is determined by the Classification Board, following a formal due process hearing.³ Criteria for placement in CCU include:

- a. Presentence or background investigations indicating an unstable personality and/or aggressive nature.
- b. A chronic inability to adjust to the general penitentiary population.
- c. The inmate constitutes a serious or continuing threat to the security of the institution or to staff members or to other inmates.

(Exhibit 7, Policy Statement #2.28).

In addition to the privileges allowed in Third Grade, inmates in Close Custody II are allowed to have personal items, such as TV, radio, tape player, headset, and approved hobby work in their cells. They receive thirty minutes of recreation a day, Class II visits, commissary, four law library books a week, and two showers a week.

Each cell in the Adjustment Center is approximately six feet by ten feet and contains, at a minimum, a sink with running hot and cold water, a commode, a metal cot, and a low density light which is controlled by the guards. There is only one inmate per cell. Each inmate is confined to his cell at least twenty-three and a half hours per day. Recreation, when permitted, consists of no more than one half hour per day. During recreation, the inmate may walk around the common area in front of the cells, or take a shower. All inmates in the

Adjustment Center eat commercially prepared frozen t.v. dinners, which are supplemented with fresh fruit, bread, juice, milk, and coffee. The t.v. dinners are prepared in an oven in the Adjustment Center.

Analysis

The Court will first analyze generally the Eighth Amendment claims raised by the plaintiffs. The Court will then briefly discuss each of the subissues raised relating to specific conditions in the Adjustment Center.

First, the Court recognizes that it is not the role of the federal judiciary to supervise the operation of state prisons. *Meachum v. Fano*, 427 U.S. 215, 229, 96 S.Ct. 2532, 49 L.Ed.2d 451 (1976). Reasonable deference must be afforded to the state authorities responsible for maintaining internal order, discipline and security within our state institutions. *Procunier v. Martinez*, 416 U.S. 396, 405, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974); *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979). When prison policies, practices, or conditions, however, offend a fundamental constitutional guarantee, the federal courts must assume responsibility for insuring that inmates' constitutional rights are protected. *Procunier v. Martinez*, supra at 405-06.

In examining the conditions in the Adjustment Center, this Court's inquiry is limited to determining whether the policies, practices, and conditions in the Adjustment Center result in a deprivation of the inmates' constitutional rights. This Court cannot, and will not, substitute its judgment for that of prison authorities as to what constitutes the most desirable conditions in the Adjustment Center or in the penitentiary as a whole.

The plaintiffs allege that the conditions of confinement in the

98 S.Ct. 2565, 57 L.Ed.2d 522 (1978); Bono v. Saxbe, 620 F.2d 609 (7th Cir. 1980); Burns v. Swenson, 430 F.2d 771 (8th Cir. 1970). The duration of confinement and the conditions of such confinement, however, may render punitive segregation unconstitutional. *Hutto v. Finney*, supra at 685-86. The Supreme Court has summarized the Eighth Amendment standard to be applied in prison condition cases as follows:

The Eighth Amendment's ban on inflicting cruel and unusual punishments, made applicable to the States by the Fourteenth Amendment, "proscribe(s) more than physically barbarous punishments." *Estelle v. Gamble*, 429 U.S. 97, 102. It prohibits penalties that are grossly disproportionate to the offense, *Weems v. United States*, 217 U.S. 349, 367, as well as those that transgress today's "broad and idealistic concepts of dignity, civilized standards, humanity and decency." *Estelle v. Gamble*, 429 U.S. 97, 102, quoting *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968).

Hutto v. Finney, supra at 685.

The Court must consider the totality of the circumstances as they exist in the Adjustment Center and then determine whether the conditions as a whole are intolerable, or shocking to the conscience, or totally unreasonable in light of the "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101, 78 S.Ct. 590, 2 L.Ed.2d 630 (1957); *Burks v. Walsh*, 461 F.Supp. 454, 481 (W.D. Mo. 1978). Although the voluminous case law in the area of prison conditions provides the Court with some guidance, the holdings in these cases are as varied as the conditions and factual settings giving rise to each individual litigation. Many of the courts finding Eighth Amendment violations were shocked first and foremost by the

based on the overcrowded conditions, that the court found other conditions, such as lack of out of cell time, to be intolerable. Overcrowded conditions do not exist in the Adjustment Center. Each inmate has an individual cell, which provides privacy and adequate space. The Court does not find the conditions existing in the Adjustment Center, considered in toto, intolerable or shocking to the conscience. There are, however, individual conditions that the defendant would be well advised to consider changing or modifying, and some that must be changed.

The plaintiffs rely on *Finney v. Hutto*, 410 F.Supp. 251 (E.D. Ark. 1976), affirmed 548 F.2d 740 (8th Cir. 1977), 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978), to establish their claim of constitutional violations. Although there are some problems existing in the Adjustment Center section of the South Dakota penitentiary, they are not even close to the conditions that existed in the Arkansas prison system. The Court finds that, taken as a whole, the conditions at the South Dakota penitentiary more closely resemble the restrictive conditions held to be constitutional in *Bono v. Saxbe*, 620 F.2d 609 (7th Cir. 1980).

