2001 WL 282705
Only the Westlaw citation is currently available.
United States District Court, S.D. New York.

James BENJAMIN, et al., Plaintiffs,
v.
William J. FRASER, et al., Defendants.

No. 75 Civ. 3073(HB). | March 22, 2001.

Opinion

Opinion and Order

BAER, J.

***1** On January 9, 2001, I granted in part, and denied in part, the motion of the City of New York and the Department of Correction, et al. (collectively, the "defendants") to terminate the consent decrees and all supplemental orders concerning environmental health and related issues at fourteen jails.[1] *See Benjamin v. Fraser,* 2001 U.S. Dist. LEXIS 84 (S.D.N.Y.2001) [hereinafter, "January opinion"]. The consent decrees at issue were entered in this action and six related cases in 1978 ("Consent Decrees").[2] My opinion of January 9, 2001 followed hearings held on May 8–10 and May 15–17, 2000 (the "May Hearings") at which this Court heard extensive testimony from present and former detainees as well as from environmental health experts. Subsequent to the docketing of the January opinion, both parties submitted motions for reconsideration which sought both substantive reconsideration of some issues and clarification of my holdings on others. For the reasons discussed below, plaintiffs' motion for reconsideration is granted in part and denied in part; defendants' cross-motion for reconsideration is granted in part and denied in part. I reserve defendants' request for clarification of my ruling regarding the modular units, and will resolve this question at a later date.

DISCUSSION

I. Plaintiffs Motion For Reconsideration

Plaintiffs request that this Court reconsider four aspects of the January opinion, specifically: (1) ventilation at the Rose M. Singer Center ("RMSC"); (2) ventilation in jail intake areas at Brooklyn Detention Center ("BKHD"), the Queens Detention Center ("QHD" or "QHC"), the Vernon C. Bain Center ("VCBC") and the West Facility; (3) sanitation at the North Infirmary Command ("NIC"); and (4) sanitation at the George Motchan Detention Center ("GMDC") Clinic.

A. Ventilation at RMSC

Plaintiffs argue that in the January opinion the Court held that ventilation in all of RMSC, not just in the "intake areas," falls short of the U.S. Constitution's ("Constitution's") requirements. Indeed the plaintiffs are correct. After discussing the extensive record evidence of the facility-wide ventilation failings at RMSC, I held, "[o]n these facts, I find that RMSC's lack of ventilation is constitutionally deficient." January opinion, at *37. The reference to "intake areas at RMSC" in the very next sentence of the January opinion was not intended to qualify my determination or limit the scope of my holding to RMSC's intake areas. *See id.* at *38. Nor, as defendants posit, did I rely exclusively upon Dr. Powitz's testimony there was "no or non-detectable exhaust ventilation in 21 of the 43 locations surveyed in the intake area of RMSC, including non-detectable ventilation in the two medical treatment rooms and the examination room." *Id.* at *37.

B. Ventilation in Jail Intake Areas at BKHD, QHD, VCBC and West Facility

Plaintiffs argue that the Court overlooked their claims concerning ventilation in the intake areas at BKHD, QHD, VCBC and West Facility, and that the Court mistook plaintiffs to have taken the position that these facilities passed constitutional muster. *Id.* at *24–25. Again, plaintiffs are correct. Because plaintiffs did, in fact, contest the ventilation in the intake areas of all four facilities in their post-hearing brief, (*See* Pl. Br. At 21; 23–30) a claim to which the defendants have not objected, plaintiffs did not waive the argument. Let me revisit, or visit, the record on the intake area issue.

1. governing law

***2** The governing law is fully set forth in the January opinion, and will be articulated here only in an abbreviated form. *See* January opinion, at *7–21. Under the Prison Litigation Reform Act ("PLRA"), this Court will award such prospective relief as is "necessary to correct a current and ongoing violation of the Federal right." 18 U.S.C. § 3626(b)(3). A "current and ongoing violation" exists where conditions "deprive inmates of the minimal civilized measures of life's necessities," *Rhodes v. Chapman,* 452 U.S. 337, 347 (1981), so as to constitute "cruel and unusual punishment"; however, the constitutional protections for pre-trial detainees—who are

not subject to "punishment" (plaintiffs here)—are greater. The conditions of pre-trial detainees are properly reviewed under the Due Process Clause of the Fourteenth Amendment, which affords more robust constitutional protections than are available for convicted prisoners and requires that detention conditions be "reasonably related to a legitimate governmental objective." *Bell v. Wolfish,* 441 U.S. 520, 535–536 (1979). Where there is a "current and ongoing violation," the Court will fashion a remedy that "extends no further than necessary to correct the violation of the Federal Right" and which is "the least intrusive means to correct the violation." 18 U.S.C. § 3626(b)(3).

