IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

BRAD SKINNER, on his own behalf, and on behalf of all others similarly situated,	)	
Plaintiff,	)	
vs.	)	Case No. 02-CV-33-B
JUDITH UPHOFF; VANCE EVERETT; JAMES HEWITT; and DAVID EBELL; all in their individual and official capacities,	)	
Defendants.	)	

FINAL DECREE ADOPTING AND INCORPORATING DEFENDANTS' SECOND PROPOSED REMEDIAL PLAN, WITH MODIFICATIONS, AND GRANTING IN PART AND DENYING IN PART PLAINTIFF'S OBJECTIONS TO THE PLAN

The matter is before the Court on Defendants' Second Proposed Remedial Plan ("Plan"), submitted to the Court on May 7, 2003, and fashioned pursuant to this Court's November 27, 2002 Order Granting Plaintiff's Motion for Summary Judgment ("Summary Judgment Order"). The parties worked toward submitting a joint plan and have agreed on the vast majority of issues in the Plan before the Court. However, there are a few issues on which the parties could not agree, and thus Plaintiff submitted four Objections to the Plan. The parties settled one of Plaintiff's Objections (relating to

Defendants' proposed Order for Protection of Documents, which was attached to the Plan as Plan Exhibit I). Thus, only three Objections remain before the Court. After reviewing the parties' written submissions, hearing oral argument, and being fully advised in the premises, the Court **FINDS** and **ORDERS** as follows:

I. **The First Issue: Investigating Nine Prior Assaults**.

Plaintiff requests that the Court include the following language (or words to the same effect) in the Plan upon its adoption, since Defendants would not agree to include it:

> Defendants are hereby ordered to investigate, using the investigation procedures adopted in the Remedial Plan, the assaults that occurred at the North prison on inmates Brad Skinner, Shane Pitzer, Melvin Slayton, Brian Alvis, John Jessel, Ellis Kennedy, Matthew Escobedo, Thomas Peitsmeyer, and Everett Phillips. Following each of these nine investigations, the defendants will then take whatever remedial and disciplinary action is deemed necessary, using the criteria and considerations set forth in the Remedial Plan.

(Pls.' Br. Re: the Remedial Plan ("Pls.' Br."), p. 2). Plaintiff argues that requiring Defendants to investigate these assaults at long last is compelled by the principles contained in the Court's Summary Judgment Order. (Id.). In particular, Defendants have a constitutional duty "to discover whether staff error or misconduct, or some other institutional deficiency, was a cause or contributing factor to an inmate assault . . . in order to avoid recurrence of

the problem in the future." (Id. (quoting Skinner v. Uphoff, 234 F. Supp. 2d 1208, 1214 (D. Wyo. 2002))). Plaintiff contends that because Defendants' refusal to investigate these prior assaults violated the Eighth Amendment, their continuing refusal to investigate the same assaults is a continuing Eighth Amendment violation, placing inmates at unnecessary risk of preventable future injury. (See id., p. 3).

Defendants respond by reference to the Prison Litigation Reform Act ("PLRA"), which states in part:

> Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.

18 U.S.C. § 3626(a)(1). According to Defendants, Plaintiff is asking for improper and unnecessary prospective relief. (Defs.' Resp. to Pls.' Objections to Defs.' Second Proposed Remedial Plan ("Defs.' Resp."), p. 9). The constitutional injuries to the inmates occurred at the time of the incidents, by Defendants' failure to provide for their reasonable safety, and Defendants'

Second Proposed Remedial Plan provides all the measures necessary to remedy past deficiencies. (Id.). Thus, ordering investigations of four and five-year-old incidents is not the "least intrusive means necessary to correct the violation of the Federal right." 18 U.S.C. § 3626(a)(1).