Conditions in the Adjustment Center at the South Dakota penitentiary do not begin to mirror the shocking conditions which lead the court to find Eighth Amendment violations in *Hutto v. Finney*, supra, and *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974). The conditions challenged in Hutto included confining at least four prisoners in a cell measuring eight feet by ten feet. There was no furniture in the cells; however, inmates did receive insect and infection laden mattresses at night. Precautions were not taken to prevent the spread of infectious diseases. Further, inmates were fed "grue", a mashed mixture of meat, potatoes, and vegetables. The "grue" had little nutritional value and provided less than 1,000 calories per day. The court's concern in Hutto was that

failed to heed the warnings of the court that the court was forced to order the changes made. This Court's experience with the named defendant is in no way typified by that described in Arkansas. For example, during the trial and based on Hutto, the defendant amended Department Policy #3.26 to provide that an inmate could not be held in Segregation for more than thirty days. Unlike the Arkansas prison system, the defendant appears to be working hard to protect the constitutional rights of inmates in the South Dakota penitentiary, while maintaining internal order, discipline and institutional security. Conditions also differ from those held to be constitutional in Collier, where housing units were declared unfit for human habitation due to the serious sewer problems causing contamination of the water supply, the uncontrolled spread of infectious diseases, frayed and exposed electrical wiring, broken windows, and only three makeshift washbasins for every eighty men.

The Court will now consider each of the individual conditions challenged by the plaintiffs. Although the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society," Trop v. Dulles, 356 U.S. 86, 101, 78 S.Ct. 590, 2 L.Ed.2d 630 (1957), such decisions must rest on objective factors, and not the subjective views of federal judges. Rhodes v. Chapman, 452 U.S. 337 (1981). Conditions of confinement are unconstitutional only when they involve the wanton and unnecessary infliction of pain or when they are grossly disproportionate to the severity of the crime. The Supreme Court cautioned the federal courts in Rhodes that "conditions that cannot be said to be cruel and unusual under (objective) contemporary standards are not unconstitutional. To the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society." Rhodes v. Chapman, supra at

1. Thirty day limit on punitive isolation.

An inmate who violates institution rules while in Second or Third Grade may be sent to Segregation. The inmate spends a minimum of five days and a maximum of thirty days in Segregation. During the trial the defendant amended Policy Statement #3.26 limiting confinement in Segregation to a maximum of thirty days to conform with the mandate issued in *Hutto v. Finney*, 437 U.S. 678 (1978). The inmate, however, may always leave Segregation before the expiration of the thirty days by sending a "kite" to the Associate Warden - Custody, stating that he desires to be released and that he will abide by the institution rules and regulations.

There is a ninety day per offense limit on the time that an inmate may be confined in either Second or Third Grade. Generally, the inmate spends his first five days in Third Grade and the remainder of any sentence is served in Second Grade. The conditions in Second Grade are much less restrictive than those in either Third Grade or Segregation, and thus do not constitutionally require a thirty day limitation. The severity of conditions and the length of confinement are interrelated. As the conditions become less restrictive, the length of time that an inmate may be so confined increases.

Although inmates may be sentenced by the Disciplinary Board to five days Third Grade and indeterminate in Second Grade, this is not truly an indeterminate sentence as long as the maximum of ninety days per offense is followed. Every inmate knows that if he abides by the rules and regulations, the maximum time that he will spend in the Adjustment Center is ninety days. This does not shock the Court's conscience, as did the indefinite sentences employed in H-House in the Georgia penal system. See *Hardwick v. Ault*, 447 F.Supp. 116, 126 (M.D. Ga. 1978).⁵

2. Medical and psychiatric care.

denied medical and psychiatric care. The Court finds nothing in the record to support this allegation. There is evidence to support the fact that inmates in the Adjustment Center do not receive regular visits from a psychologist or a psychiatrist. The unit manager in the Adjustment Center, however, holds a B.A. degree in psychology and a M.A. degree in guidance and counseling. Inmates may also send a "kite" to their prison counselor, requesting that the counselor visit with the inmate in the Adjustment Center. It appears that medical care is provided when needed or when requested by an inmate.⁶

Deliberate indifference to an inmate's serious medical needs violates the Eighth Amendment. *Estelle v. Gamble*, 429 U.S. 97, 104, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). "In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend 'evolving standards of decency' in violation of the Eighth Amendment." *Id.* A medical need is serious if it has been diagnosed by a physician as mandating treatment or if it is so obvious that even a lay person would recognize the need for medical attention. *Laaman v. Helgemoe*, 437 F.Supp. 269, 311 (D. N.H. 1977). The right to medical care includes not only physical needs, but also psychological and psychiatric needs. The Fourth Circuit Court of Appeals has held that an inmate is entitled to psychological or psychiatric treatment if

a physician or other health care provider, exercising ordinary skill and care at the time of observation, concludes with reasonable medical certainty (1) that the prisoner's symptoms evidence a serious disease or injury; (2) that such disease or injury is curable or may be

substantially alleviated; and (3) that the potential for harm to the prisoner by reason of delay or the denial of care would be substantial. The right to treatment is, of course, limited to that which may be provided upon a reasonable cost and time basis and the essential test is one of medical necessity and not simply that which may be considered merely desirable.

Bowring v. Godwin, 551 F.2d 44, 47-48 (4th Cir. 1977).

Inmates in the Adjustment Center, as well as inmates in the general population, are entitled to reasonable psychiatric and/or psychological treatment when medically necessary. When an inmate is diagnosed under the Bowring test as needing psychiatric or psychological treatment, the defendant is under an affirmative duty to provide such care. *Laaman v. Helgemoe*, supra at 313. If there is a policy stating that inmates in the Adjustment Center are not entitled to the services of a psychiatrist or a psychologist, as claimed by the plaintiffs, then such policy must be changed. This does not mean that an inmate is entitled to such services simply because he is confined in the Adjustment Center. It simply means that the defendant has an affirmative duty to provide psychiatric care whenever it is medically indicated.

3. Lighting.

Each cell is equipped with two lights; a sixty watt bulb⁷ is used during the day and a forty watt bulb is used for night lighting. Inmates in Close Custody II are allowed to have their own bed lamps.