It is beyond peradventure, that failure to provide adequate ventilation is a violation of a Federal right. *See Hoptowit v. Spellman,* 753 F.2d 779, 783 (9th Cir.1985); *Ramos v. Lamm,* 639 F.2d 559, 568 (10th Cir.1980). "Ventilation involves two facets: supply of fresh air and exhaust of impure air. Ventilation may be achieved through either active or passive means. Active ventilation is commonly used in sealed buildings with few apertures, and involves the use of mechanical air delivery and exhaust systems. Passive ventilation relies on the exchange of air through open windows." January opinion, at *22–23. As I stressed in my January opinion, inadequate ventilation is a particularly serious concern as it "can contribute to the transmission of air-borne diseases, a problem which, is magnified for detainees who have compromised immune systems as a result of HIV infection or suffer from asthma or other respiratory ailments," and because [i]nadequate ventilation ... undermines efforts to maintain minimum levels of sanitation within the Department's facilities, providing an environment where mildew, mold, rust, and bacteria can flourish." *Id.* at *21.

2. analysis

The notes of Department of Correction's Director of Environmental Health, Patricia Feeney ("Ms.Feeney") taken by her in connection with her walk-through of BKHD in December, 1999 indicate ventilation problems in four of six "holding pens" in the intake area. (Pl. Exh. 365 at E06617.) Pen 10 entirely lacked a supply register, the register in Pen 10 was covered, and the registers in Pens 6 and 3 were "clogged with paint." (*Id.*) Additionally, the exhaust register in Pen 10 was dusty. (*Id.*)[3] At the May 5, 2000 hearing, Robert W. Powitz, Ph.D., an expert in the field of environmental health ("Dr.Powitz"), testified that "[w]e found ventilation problems at ... Brooklyn." (Tr. 654.) This record is sufficient to sustain a finding that ventilation in the intake areas of BKHD does not satisfy the Constitution.

***3** At QHD, Dr. Powitz noted that there was no ventilation or problematic ventilation in four of the five pens. (Pl.Exh. 000140–01.) During the same visit to QHD, Ms. Feeney observed that of five pens, three pens lacked supply registers and the exhaust register in a fourth pen was partially blocked. (Pl. Exh. at E06608.) In her subsequent evaluation, dated April 20, 2000, Ms. Feeney stated that the "[v]entilation units in the facility were operable," but conceded that "[i]n several areas, the ventilation registers were partially clogged with dust. This impedes air flow through the register even when the unit is operating properly." (Def. Ex. F–1 at 21.)[4] Since the constitutional analysis turns on whether ventilation in QHD's intake areas was adequate, and not on the mechanical question of whether the ventilation system was operable, the Court takes particular note of Ms. Fenney's finding of impeded air flow and the significant health consequences to which this finding attests. This record is sufficient to sustain a finding that ventilation in the intake areas of QHD does not meet constitutional standards.

On March 30, 2000, Ms. Feeney and Dr. Powitz conduced a concurrent inspection of VCBC. In her April 26, 2000 report, Ms. Feeney found "[a]dequate heating and ventilation." (Def. Ex. F–9 at 1.) She noted that Dr. Powitz had found "no ventilation" in holding pen 4, but concluded that he was in error as "the air intake temperature was 110 [degrees] F. indicating that the ventilation worked appropriately." According to his notes, Dr. Powitz did find that there was no ventilation in holding pen 4, and noted with respect to holding pen 2, "[detainee] says supply off—no test—76 degrees." (Pl. Exh. 366 06671.) Subsequently, Dr. Powitz testified that while there were ventilation problems at VCBC, they were of a "lesser degree" than those at other facilities. (Tr. 654). This record does not sustain a finding that ventilation in the intake areas of VCBC is inadequate under the Constitution.

