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United States District Court, S.D. New York.

Elizabeth POWELL, et al., Plaintiffs,
v.
Benjamin WARD, et al., Defendants.

No. 74 Civ. 4628 (CES). | March 20, 1991.

Opinion

MEMORANDUM DECISION

STEWART, District Judge:

***1** Special Master Linda R. Singer has issued her Ninth Report dated September 5, 1990 on defendants' compliance with the court's Orders concerning disciplinary proceedings at Bedford Hills Correctional Facility. After that Report was issued the Special Master also submitted findings and recommendations concerning superintendent's hearings of Tanya Cannon on August 9, 1990 and Marie Foster on September 28, 1990. Having considered the parties' objections, we adopt her findings and affirm her recommendations and conclusions to the extent outlined below.

Substitute Hearing Officers

The Special Master questioned defendants' definitions of regular and substitute hearing officers for Tier II and Tier III hearings. Defendants calculated the reversal rates for both regular and substitute hearing officers for Tier II and Tier III hearings. Defendants defined as regular Tier II hearing officers those who had conducted more than 200 hearings. Regular Tier III hearing officers were those who had conducted more than 20 hearings.

The Special Master recommended that the benchmark number for regular hearing officers be set at 50 for Tier II hearings and at 10 for Tier III hearings. She also suggested adding to the list of regular hearing officers those who had significant experience conducting hearings in the past, even though they may not have conducted the requisite number during the current monitoring period. This would result in adding to the list Captain Duncan, Lt. Stark and Lt. Burgess, all of whom the Special Master had considered regular hearing officers in the past.

We agree with the defendants' alternative formulation for identifying regular hearing officers, as stated in their objections. *See* October 19, 1990 Defendants' Objections to the Special Master's Recommendation [Ninth Report] dated September 5, 1990 ("Defts' Obj.I") at 2–3. Thus, a regular hearing officer for both Tier II and Tier III hearings will be defined as one who has 1) completed classroom training; 2) conducted approximately ten Tier II hearings a week over a two-month period; and 3) continues to do approximately six hearings each month.

Expungement of Records: Robin Anderson's Warden Card

The Special Master found that our Orders concerning expungement were violated due to the excessive amount of "white-out" on Robin Anderson's warden card, regardless of whether actual prejudice to the inmate can be demonstrated. Defendants agree that actual prejudice need not be shown to establish a violation of the court's Orders. However, they assert that there must be evidence in the record to support the conclusion that it is foreseeable that the inmate could be prejudiced.

We agree with plaintiff that it is not necessary to know the Parole Board's specific reaction to seeing eight lines of whiteout on this inmate's warden card. Anyone who saw the card would know that she had approximately eight disciplinary hearings reversed. The fact that the Parole Board did not base its written decision on Anderson's disciplinary record does not eradicate the influence her record may have had consciously or subconsciously on their decision.

Access to Written Records

***2** In her discussion of the handling of documentary evidence by the hearing officer, the Special Master stated that she found it improper for the hearing officer at Donna Hylton's hearing to view documents outside the inmate's presence.[1] Nevertheless, the Special Master did not recommend reversal of this hearing.

Defendants object to the Special Master's comments on two grounds: 1) they contend that this court's Orders do not encompass the handling of documentary evidence that comes to the hearing officer's attention after the hearing has begun; and 2) they claim that the hearing officer complied with due process in this instance.

We find that this hearing should be reversed because it violates Section 1(e) of our Order.[2] That section provides:

No person who has participated in any investigation of the acts complained of ... shall be a member of any

Adjustment Committee or Superintendent's Proceeding relating to these acts.

While the action taken by the hearing officer in this case did not harm the inmate, it is important that the hearing officer remain impartial and not undertake independent investigation of the charges. This procedure constitutes the sort of off-the-record investigation prohibited by Section 1(e) of our Order. The fact that this investigation occurred after rather than before the start of the hearing does not cure the defect.[3]

Jilliean Walker Hearing, May 18, 1988

The Special Master recommended reversal of the Jilliean Walker hearing held on May 18, 1988 concerning a charge of use of narcotic substances. Ms. Walker was found guilty based on the results of a urinalysis test which tested positive for cocaine and benzodiazapine. Ms. Walker was denied a witness and was not provided with a written explanation of the denial. It is because of the witness denial without written explanation that the Special Master recommends reversal.

Ms. Walker requested the testimony of Dr. Sun, a doctor at Bellevue Hospital. Ms. Walker asserted that the positive test result was a false positive caused by the ingestion of a prescribed drug called Soma. The hearing officer denied Ms. Walker's request because Dr. Sun did not work at Bedford Hills. The hearing officer made no attempt to contact Dr. Sun. The hearing officer did not complete a witness denial form or justify on the tape why calling Dr. Sun would jeopardize institutional safety or correctional goals. The hearing officer instead contacted a representative of the company which administers the test. The representative stated that Soma would not affect the test results.