Inmates in the Adjustment Center cannot be deprived of basic necessities. Adequate lighting is clearly a basic necessity,⁸

⁷There is some conflict in the testimony as to whether the light used during the day is a sixty or a seventy-five watt bulb.

especially when inmates spend a minimum of twenty-three and a half hours a day in their cell. See *Finney v. Arkansas Board of Correction*, 505 F.2d 194, 208 (8th Cir. 1974). Reading is one of the few activities available to inmates in the Adjustment Center. This Court would agree with the Seventh Circuit Court of Appeals that inmates in the Adjustment Center must be provided with adequate light for reading, unless the defendant can establish a rational basis for the dimly lit cells. *Bono v. Saxbe*, 620 F.2d 609, 617 (7th Cir. 1980).

4. Clothing and shelter.

There is a metal cot in all the cells in the Adjustment Center. A mattress is not required by the institution rules in either Segregation or Third Grade. Inmates in Segregation and Third Grade, however, are provided with two blankets. In Second Grade and Close Custody II inmates receive a mattress, two sheets, a pillow and a pillowcase, and two blankets. At the time the Court toured the Adjustment Center, there were mattresses in all the cells, including those in Segregation and Third Grade.

At times the metal cots have been removed from some cells in Segregation. This occurs on an individual basis after an inmate has fashioned handmade weapons from parts of his bed. Mattresses have also been removed from cells when the inmate uses the mattress to start a fire in the Adjustment Center.

Inmates in the Adjustment Center are issued prison coveralls. There is nothing in the evidence to indicate that the coveralls are not sufficient to adequately clothe an inmate.

The State must furnish its prisoners with reasonably adequate food, clothing, shelter, sanitation, medical care, and personal safety. The Constitution, however, does not require that prisoners, as indivi-

mark the progress of a maturing society," *Trop v. Dulles*, 356 U.S. 86, 101 (1957), would dictate that all inmates be provided with an adequate place to sleep, which would include a cot, a mattress, and appropriate bedding. Inmates, however, who abuse the privileges afforded to them by a "maturing society" cannot complain when those privileges are removed, at least for a short time. Institutional security is of paramount importance. *Bell v. Wolfish*, 441 U.S. 520, 547, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1976). When weapons are fashioned from the metal bed frames, when mattresses are set afire, and when bedding is used to clog the plumbing, the defendant may deprive the offending inmate of his cot, or his mattress, or his bedding without violating the Eighth Amendment. As the State noted in its brief, when weapons are fashioned from metal bed frames, "it would seem to be a reasonable security measure to deprive certain inmates, from whom such weapons have been confiscated, of their metal cots, at least for a short period, provided blankets and a mattress were provided." (Defendant's post-trial brief at 23). The Court would find the same reasoning appropriate when an inmate burns his mattress. That is, it would be a reasonable security measure to deprive that inmate of a mattress for a short period of time, as long as he was provided with a cot and a blanket.

5. Ventilation.

The plaintiffs cite *Hutto v. Finney*, supra, in support of their ventilation claim. The ventilation problems in Hutto were not only more severe, but they were also compounded by the overcrowded conditions in the Arkansas prison. The ventilation in the Adjustment Center, as observed by the Court during its tour, would appear to be constitutionally adequate. Inmates do not have a constitutional right to be free from the mildly offensive odor that permeates the entire northern

plaintiffs further testified that due to this collection of garbage, there are occasionally bugs and mice in the cellblock. Prison authorities, however, testified that most of the litter that accumulates in the corridor is thrown by the inmates from their cells, and that when they are given an opportunity to clean the area, they refuse to do so. There was conflicting testimony as to the actual garbage collection schedule, although garbage is apparently removed periodically for central collection.

The accumulation of trash and debris is a haven for rodents and infection carrying insects, all of which constitute a health hazard. A program of daily trash collection and periodic pest control must be instituted in order to provide inmates with reasonably healthy and safe quarters.

7. Diet.

All the inmates in the Adjustment Center are served commercially prepared frozen t.v. dinners. The dinners are cooked in an oven located in a multipurpose room in the Adjustment Center. This policy was instituted in order to avoid the security problems encountered in transporting food from the main kitchen to the Adjustment Center, or transferring inmates from the Adjustment Center through the general population to the dining hall. The t.v. dinners are supplemented with milk, coffee, fresh fruit at least twice a day and four slices of bread with butter at each meal. Testimony at trial indicated that there is reasonable variation in the meals.

Prison authorities must provide inmates with the basic necessities of life, including reasonably adequate food. *Newman v. State of Alabama*, 559 F.2d 283, 286 (5th Cir. 1977). The plaintiffs rely on *Campbell v. Cauthron*, 623 F.2d 503, 508-09 (8th Cir. 1980), for the

person on this diet could lose up to nine pounds a month. The defendant's expert agreed that such a diet is inadequate, unless it is supplemented with a daily addition of vitamin C-enriched juice, a glass of milk and a peanut butter sandwich. Further, Campbell involved conditions in a county jail housing pre-trial detainees.

In the present case, there has been no expert testimony indicating that the supplemented t.v. dinners are nutritionally inadequate, or that any of the inmates in the Adjustment Center have suffered a significant weight loss. Although a diet of t.v. dinners may not be the most interesting, they appear to be reasonably adequate. Further, the defendant has articulated a reasonable rationale for implementing the t.v. dinner policy. "Prison administrators . . . (must) be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." Bell v. Wolfish, supra, 441 U.S. at 547 (1979).