At the May, 2000 hearing, Dr. Powitz also testified that "[w]e found ventilation problems ... of a lesser degree at West Facility." (Tr. 654.) Neither this testimony nor anything in the record suggests that the ventilation problems at West Facility were of a constitutional magnitude. Dr. Powitz testified that the ventilation system at West Facility was operational. (Tr. 746.) Ms. Feeney's report of her visit on March 29, 2000 to West Facility makes no mention of ventilation, and states that "[t]he overall environmental condition of the facility was excellent." (Def. Exh. F–4 at 1.) Dr. Powitz's notes do not refute this assessment. His only comment on ventilation in the intake areas of West Facility is: "Hospital—No Ventilation." (Pl. Exh. 366 at 06736.) This record does not sustain a finding that ventilation in the intake areas of West Facility falls below constitutional minimums.

Therefore, the record is sufficient to sustain a finding that "intake area" ventilation does not satisfy the Constitution's requirements at BKHD and QHD, but does not support such a finding at VCBC and West Facility.

C. Sanitation at NIC

***4** In the January opinion, I wrote: "I find that sanitary and lighting conditions at medical areas in ... NIC had been improved by the time of the May Hearings and thus there is no 'current and ongoing violation' of detainees' rights to adequate sanitation in these facilities." January opinion, at *100. I made that decision despite the overwhelming evidence of constitutional violations at the time of Dr. Powitz's and Ms. Feeney's visit on March 20, 2000, a mere two months prior to the May Hearings, because I credited the April 25, 2000 letter of Elizabeth Loconsolo, the Department's General Counsel ("Ms.Loconsolo"), and the testimony of Ms. Feeney that conditions at NIC had been substantially improved. *Id.* at *100.[5] After careful review of Ms. Loconsolo's letter and Ms. Feeney's testimony, I conclude that as of the May Hearings the sanitary conditions at NIC's medical areas (inclusive of NIC's clinics areas and infirmary housing areas) constituted a "current and ongoing" constitutional violation.

The Eighth Amendment guarantees adequate sanitation, *Hoptowit,* 682 F.2d at 1246; if a prisoner is subjected to severe or prolonged poor sanitation, courts may find that she has suffered pain within the meaning of the Eighth Amendment. *Anderson v. County of Kern,* 45 F.3d 1310, 1314 (9th Cir.1995). Pre-trial detainees are entitled to a sanitary environment, and unsanitary conditions of detention constitute a "current and ongoing violation of the Federal right."

The January opinion reviews in considerable detail some, but hardly all, of the evidence that establishes the substandard sanitary conditions at NIC. *See id.* at *102–106. Although much of the relevant portion of the January opinion reviews Dr. Powitz's testimony, Ms. Feeney's notes and testimony as well as other record evidence also clearly attest to the severe sanitation problems at NIC at the time of the two experts' visit to NIC in March, 2000. (*See* Pl. Exh. 366, at E06679–88; Tr. 959–968; Def. Exh. F–46 at E01758,1813–4, 1822, 1853–54, 1906 (sanitarians' reports of NIC intake from August until November 1999)). Given the weight of the evidence in the record, there can be no question that, absent compelling evidence that the problems had been corrected by the time of the May Hearings, NIC's sanitation was deficient under the Constitution. Ms. Loconsolo's letter, which I credit and which was introduced by the plaintiffs, and Ms. Feeney's testimony, while heartening, do not constitute such compelling evidence. Upon close review, the letter and testimony make no reference to many of the problems identified by both Dr. Powitz and Ms. Feeney in earlier inspections and discussed in the January opinion. Thus, while Ms. Feeney did testify that "I have conducted subsequent inspections and the clinic is clean, the treatment rooms were clean .... the equipment was clean" (Tr. 968), her testimony was highly general and did not encompass areas of NIC other than the clinic and treatment rooms. Also, Ms. Loconsolo's lengthy and highly-detailed letter rebutted many of Dr. Powitz' claims, but left unanswered, or unsatisfactorily answered, many other clear failings.