Defendants assert that the denial of this witness was proper because Dr. Sun could not have offered relevant testimony. They note that our Orders require that hearing officers call only witnesses who may be able to offer "relevant" testimony. Defendants argue that it is a matter of objective scientific fact as to whether Soma caused the positive test result and that the company representative provided this factual information. Thus, defendants reason, no additional evidence could be relevant.

***3** Defendants' argument ignores the fact that the reason given by the hearing officer for refusing to call the witness was not that the anticipated testimony would be irrelevant, but that the witness was not a Bedford Hills employee. This is not a sufficient reason for denying a witness.

We agree with the Special Master that the failure to provide a written explanation of the witness denial is a clear violation of our Order. Accordingly, we order that this hearing be reversed.

Hearings of Renee Scott, January 28, 1988 and of Tina Pointer, March 23, 1988

We agree with the Special Master that both of these hearings should be reversed. The statements of evidence do not adequately support the charge of fighting. We discussed this issue thoroughly in our Memorandum Decision for Damages III and rejected defendants' objections. *See Powell v. Ward,* No. 74 Civ. 4628 (S.D.N.Y. Jan. 8, 1990) at 5–7. We note for the record defendants' continuing objection to this ruling.

Role of Personnel from the Office of Mental Health in Disciplinary Hearings

The Special Master found that the defendants' new policy regarding the consultation of personnel from the Office of Mental Health ("OMH") violates our Order concerning witnesses. We agree.

The Stipulation and Order of February 27, 1981 requires that certain determinations be made with regard to inmates who are admitted to the Satellite [Mental Health] Unit before a disciplinary hearing may proceed. Specifically, "under codified procedures applicable at Bedford Hills Correctional Facility," it must be determined whether the inmate's misbehavior was caused by mental illness and whether she is capable of understanding the charge and participating in the hearing.

According to defendants' counsel, the new policy allows the hearing officer to consult OMH staff for information concerning the inmate's mental health status at the time of the incident and at the time of the hearing. However, the hearing officer will make the ultimate determination as to whether the inmate's mental health status contributed to the offense charged and whether the inmate is competent to proceed with the hearing. Information obtained during this consultation will be kept confidential and will not be disclosed to the inmate. *See* May 17, 1990 Letter of Barbara Butler, Ninth Report of the Special Master, Exh. AA.

Two aspects of this policy were of concern to the Special Master. First, she questioned the wisdom of having hearing officers evaluate an inmate's mental health status, rather than mental health personnel. Second, she found that allowing testimony from OMH personnel to be taken outside the presence or knowledge of the inmate was a violation of our Order regarding witnesses. That Order allows a witness to be denied when the hearing officer finds that such testimony in the presence of the inmate will jeopardize institutional safety or correctional goals.

That determination must be made on a case by case basis.

Defendants respond that OMH is a non-party to this action and is also an entity which is independent of their authority. They point out that OMH policies preclude their personnel from making such determinations, especially in the presence of the inmate. Thus, defendants assert they cannot require OMH personnel to make the determinations required by the Stipulation and Order.

***4** Indeed, defendants do not want OMH to participate in these determinations nor do they want the inmate to hear the OMH staff person's testimony. Defendants are concerned that inmates will perceive the participation of OMH personnel in such determinations as having contributed to a determination that the inmate be confined or otherwise disciplined. Defendants say such a perception will undermine the relationship between clinicians and inmates, jeopardizing institutional safety and conflicting with correctional goals. Defendants also predict that violent or disruptive activities will increase if OMH staff are publicly perceived as providing a way for inmates to avoid responsibility for their acts. Debts' Obj. I at 14–19. Thus, defendants assert that they have provided evidence of an institutional need not to have OMH personnel make forensic evaluations and to keep OMH clinicial consultations confidential.

We are persuaded that it is not a violation of the Stipulation and Order of February 27, 1981 for hearing officers to make the ultimate determinations about an inmate's mental status. However, we find that secret, off-the-record consultations between hearing officers and OMH personnel are directly contrary to our Orders concerning witnesses. Defendants' new policy creates a blanket prohibition on consultations between hearing officers and OMH personnel in the presence of or with the knowledge of the inmate concerned. When considering such a blanket prohibition in the past, we have observed:

... [A]dministrative necessity does not require a blanket rule which precludes the presence of witnesses when there are no countervailing concerns warranting that prohibition. Requiring prison officials to determine on an individual basis whether witnesses can be present encourages them to exercise their discretion to strike the appropriate balance between the prisoner's right to call witnesses and the prison's need to maintain order.

Powell v. Ward, 487 F.Supp. 917, 929 (1980).