8. Recreation and exercise.

Inmates in Segregation and Third Grade do not receive any recreation. Inmates in Second Grade receive fifteen minutes of recreation a day and inmates in Close Custody II receive thirty minutes of recreation a day. Inmates in Close Custody II also receive an occasional "rooftop rec" during good weather. Recreation for all inmates in the Adjustment Center consists of walking around in the general corridor of their cell-block.

The plaintiffs are requesting a minimum exercise period of one hour per day outside the cell, and "exercise equipment and facilities which provide a meaningful opportunity for exercise." (Plaintiffs' Post-Trial Brief at 13). The plaintiffs rely on Campbell v. Cauthron,

involved conditions in a county jail, not conditions in an administrative or a punitive segregation unit. Even in Campbell the court recognized the need to balance institutional security with the inmate's need for physical exercise by stating that exercise opportunities could be provided within the cell for those inmates that would present a security risk if released from their cells. Id. at note 4.

The length of confinement is an important consideration in determining whether certain conditions of confinement meet constitutional standards. See Hutto v. Finney, supra, 437 U.S. at 686. The failure to provide recreation for the inmates confined to Third Grade or Segregation for five days does not constitute enforced idleness of a sufficient duration to result in physical degeneration. Again, after five days in Segregation an inmate is able to send a "kite" to the Associate Warden - Custody requesting his release from Segregation. Therefore, it would seem to the Court that after five days in Segregation, it is the inmate's decision as to whether he wants to abide by the rules of the institution and thus move to another section of the Adjustment Center where recreation is provided. Under these conditions, the inmate is not denied recreation; rather he is making an informed decision as to whether he wants to participate in the limited recreation provided in Second Grade.

The question of the adequacy of recreation provided for the inmates in Second Grade and Close Custody II presents a closer question. Although deprivation of exercise does not per se constitute cruel and unusual punishment, such a deprivation may impair a person's health and thus would be forbidden by the Eighth Amendment. Miller v. Carson, 563 F.2d 741, 751 (5th Cir. 1977) citing Estelle v. Gamble, 429 U.S. 97 (1976). In Hardwick v. Ault, 447 F.Supp. 116, 127 (M.D.Ga. 1978), the court found that two hours of exercise a week in a very small yard

Eighth Amendment if confined to a relatively short period of maximum confinement, the rule may be quite different when" the restriction is extended over an indefinite period of time. Sweet v. South Carolina Dept. of Corrections, 529 F.2d 854, 866 (4th Cir. 1975).

The Court is concerned with the limited duration of exercise provided to the inmates in Second Grade and Close Custody II, especially when recreation simply consists of wandering the narrow corridor in front of the cellblock. In Second Grade the limited opportunities for recreation might be justified by the fact that the maximum period of confinement for any one offense is ninety days. Inmates in Close Custody, however, may spend an extended period of time in this unit, and the continued limitation on exercise and recreation may be more serious. The Court does not wish to unduly interfere with prison administration by ordering the penitentiary to provide increased opportunities for more appropriate recreation and exercise. Therefore, the Court is simply requesting that the defendant reevaluate the policies in the Adjustment Center and CCU as they relate to recreation, and if possible, provide inmates with an appropriate opportunity to exercise for an increased period of time each day.

9. Access to the law library.

Inmates in Segregation and Third Grade, according to written policy, are not allowed law books. The Unit Manager, however, testified that he believed that all inmates had a right to law books, and therefore he allowed inmates in Segregation and Third Grade to receive law books when they requested them. Inmates in Second Grade and Close Custody II may receive four law books from the library per week. Inmates also have access to a photocopy machine located in the multi-purpose room in the Adjustment Center for copying necessary documents.

the law." *Bounds v. Smith*, 430 U.S. 817, 828, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977). Inmates in punitive isolation cannot be denied total access to the prison library. *Kirby v. Blackledge*, 530 F.2d 583, 586 (4th Cir. 1976); *Knell v. Bensinger*, 489 F.2d 1014, 1017 (7th Cir. 1973). Restricted access to the law library, however, is not a per se violation. Prison regulations that reasonably limit the time, place, and manner in which inmates may engage in legal research do not violate constitutionally protected rights as long as the regulations do not frustrate access to the courts. *Twyman v. Crisp*, 584 F.2d 352, 358 (10th Cir. 1978).

Inmates in *Frazier v. Ward*, 426 F.Supp. 1354 (N.D.N.Y. 1977), were not permitted to leave the segregation unit to go to the library; rather they were permitted, upon request, to receive two law books every other day from the law library. The court stated that this procedure did not violate constitutional standards and that to order direct access to the library would "in effect diminish the purposes of segregated confinement." *Id.* at 1371.

There is no showing by the plaintiffs that restricted access to the law library has denied inmates access to the courts. The Court, however, does agree with the plaintiffs that it is nearly impossible to do research with only four books per week. The defendant has not presented the Court with any rational reason or justification for this policy. The Court finds that in order to protect the inmates' fundamental constitutional right of access to the courts all inmates in the Adjustment Center must be allowed reasonable access to the law library. In the Court's opinion, reasonable access would allow inmates to receive a given number of books each day. Inmates, of course, would be expected to return the books in their cells before receiving new books from the

Inmates in the Adjustment Center and CCU do not participate in vocational, educational, or work programs. The plaintiffs have requested that the Court order the defendant to implement programs for the inmates in the Adjustment Center to occupy their time and to prevent mental and physical degeneration.

Although rehabilitation may be a valid penological objective, prisoners do not have a constitutional right to rehabilitation. *Bono v. Saxbe*, 620 F.2d 609, 615 (7th Cir. 1980). The Tenth Circuit Court of Appeals held in *Battle v. Anderson*, 564 F.2d 388 (1977), that "while an inmate does not have a federal constitutional right to rehabilitation, he is entitled to be confined in an environment which does not result in his degeneration or which threatens his mental and physical well being." Id. at 403.