***5** For example, entirely unanswered is the evidence that the "treatment counter" was "filthy" (January opinion, at *102); the "medication counter was excessively dirty," (*id.*); and under pads (or "chucks") are used as shelf liner in working areas" even though to do so is "a breach of good infection control practice" (*id.* at *103–104).[6] Further, since they limited their statements to the medical areas of NIC, Ms. Loconsolo and Ms. Feeney made no representations about sanitation in the infirmary living areas at NIC—areas which, as part of NIC, figure into the constitutional analysis of the facility.

> In Dorm 1, the shower wall finish was in poor condition and there was pooling water on the floor with scaling dirt, along with a trip hazard on the floor. Many beds in Dorms 1 and 2 were less than 6 feet apart. (Pl. Ex 107 at P000258–59.) In Dorm 2, the wheel chair ramp to the shower is made of wood and presents a risk of injury. (Tr. 714–715; see also Pl.Ex. 182 (photo of ramp).) In addition, Dr. Powitz found the floor and sill in the 2B shower were uncleanable. (Tr. 714; see also Pl.Ex. 181 (photo).)
>
> *Id.* at *104–105.

Moreover, many of Ms. Feeney's and Ms. Loconsolo's statements about previously identified problems at NIC carry little weight in the present analysis. For example, Dr. Powitz testified that during his inspection on March 20, 2000 he noted an open bottle of sterile water dated January 4 th (once opened, sterile water should be used within the day) and three other open but undated bottles of water. *Id.* at *104. In response, Ms. Feeney testified only that the Department has been unable to determine whether there were outdated nonpharmaceutical materials in the nurse's station area. (Tr. 962.) Ms. Loconsolo's letter stated only that "a memo was circulated and posted reminding staff that all saline and sterile water must be labeled after opening and discarded if not used within twenty-four hours." (Pl. Exh. 357, at 5.) The issue before the court is whether the conditions at NIC were so unsanitary as to violate the Constitution. The circulation of a memo reminding staff of a rule they already knew or should have known and ignored is of limited value here. Likewise, Ms. Loconsolo's report that "[c]linic staff has been advised that they must secure their personal effects in their assigned lockers" (Pl. Exh. 357, at 6) does not entirely sanitize Dr. Powitz's finding that staff stored personal clothing and personal food in the pharmacy. (Tr. 617). In the same vein, Dr. Powitz testified that "he believed hand washing sinks were not being used because

the sinks were dry." *Id.* at *102–103. In her letter, Ms. Loconsolo stated that "[a] subsequent inspection by CHS personnel found visible signs that the sink had been utilized." (Pl. Exh. 357, at 6.) That may well be, but given the fact that the sinks were dry during Dr. Powitz's visit, the subsequent inspection does not fully dissolve the concern that staff are not using the sinks or not using them often enough.

***6** Further, in her letter Ms. Loconsolo admits of other problems beyond those specifically mentioned in the January opinion, including: there is "some evidence of dust in limited areas of the [Ob–Gyn] clinic" (Pl. Exh. 357, at 2); the physician's examination area is "limited" (*id.* at 3); "some of the areas outside of cardboard boxes containing sealed sterile items were dirty" (*id.* at 4); "there may be cabinets where culture kits are stored with non-sterile supplies" (*id.*); "cabinets in the medication room did appear to be dusty" (*id.* at 5); "there was dirt build-up in isolated spots on the walls and some furnishings" (*id.*); and "there may have been some dust on the base of some IV poles and scattered areas of rust on parts of exam tables" (*id* . at 5–6). Additionally, Ms. Loconsolo implicitly acknowledged other problems to be remedied in the future—i.e., problems not corrected by the time of the May hearing—: "six new blood pressure cuffs" have been ordered (*id.* at 4) and "new exam tables are on order, as are new mediation cassettes" (*id.* at 6) (Dr. Powitz testified that medication cassettes were "grossly spoiled" (January opinion, at *103)).