Plaintiff is correct that Defendants, through their failure to investigate previous assaults and their resulting failure to protect the inmates from harm, violated the Eighth Amendment rights of the victim inmates at the Wyoming State Penitentiary ("WSP"). The Court does not, however, go so far as to agree that by not going back in time four or five years to investigate these past incidents, Defendants are in continual violation of the Eighth Amendment and this Court's Summary Judgment Order. The Court agrees with Defendants that there is little to be gained at this juncture by initiating new investigations of the incidents involving the nine inmates listed by Plaintiff. The staleness of the past assault incidents would present serious obstacles to any sort of meaningful investigation. While the Court certainly understands Plaintiff's desire to gain as much information as possible in order to prevent any subsequent assaults arising out of similar faulty conditions, the Court believes that the deficiencies

at the WSP have been brought to light, and that the Plan addresses them by the "least intrusive means necessary to correct the violation of the Federal right." 18 U.S.C. § 3626(a)(1). The most sensible and workable option, then, is to proceed from this point forward under the provisions of the Plan.

II. **The Second Issue: The "No State Interest" Paragraph**.

Plaintiff objects to the first sentence in the following paragraph of the Plan:

> Nothing contained in this Plan is intended to create any contractual rights or state law liberty interest in any person, party or organization. The terms of this Plan are intended to assure the enforcement of federal constitutional rights for the members of the certified class of Plaintiffs, and only for those rights addressed in the Court's November 27, 2002, summary judgment order.

(Plan, pp. 5-6, ¶ I.B.3.). Plaintiff argues that the first sentence in this paragraph is vague and overbroad. (Pls.' Br., p. 6). Plaintiff does not wish to agree to language that appears to be intended to limit the rights of the class that Plaintiff represents. (Id., pp. 6-7). Defendants respond that the purpose of this provision is to clarify the intent and scope of the Plan, which is to remedy the Eighth Amendment violation found by the Court in its Summary Judgment Order. (See Defs.' Resp., p. 6).

The Plan is not intended to be a contract or to create any state law liberty interest. (See id., pp. 6-7).

The Court finds that by including the language at issue, Defendants simply clarify the intent and scope of the Plan. The Court does not find that Defendants are attempting to limit any of Plaintiff's rights by this language. Rather, Defendants desire to ensure that the Plan will not be read to create new rights that were unintended. The Plan was created only to address the issues raised by this Court in its Summary Judgment Order so as to rectify the problems giving rise to the Eighth Amendment violations. The language of the "no state interest" paragraph is not offensive to Plaintiff's constitutional rights, and therefore it shall remain in the Plan.

III. **The Third Issue: The Temporary Restriction Order and Temporary Protective Custody Policies**.

Plaintiff argues that the WSP's protective, segregated custody policies must be amended to protect the rights of the inmates. Such custody exists in three types: (1) Temporary Restriction Order ("TRO"), which can last up to fifteen days; (2) Temporary Protective Custody ("TPC"), which can last up to thirty days; and (3) Protective Custody ("PC"), which can last indefinitely. (Pls.' Br., pp. 7-8 (citing Policy Nos. 3.305 & 3.304, Plan Exs. G & H)).

The aspect of these policies to which Plaintiff objects is the provision that authorizes prison officers to use "unbridled and arbitrary discretion" to remove all property (except necessities) from inmates assigned to TRO and TPC, and to suspend contact visits with their families. (Id., p. 8 (citing Plan Ex. G, p. 1, § II; Plan Ex. H, p. 2, ¶ F, p. 4, ¶ C)). Plaintiff contends that the use of "unbridled discretion" by the prison authorities discourages inmates from reporting threats and requesting TRO/TPC protection. (Id.). Therefore, Plaintiff requests that the Court order Defendants to: (1) develop written criteria for determining which inmates must forfeit their property and/or visitation privileges as a condition of placement in TRO or TPC; (2) require that the officers making these decisions articulate the grounds for them; and (3) identify the staff positions entrusted with this power. (Id., p. 10).

Defendants respond that the TRO and protective custody (both TPC and PC) policies were revised prior to this litigation in direct response to correspondence with Plaintiff's legal counsel. (See id., p. 10). The policies provide standards for decision making and supervisory review, and every decision is appropriately

documented, although the policies require some discretion and flexibility. (See id., pp. 11-12).

With respect to the level of deference a court should give to a prison in its operations, the Tenth Circuit has stated:

> [C]ourts must accord deference to a prison's choice of regulations employed to implement valid penological goals. Nonetheless, if an inmate claimant can point to an alternative that fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard.