Although the Court recognizes, and the defendant concedes, that forced idleness for the general population on a long term basis might cause degeneration, there is no substantial evidence that forced idleness for limited periods of time in the Adjustment Center result in mental and physical degeneration. Further, the defendant has articulated a legitimate security interest in restricting access by inmates in the Adjustment Center to work release, vocational, educational, and other rehabilitative programs. The inmates in the Adjustment Center have been unable to function effectively in the general population without causing serious disruption. It is this disruptive behavior that has caused these inmates to be segregated from the general population and confined to the Adjustment Center. It is therefore a justifiable administrative policy to deny these disruptive inmates access to group rehabilitation programs. "The Constitution does not require that prisoners, as individuals or as a group, be provided with any and every amenity which some person may

Adjustment Center and that the defendant must be ordered to train guards in firefighting techniques and that an evacuation plan must be implemented and enforced. At the present time all guards receive training in the area of basic fire safety techniques.

The Court recognizes that all inmates have a basic right to be safe and secure in their place of confinement. The plaintiffs, however, have not convinced this Court that they are not reasonably safe while confined to the Adjustment Center.

The plaintiffs raise this issue in relation to a series of inmate-originated fires where mattresses and debris were burned in the Adjustment Center. Testimony at trial would indicate that prison authorities handled the fire in a calm and reasonable manner, and that no serious injuries were sustained. The Sioux Falls Fire Department responded quickly to the call for assistance, they put out the fire and installed fans to clear the area of smoke. This was all accomplished in a very short period of time, and without injury. To release unnecessarily all the inmates confined in the Adjustment Center would have presented a substantial security risk to the institution, and in the Court's opinion would have been unwarranted.

12. Personal Hygiene.

Inmates in Segregation are allowed one shower per week, while inmates in Third Grade, Second Grade, and Close Custody II are allowed two showers per week. All inmates have in their cells a sink with hot and cold running water, a hand towel, a bar of soap, and a partial roll of toilet paper. The plaintiffs claim that two showers per week are simply inadequate and that all inmates in the Adjustment Center must be given an opportunity to shower at least once every two days. The defendant argues that the basic necessities for personal hygiene are provided

a value judgment. A request that all inmates receive a shower every other day is certainly a reasonable request, in the Court's opinion, especially when the defendant has not attempted to provide a rational justification for the present shower policy. The Court would suggest that the defendant reevaluate the rationale for the present shower policy and if possible allow inmates to shower on a more regular basis. The present policy, however, although arbitrary, is not totally shocking to the conscience, and does not rise to the level of a constitutional violation, unless inmates can show that they suffer health problems as a direct result of this policy.

Although the Court is requesting that the defendant reevaluate the shower policy, the Court is not willing to interfere with the day to day administration of the Adjustment Center by ordering that the defendant institute a policy of allowing inmates to shower every other day. See Bell v. Wolfish, supra, 441 U.S. 520 (1979).

13. Dark cells.

There are two dark cells in the Segregation unit. These cells contain only a commode and a diagonal metal bar attached to the wall. A large wooden door on the front of the cell may be closed to completely block out light from the cell. Testimony at trial indicated that these cells are seldom used, and that by unwritten policy an inmate could only be confined to a dark cell for a period of twenty-four hours. The dark cells are used to protect an inmate from himself or to protect others from the inmate. Further testimony as to the actual conditions in the dark cells is sketchy at best. For example, there is no evidence as to whether an inmate is stripped before going to the dark cell, whether the inmate receives regular meals, and whether the inmate is allowed even two blankets. The plaintiffs claim that the conditions of confinement

501 F.2d, 1291, 1305 (5th Cir. 1974), the court refused to totally enjoin the use of dark cells in all circumstances. The Court in Gates, however, placed very strict restrictions on the conditions in the dark cells, including maximum confinement of twenty-four hours.

The defendant must develop and implement policies regarding the use of the dark cells. The policies must explicitly set forth the circumstances under which an inmate could be confined to a dark cell and the conditions of confinement while in the dark cell. Further, confinement in a dark cell must be limited to a maximum period of twenty-four hours. This is not to say that the dark cell cannot be used as a regular cell in the segregation unit, if the wooden door remains open and the inmate in the cell is afforded all the rights and privileges generally allowed in Segregation.

14. Strip searches.

All inmates in the Adjustment Center are allowed attorney visits. The inmates in Second Grade and Close Custody II are also allowed non-contact visits. In a noncontact visit there is a plexiglass divider between the inmate and his visitor, and they communicate by phone. Inmates are strip-searched upon entering or leaving the Adjustment Center. The inmates are escorted, in handcuffs, to and from their destinations.

Strip-searches routinely administered and not based on probable cause or directly related to prison security constitute cruel and unusual punishment. *Bono v. Saxbe*, 620 F.2d 609, 617 (7th Cir. 1980); *Hurley v. Ward*, 584 F.2d 609, 611 (2nd Cir. 1978); *Frazier v. Ward*, 426 F.Supp. 1354, 1366 (N.D.N.Y. 1977).

Routine strip-searches of inmates returning to the Adjustment Center from noncontact visits must be immediately discontinued. Strip-

Facts

Generally an inmate is only confined to the Adjustment Center after conviction by the Disciplinary Board of a major rules infraction. The Disciplinary Board is composed of three penitentiary officials: the disciplinary officer, a member of the noncustodial staff, and a third person. The charging officer, the investigating officer, or any person having personal knowledge of any material fact of the alleged violation cannot sit on the Disciplinary Board.