Finally, as Ms. Loconsolo and Ms. Feeney may be considered interested witnesses, I am constrained to look at their testimony carefully. Further, their institutional connections, coupled with the protracted history of incomplete or outright non-compliance with the Consent Decrees, must go into the mix. On the record before me, I conclude that at the time of the May Hearings the sanitation at the medical areas—i.e., the clinc areas and infirmary housing areas—of NIC was inadequate, and thus constituted a "current and ongoing" violation. This Court does not issue separate findings with respect to clinics and infirmary housing areas (an issue raised by the plaintiffs) because such a distinction in the present analysis is neither logical nor practical. NIC's medical areas, not its individual subparts, are the objects of the constitutional analysis. Lastly, because I conclude to ground my holding upon the conditions at NIC at the time of the May Hearings, and have not acted on plaintiffs' suggestion that this Court consider the possibility of near-future violations, I need not resolve the parties' disagreement and interesting arguments about the temporal meaning of "current and ongoing" under the PLRA.[7]

D. Sanitation at GMDC Clinic

In the January opinion, I held that "[s]anitation and lighting in medical areas at the GMDC Infirmary and the RMSC clinic falls below professional standards and violates constitutional standards." January opinion, at *100. For purposes of clarity, let me say that sanitation and lighting in the clinic and infirmary housing areas fall below professional standards and violates the Constitution. My understanding is that as to this item, and I trust to many others, the parties are working toward a proposal acceptable to both sides.

II. Defendants Cross–Motion For Reconsideration

***7** Defendants request that the Court clarify its January Opinion with respect to (1) ventilation at the Queens House of Detention; (2) the facilities whose temperature OCC is directed to monitor; (3) the modular units; and (4) the RMSC Clinic.

A. Timeliness of Defendants' Cross–Motion

Local Rule 6.3 states that "a notice of motion for reconsideration or reargument shall be served within ten (10) days after the docketing of the court's determination of the original motion." Although Rule 6.3 does not by name include cross-motions, if does expressly include "all motions," and a cross-motion is a motion. *See Tisdel v. Barber,* 968 F.Supp. 957, 963 (S.D.N.Y.1997) ("[w]e do not believe that *a cross-motion, which is logically a separate motion* brought by the non-moving party, can be considered to have been made at the time the original motion was made") (emphasis supplied). Defendants offer no case authority for their view that cross-motions are not "motions" within the scope of Rule 6.3, nor can they. Thus, the defendants' January 24, 2000 deadline to file a cross-motion for reconsideration came and went without filing and their motion is untimely. However, this Court thinks it appropriate that it exercise its discretion and consider the cross-motion to the extent that it requests clarifications and corrections of clerical errors in the January opinion.

B. Ventilation at Queens Detention Complex ("QHD")

The inclusion of QHD among the facilities that required remedy to improve ventilation was inadvertent; however, in section "I.B.2" of this opinion the Court found that the ventilation in the intake areas of QHD were constitutionally inadequate. Thus, QHD belongs among the facilities requiring remedy to improve ventilation to the extent of its intake areas.

C. Scope of Court's Air Temperature

The January opinion directed the OCC to monitor the temperature during the winter and summer months at "the above listed facilities ." January opinion, at *53. However, the facilities listed directly above that mandate were, in fact, the facilities in which the Court determined that ventilation was constitutionally deficient. Thus, the language of "above listed" was at least confusing, and should not have referred to facilities with inadequate ventilation. To clarify, OCC is directed to monitor the temperature at AMKC, ARDC, BKHD, GMDC, GRVC, JATC, NIC, QHD, OBCC, and RMSC.

D. Modular Units

The Court will not decide this portion of the defendants cross-motion at this time but has requested a site visit with experts to be arranged in the immediate future.

E. RMSC Clinic

The January opinion stated: "Director Feeney's notes taken during a tour of the RMSC clinic on March 21, 2000 can be summed up in the following notation: 'Clinics don't meet vetinary [sic] standards." ' January opinion, at *106. Defendants claim that the remark attributed to Ms. Feeney was in fact a quotation in Ms. Fenney's notes of a statement made by Dr. Powitz. Plaintiffs disagree, and submit, leaving that comment aside, Ms. Feeney's notes as well as those of Dr. Powitz "are replete with findings of [RMSC's] grossly unsanitary state." This Court's holding that RMSC's sanitation is unconstitutional is clear, fully supported by the record, and requires no clarification or correction. Moreover, there is no reason to assume that the statement, "Clinics don't meet vetinary [sic] standards"—which appears in Ms. Feeney's notes, in her hand, without quotations marks or any other indication of attribution—does not reflect that dogs and cats deserve better conditions.