Shabazz v. Parsons, 127 F.3d 1246, 1249 (10th Cir. 1997) (internal quotation marks and citations omitted). While the TRO and TPC policies contain many administrative review measures, they do not specifically require that WSP staff document reasons for their decisions regarding which inmates must forfeit their property or contact visits when assigned to TRO or TPC. The closest requirement that the Court can find is that the staff member initiating the TRO is to "document the need for the action and the relationship of the degree of restriction to the precipitating event." (Plan Ex. G, p. 4).

The Summary Judgment Order was based on the premise that Defendants violated the WSP inmates' Eighth Amendment right to be free from cruel and unusual punishment. According to the United

States Supreme Court, "the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment." Helling v. McKinney, 509 U.S. 25, 31 (1993). Prison officials have the duties of providing humane conditions of confinement and ensuring adequate food, clothing, shelter, and medical care, as well as taking "reasonable measures to guarantee the safety of the inmates." Hudson v. Palmer, 468 U.S. 517, 526-27 (1984). Because of the possibility that WSP staff might use the TRO and TPC systems as punitive measures, although contrary to the purpose of those systems, it is fit that the WSP adopt a requirement that justifications for the denial of property and/or contact visitation in the TRO and TPC context be put into writing. It is also fit that the WSP include in its TRO and TPC policies a specification of which positions have the authority to make these determinations. These are not unreasonable or unduly burdensome requirements. It can certainly be said that they accommodate "the prisoner's rights at *de minimis* costs to valid penological interests." Shabazz, 127 F.3d at 1249. There is nothing to be lost, and greater procedural fairness to be gained, by having WSP staff document in writing their reasons for

denying property or visitation rights while an inmate is assigned to TRO or TPC.

The Court therefore **ORDERS** Defendants to include in their TRO and TPC policies a requirement that officers making decisions regarding property deprivation and contact visitation restrictions articulate the basis for their decisions in writing. Furthermore, the Court **ORDERS** Defendants to determine, and to articulate in their written policies, which WSP positions hold this decisionmaking authority.

The Court will stop short, however, of granting Plaintiff's third request: to order Defendants to develop written criteria for determining which inmates must forfeit property in exchange for TRO or TPC protection. Flexibility and the ability to exercise sound discretion must be maintained, and the Court is loath to tie the hands of prison officials with written criteria and rules that cannot possibly account for every situational nuance. It cannot be said that such a written criteria requirement would accommodate "the prisoner's rights at *de minimis* costs to valid penological interests." Shabazz, 127 F.3d at 1249.

Of course, the Court is mindful that the WSP is operating under an injunction that was issued because, among other reasons,

the prison staff did not demonstrate a concern for "valid penological interests." This is the reason why the Court deems it fitting to grant two of Plaintiff's three requests on the TRP/TPC issue. As for mandating written criteria, however, it is clear that if WSP staff abuse the TRO and TPC systems by using them in a punitive fashion, then Defendants will have to answer to the Court anyway. The determination whether or not an inmate assigned to TRO or TPC is best left to the discretion of prison officials, which they are obliged to exercise soundly and in good faith. Should an inmate file a complaint against the WSP regarding these matters, the Court prefers to retain the ability to consider the totality of the circumstances, rather than be constrained to considering whether or not a pre-articulated criterion was violated or followed. Therefore, the Court will not require Defendants to develop written criteria for determining which inmates assigned to TRO or TPC must forfeit their property and/or contact visitation rights.

Conclusion

Plaintiff's First and Second Objections to Defendants' Second Proposed Remedial Plan are **DENIED**. Plaintiff's Third Objection is **GRANTED IN PART**, to the extent that: Defendants are **ORDERED** to

include in their TRO and TPC policies a requirement that officers making decisions regarding property deprivation and contact visitation restrictions articulate the basis for their decisions in writing; and Defendants are further **ORDERED** to determine, and to articulate in their written policies, which staff positions hold this decisionmaking authority. Additionally, Plan Exhibit I to Defendants' Second Proposed Remedial Plan is **STRICKEN**, and the Court **SUBSTITUTES** its July 14, 2003 Order for Protection of Documents in lieu thereof. With these modifications, Defendants' Second Proposed Remedial Plan is **ADOPTED** and **INCORPORATED** into this Final Decree.

Dated this 7th day of October, 2003.

Clarence A. Brimmer
United States District Court Judge