The following procedures are followed by the Disciplinary Board for all major rules infractions. The report of a rules infraction must be submitted in writing by the charging officer. The inmate must receive a Rule Infraction Report containing a statement of the charge at least four days before the hearing date. The inmate also receives two copies of the Notice of Violation, which contains the number of the rule allegedly violated, the adverse witnesses that may be called at the hearing, and the evidence that may be produced at the hearing. On part B of the form the inmate may plead guilty, not guilty, or no contest. If the inmate chooses to plead not guilty or no contest he will receive an adversary hearing before the Disciplinary Board.⁹ The inmate has the right to be represented by a member of the noncustodial staff, usually his assigned counselor, to appear pro se, or to retain counsel at his expense. The inmate has the right to cross-examine witnesses at the hearing, and to call witnesses in his defense, subject to certain security restrictions imposed by the Disciplinary Board.

The inmate remains in the general population pending the hearing, unless the officer in charge determines that the inmate represents a threat to institutional security or discipline. Inmates placed in the Adjustment Center on administrative detention are entitled to a review

the continued detention. Inmates sentenced to the Adjustment Center by the Disciplinary Board receive credit for the time spent in the Adjustment Center pursuant to a detention order.

The inmate receives the written findings of the Disciplinary Board following the hearing. The report of the Disciplinary Board includes a summary of the witnesses and testimony presented by the institution, a summary of the witnesses and testimony presented by the inmate, a summary of the evidence supporting the Board's decision, the Board's decision, the sentence imposed, and the number of days credit for time spent in administrative detention. This report is signed by the three members of the Disciplinary Board and the inmate.

If the inmate is sentenced to time in the Adjustment Center the sentence will be either five days Third Grade and a given number of days Second Grade, or five days Third Grade and indeterminate Second Grade. The majority of inmates receive indeterminate sentences in Second Grade. The maximum time that an inmate can spend in the Adjustment Center per offense is ninety days.

The inmate confined to the Adjustment Center on an indeterminate sentence is reviewed by the Review Board twenty days after the imposition of sentence. If continued confinement in the Adjustment Center is ordered, the inmate is reviewed at least once every fifteen days until released. The inmate is not present at the review hearing. The inmate receives a written report from the Review Board indicating whether his confinement in the Adjustment Center is to continue and the date of the next review hearing. The report does not apprise the inmate of the reasons for continued confinement or what the inmate must do to be released from the Adjustment Center. The Review Board is composed of the Disciplinary Officer, a ranking officer, and a member of the non-

a maximum of thirty days in Segregation. The inmate's total time in the Adjustment Center, however, cannot exceed the original ninety days unless he receives a due process hearing before the Disciplinary Board on the later rules infraction.

Analysis

When an inmate is charged with a major rules infraction, he is afforded a full due process hearing, which meets the requirements set forth by the Supreme Court in *Wolff v. McDonnell*, 418 U.S. 539, 563-70, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974). The plaintiffs concede that inmates receive a due process hearing before the Disciplinary Board before a transfer is made from the general population to the Adjustment Center. The plaintiffs, however, argue that before an inmate can be transferred from Second or Third Grade to Segregation he is again entitled to a full blown due process hearing, because the inmate's privileges are being further limited. The defendant contends that the transfer of an inmate from one level in the Adjustment Center to another level constitutes an intra-institution transfer and does not require a due process hearing as long as the inmate's total time in the Adjustment Center does not exceed the ninety day maximum allowed as a result of the initial sentence.

The right to a minimum due process hearing before being placed in punitive segregation was established in *Wolff v. McDonnell*, supra. The South Dakota State Penitentiary fully complies with the Wolff requirements prior to confining an inmate in the Adjustment Center.

The plaintiffs claim that an inmate is entitled to a full due process hearing prior to confinement in the Segregation unit. The plaintiffs reason that an inmate in Second or Third Grade has a justifiable expectation that he will not be arbitrarily moved from Second or

Segregation. The conditions in all levels of the Adjustment Center are essentially the same. The only distinction between the various levels are the privileges afforded to the inmate.¹⁰ Prison authorities must be allowed some discretion in the meting out of disciplinary measures and some flexibility in the implementation of penal programs in order to meet institutional needs and goals. See Glouser v. Parratt, 605 F.2d 419, 420-21 (8th Cir. 1979). Absent an unreasonable or arbitrary exercise of this discretion, this Court is not willing to interfere with day to day programming within the Adjustment Center.

The plaintiffs also challenge indeterminate confinement in the Adjustment Center without meaningful review based on objective criteria. Indeterminate confinement is not a constitutional deprivation per se. Sweet v. South Carolina Department of Corrections, 529 F.2d 854, 861 (4th Cir. 1975). The defendant concedes that Kelly v. Brewer, 525 F.2d 394 (8th Cir. 1975), does require a periodic review of confinement under an indeterminate sentence. The defendant, however, argues that the inmate is not entitled to a full blown due process hearing each time he comes up for review. The Court would agree. The following minimal procedures, however, are required in order to provide the inmate with a meaningful review. The inmate must be allowed advance notice of the hearing date and the opportunity to submit a written statement to the Review Board. If confinement on an indefinite sentence is continued, the inmate must receive written notice of the reasons for continued confinement, the conduct that is expected in order that the inmate may be released to the general population, and the objective criteria that

¹⁰ All cells in the Adjustment Center are the same size and contain, at a minimum, a sink with running hot and cold water, a commode, a metal cot, and a low density light. Heat, sanitation, and ventilation are the same in all

the Board will apply at the next review hearing. *McCray v. Bennett*, 467 F.Supp. 187, 192-93 (M.D. Ala. 1978); *Hardwick v. Ault*, 447 F.Supp. 116, 124 (M.D. Ga. 1978); *Bono v. Saxbe*, 450 F.Supp. 934, 945 (E.D. Ill. 1978); *Kelly v. Brewer*, 525 F.2d 394, 397 (8th Cir. 1975).