CONCLUSION

***8** For the aforementioned reasons, plaintiffs' motion is granted in part and denied in part, and the defendants' motion is granted in part, and denied in part. Defendants' motion for reconsideration of this Court's January opinion with respect to modular units is reserved.

SO ORDERED

Footnotes

1 The fourteen jails that were under review in the May proceeding were the Anna M. Kross Center (AMKC), the Adolescent Reception and Detention Center (ARDC), the George Motchan Detention Center (GMDC), the James A. Thomas Center (JATC), the Rose M. Singer Center (RMSC), the George R. Vierno Center (GRVC), the North Infirmary Command (NIC), and the West Facility (West) on Rikers Island; the Vernon C. Bain Center (VCBC), a "maritime facility" anchored off the Bronx; the Manhattan Detention Center, (MDC), the Queens Detention Center (QHD), the Brooklyn Detention Center (BKHD), and the Bronx Detention Center (BXHD).

2 The six related cases are: *Forts v. Malcolm,* 76 Civ. 101 (New York City Correctional Institute for Women), *Ambrose v. Malcolm,* 76 Civ. 190 (Bronx House of Detention for Men), *Maldonado v. Ciuros,* 76 Civ. 2854 (Adolescent Reception and Detention Center), *Detainees of the Brooklyn House of Detention for Men v. Malcolm,* 79 Civ. 4913, *Detainees of the Queens House of Detention for Men v. Malcolm,* 79 Civ. 4914, *Rosenthal v. Malcolm,* 74 Civ. 4854 (Adult Mental Health Center on Rikers Island).

3 Ms. Feeney also noted significant ventilation problems in non intake-areas of BHHD. (Pl. Exh. 365 at E06617–27.)

4 Ms. Feeney also noted significant ventilation problems in non intake-areas of QHD. (Pl. Exh. 365 at E06608–15.)

5 Plaintiffs' half-hearted and unsuccessful attempt to make an issue of the fact that Ms. Loconsolo's letter was unsworn is curious, not least because the letter was plaintiffs' exhibit, not defendants'.

6 Ms. Loconsolo did state that in many hospitals chucks are used to "prevent gross contamination of tables, stands, etc.," but does not fully rebut Dr. Powitz's testimony that chucks were relied upon excessively, some of the surfaces underneath the pads were stained, or that unless replaced chucks "become a porous surface on what should be a smooth, washable surface. A chucks under pad cannot be disinfected." (Tr. 617–618).

7 Plaintiffs argue that because the improvements at NIC described by Ms. Feeney and Ms. Loconsolo were made on the eve of trial, in its determination of whether a problem is "current and ongoing" this Court should take into account of both the likelihood that problems at NIC will recur after trial and the apparent failure of the defendants to put into place specific measures to ensure that NIC's sanitation will not slip from its May, 2001 conditions. Defendants argue that the PLRA limits a court's scrutiny to a "snapshot" of the facility at the time of trial, and bars any consideration of prospective problems, however predictable they may be

(as I would say is the case here). Although this Court does not here decide the temporal boundaries of "current and ongoing," I do note that existing case law favors the defendants' argument. *See Cason v. Seckinger,* 231 F.3d 777, 784 (11th Cir.2000) ("we hold that a 'current and ongoing' violation is a violation that exists at the time the district court conducts the § 3626(b)(3) inquiry, and not a potential future violation"); *Castillo v. Cameron County, Texas,* 2001 U.S. App LEXIS 158, at *37 (5th Cir.2000) ("[t]herefore, in order to make the required finding of a current and ongoing violation of a Federal right required by § 3626(b)(3) a court must look at the conditions in the jail at the time termination is sought, not at conditions that existed in the past or at conditions that may possibly occur in the future, to determine if there is a violation of a federal right").