Administrative Segregation: Close Custody II

Facts

The Close Custody Unit is used to provide "more secure housing and control of those inmates who have not responded to counselling or conventional disciplinary sanctions and who are flagrantly or chronically disruptive of good order or security." (Exhibit 7, Policy Statement #2.28).

Close Custody II is not to be used as punishment. Criteria for placement in CCU include:

- a. Presentence or background investigations indicating an unstable personality and/or aggressive nature.
- b. A chronic inability to adjust to the general penitentiary population.
- c. The inmate constitutes a serious or continuing threat to the security of the institution or to staff members or to other inmates.

(Exhibit 7, Policy Statement #2.28).

Placement in CCU is determined by the Classification Board. The Classification Board is composed of five members, at least two of which must be members of the Programs Department. Originally inmates were sent to CCU without notice and a hearing. During the trial the defendant proposed to change the procedures employed by the Classification Board so that inmates would receive a formal due process hearing prior to placement in CCU. (See Exhibit F). It is the Court's understanding

Classification Board by any Associate Warden or Captain who has investigated recommendations made by subordinate staff. The following are the proposed procedures for classification hearings for CCU. Written notice of the hearing to increase the inmate's custody classification to Close Custody II must be given to the inmate at least twenty-four hours before the hearing. The inmate may be represented by his counselor at the hearing. The inmate may be present at the hearing and may present a statement and/or documentary evidence. The Committee's decision and the rationale for the decision must be submitted to the inmate in writing. The need for continued confinement in CCU is reviewed by the Classification Board at least once every sixty days. The inmate may attend the review hearing and may submit a statement to the Board. The Classification Review Board must submit a written statement to the inmate if classification in CCU is continued.

The plaintiffs claim that they have a protected liberty interest in remaining in the general population and therefore they cannot be reclassified to CCU without a formal due process hearing. The defendant, on the other hand, argues that classification is a discretionary administrative function and therefore the transfer of an inmate from the general population to CCU does not require a formal due process hearing.

Analysis

Enomoto v. Wright, 462 F.Supp. 397 (N.D. Cal. 1976), aff'd 434 U.S. 1052 (1978), held that "the inmate has an interest, conferred by statewide regulation and protected by due process, in not being confined in maximum security segregation unless he is found, for clearly documented reasons, to come within the standard set by the rules." Id. at 403. Just as in Enomoto, the rules and regulations governing the South Dakota Penitentiary have created a justifiable expectation that an

created right is not arbitrarily abrogated. *Wolff v. McDonnell*, supra, 418 U.S. at 557 (1974); *Enomoto v. Wright*, supra, 462 F.Supp. at 402.

Whenever an inmate is transferred from the general population to maximum security, whether it involves punitive segregation or administrative segregation, and the inmate suffers a grievous loss of liberty due to the conditions of confinement, he is entitled to notice and a hearing that meets the minimum due process requirements announced in *Wolff*. *Vitek v. Jones*, 445 U.S. 480, 488 (1980); *Enomoto v. Wright*, supra at 402. The defendant argues that the conditions in Close Custody II, other than meals, recreation time, and intermingling with the general population, are identical to those enjoyed by the general population. Such a statement is patently false. Inmates in CCU are not able to participate in group educational, vocational, or rehabilitation programs. Inmates in CCU are not eligible for work assignments, or work release programs, nor are they allowed access to the recreation center, or to conduct research in the law library. They are not allowed contact visits, and their opportunity to shower is restricted. Although inmates in CCU are able to have personal effects, such as a radio, t.v., and tape player in their cells, the conditions of confinement are certainly more onerous than those in the general population.

Further, the defendant's reliance on *Meachum v. Fano*, 427 U.S. 215, 96 S.Ct. 2532, 49 L.Ed.2d 451 (1976), and *Montanye v. Haymes*, 427 U.S. 236, 96 S.Ct. 2543, 49 L.Ed.2d 466 (1976), is misplaced. These cases hold that an inmate may be transferred from one prison to another without a due process hearing, even though the conditions in the new prison are more onerous than those prevailing in the prison where the inmate was previously confined. The Court reasoned that an inmate does not have a protected liberty interest in being confined in a given

authorities, especially when the inmate was transferred from the general population of one institution to the general population of another institution. Furthermore, Meachum and Montanye hold that if the state imposes limits on the discretion of prison authorities, by statute, rule, or regulation, so that transfer decisions depend on a specific standard being met, the state has created a liberty interest which must be protected by due process. Wright v. Enomoto, supra, 462 F.Supp. at 402.

The Court holds that the Classification Board must comply with minimum due process procedures, as outlined in Exhibit F, before transferring an inmate from the general population to CCU. If the defendant has not implemented these procedures, he must do so immediately.

In addition to the procedures presently followed by the Classification Review Board, the Board must provide inmates with a list of the relevant objective criteria that is applied by the Board. When classification in CCU is continued, the Board must provide the inmate with the reasons for continued confinement and the conduct that is required of the inmate for return to the general population. Kelly v. Brewer, 525 F.2d 394, 397 (8th Cir. 1975); Bono v. Saxbe, 450 F.Supp. 934, 945 (E.D. Ill. 1978).

EQUAL PROTECTION

In their third cause of action the plaintiffs claim that Native Americans as a subclass are discriminated against in the disciplinary process, in that Native American inmates are more often sent to the Adjustment Center by the Disciplinary Board, and that these inmates spend a longer period of time in the Adjustment Center than white inmates

The central purpose of the Equal Protection Clause of the Fourteenth Amendment is to prevent official conduct which results in

establish a racially disproportionate impact, they must then prove that the racially disproportionate impact resulted from a racially motivated purpose. A discriminatory purpose may be inferred from the totality of the circumstances, including statistical evidence, when the statistical evidence shows a gross disparity which adversely impacts on a particular race. *Inmates of Nebraska v. Greenholtz*, 567 F.2d 1368, 1374-75 (8th Cir. 1977), cert. denied 439 U.S. 841 (1978).

The plaintiffs compiled data from the prison disciplinary files for a three-year period beginning January 1, 1977, encoded this data, and through lengthy computer printouts attempted to establish a significant racial imbalance in the Adjustment Center. In the initial computer run, the effects of recidivism and multiple infractions were not considered. In a supplemental computer run, presented as rebuttal evidence, the plaintiffs' expert attempted to take into account recidivism.

When recidivism is considered, the plaintiffs' statistics show that Native American single offenders receive slightly more severe sentences than white, and are more often placed on prehearing detention, although, as a group, Native American single offenders spent relatively few days in the Adjustment Center. For double offenders the statistics were completely reversed, with whites, as a group, receiving more severe sentences and more often held on a prehearing detention order. For multiple offenders there were only slight disparities between Native American and white inmates. In commenting on the statistics, the plaintiffs' expert stated that "the data for whites and Native Americans are quite comparable (for double and multiple offenders) and it appears that the degree of severity of sentence depends upon the number of infractions that they have received." (Exhibit 22 at p. 42). It appears that recidivism, and not racism, accounts for the sentencing disparities.

the fact that the only controlled variable in the plaintiffs' evidence was race. It is obvious that the Disciplinary Board must consider a number of important factors in rendering its decision, and these other factors have not been considered or incorporated into the plaintiffs' evidence.

The plaintiffs have also attempted to show that Native American inmates receive harsher sentences from the Disciplinary Board when charged with a violation that requires a more subjective determination of guilt, i.e., insolence. The plaintiffs' statistics in this area, however, are severely flawed in that it does not consider multiple infractions. Therefore, an inmate charged with insubordination, attempted assault of another inmate, and assault of a guard could be sentenced to time in the Adjustment Center based on the cumulative seriousness of the alleged violations. According to the plaintiffs' evidence, however, the inmate was sentenced to time in the Adjustment Center for insubordination, simply because that was the first offense listed on the Notice of Violation, and therefore the offense that was encoded by the plaintiffs.

Based on all the evidence adduced at trial, the Court finds that the plaintiffs have not produced sufficient evidence of a racially disproportionate impact so as to establish a prima facie case of racial discrimination.

CONCLUSION

In summary, the Court holds that this case was properly maintained as a class action pursuant to Rules 23(a) and (b) of the Federal Rules of Civil Procedure, and that the plaintiffs, Dale Clark and Elroy Wabasha, properly represent and adequately protect the interests of the class.

In considering the totality of the circumstances as they exist in

clothing, shelter, sanitation, medical care, and personal safety. Therefore, the Court holds that the basic conditions existing in the Adjustment Center are well within constitutional standards and do not violate the Eighth Amendment. The Court has addressed each of the specific conditions challenged by the plaintiffs, and has determined that many of the policies and practices need to be reevaluated by the defendant. The Court does not wish to unduly interfere with the administration of the South Dakota Penitentiary, and therefore, the Court is requesting that the defendant develop new policies and procedures for the Adjustment Center. The changes in existing policies and procedures should address the concerns expressed by the Court. If a given change is impracticable, the defendant should present to the Court a rational justification as to why the change would interfere with internal order, discipline, and institutional security.

The following briefly summarizes the Court's position on each of the challenged conditions.

1. There must be a thirty day limit on the time spent in Segregation, and a ninety day limit on the time spent in punitive segregation for any one offense.
2. Psychiatric care must be provided to inmates in the Adjustment Center whenever it is medically indicated.
3. Adequate lighting must be provided.
4. Inmates must be provided with a cot, a mattress, and appropriate bedding, with the understanding that an inmate may be deprived of any one of these items if he uses them in a destructive manner.
5. Adequate sanitation, including a program of daily trash collection and periodic pest control, must be provided.

8. The recreation and exercise policy must be reevaluated, especially in Second Grade and Close Custody II.
9. The policy on access to law books must be reevaluated.
10. Rehabilitation programs are not constitutionally mandated.
11. The fire protection program, through the Sioux Falls Fire Department, appears to be adequate.
12. The shower policy must be reevaluated.
13. Written policies regarding use of the dark cells must be developed.
14. Strip-searches without probable cause must be discontinued.

In relation to the due process claims, the evidence indicates that inmates receive a due process hearing prior to confinement in punitive segregation. The Court holds that this satisfies the requirements of due process and that inmates may be transferred from Second or Third Grade to Segregation without another due process hearing, as long as the inmate is not confined in the Adjustment Center for more than ninety days for any one offense. The defendant has proposed due process hearing procedures for classification of an inmate to Close Custody II. If these procedures have not already been implemented, they must be implemented immediately.

Finally, the Court finds that the plaintiffs have failed to make out a prima facie case of racial discrimination in support of their equal protection claim.

Accordingly, it is ORDERED that the defendant submit to the Court, within thirty days from receipt of this order, detailed policies and procedures relating to the Adjustment Center. At the time that the policies and procedures have been approved by the Court, an appropriate judgment will be entered.