We are not persuaded that defendants have established "countervailing concerns warranting that prohibition." We agree with plaintiffs that mental health staff make other decisions which affect inmates' lives in ways which may be perceived by the inmate as either positive or negative. Inmates are well aware of the influence that mental health decisions have on very important parole and corrections decisions.[4]

Defendants argue that OMH is beyond the court's reach because it is not a party to this lawsuit. Plaintiffs are correct in noting that the Commissioner of Corrections is a party and is, of course, responsible for complying with our Orders. It is significant to us that some hearing officers have continued to consult OMH personnel since the adoption of the new policy in March 1990 and yet have complied with our Orders regarding witnesses.[5] Thus, it is clear that hearings can be conducted in compliance with our Orders. There is no evidence yet that the undesirable consequences anticipated by defendants will materialize.

Tanya Cannon's August 9, 1990 Superintendent's Hearing

***5** After issuing the Ninth Report the Special Master issued findings and recommendations concerning two additional hearings, that of Tanya Cannon and of Marie Foster.

The Special Master recommended that Tanya Cannon's hearing on August 9, 1990 be reversed because of an improper denial of a witness. At her hearing Ms. Cannon requested that Dr. Chiaffi, her psychiatrist, be called. The hearing officer denied calling the witness because he had resigned from the Bedford Hills Correctional Facility.

Defendants assert that Dr. Chiaffi's testimony would not have been relevant and that trying to contact him would have presented an administrative burden. We disagree. Defendants' argument of irrelevance is undercut by their own discussion of the information obtained when the hearing officer, after denying Dr. Chiaffi as a witness, instead contacted an OMH staff person who read Dr. Chiaffi's notes from Ms. Cannon's file. In our view the information elicited was certainly relevant and was, according to defendants themselves, relied upon by the hearing officer in mitigating the penalty imposed. *See* January 8, 1991 Defendants' Objections to the Special Master's Findings and Recommendations dated September 5, 1990: and Comments on Hearings Continued at Bedford Hills ("Deft's Obj. II") at 9.

As for administrative burden, we agree with the Special Master that this situation is analogous to that of a requested employee/witness who is on leave. In that case a phone call is made. In our view in this case at least one phone call could have been made to obtain a work phone number at which Dr. Chiaffi could be reached. Accordingly, we adopt the Special Master's findings and recommendations and reverse this hearing.

Marie Foster's Hearing on September 28, 1990
Marie Foster had a hearing on September 28, 1990. She was charged with creating a disturbance and with being out of place. This charge stemmed from an incident in which Ms. Foster caused a "facility lockdown" and standing count because she was in an area where she did not belong.

The Special Master recommends reversal of this hearing on the ground that the statement of evidence does not support the charge of creating a disturbance. We agree. Defendants assert that conduct causing a facility lockdown and standing count interrupts, i.e., disturbs the regular routine of the facility. Thus, they argue that "being out of place" is, *ipso facto,* a disturbance. According to defendants, rule 104.13 states that inmates shall not engage in conduct which disturbs the order of any part of the facility.

However, the fact remains that the statement of evidence says only that Ms. Foster caused a countdown. It does not say that the countdown *was* the disturbance. Accordingly, we adopt the Special Master's finding that the hearing was defective because the statement of evidence does not support the charge of creating a disturbance.

We also reject defendants' other objections to this finding. Defendants challenge the finding as being beyond the scope of this lawsuit. They assert that it their prerogative to determine what behavior creates a disturbance and that such a determination is not a matter of procedural due process. We emphasize that our finding here is not one which defines the charge of creating a disturbance. Our finding is that the evidence relied upon here does not support the charge as it is defined.

***6** Defendants further argue that our Orders have never required that statements of evidence include non-evidentiary statements. In our Memorandum Decision for Damages III we discussed our view that it is necessary for statements of evidence to contain sufficient evidence to support the charge. *See Powell v. Ward,* No. 74 Civ. 4628 (Jan. 8, 1990) at 7 n. 6. Even if it is true that our previous Orders do not specifically require non-evidentiary statements, they and *Wolff v. McDonnell,* 418 U.S. 539 (1974), also have the logical implication that the content of the statement of evidence satisfy the elements of the offense. Otherwise, the statement of evidence does not withstand the "scrutiny" envisioned in *Wolff v. McDonnell. Wolff,* 418 U.S. at 565. Thus, we reject this argument of defendants as well.[6]

Superintendent Lord's Affidavit; Continuation of Monitoring
The Special Master discussed her concerns regarding statements made by Elaine Lord, Superintendent of Bedford Hills Correctional Facility, in an affidavit submitted in another case, *Patterson v. Coughlin, et al.,* 88 Civ. 1739 (SWK). She recommended that we hold a hearing for the purpose of questioning the Superintendent about the meaning of her statements and defendants' commitment to following our Orders once monitoring has ceased.

We are troubled by the Superintendent's statements in the affidavit. We are equally troubled by evidence of defendants' increasing lack of cooperation with the Special Master. We note that defendants frequently take months to respond to the Special Master's correspondence or requests for information, they construe our Orders as narrowly as possible, they require the Court to rule on virtually every reversal, and they challenge even well-established procedures for cooperating with the Special Master.[7] For example, our orders regarding witnesses are clear and yet the defendants persist in taking the most narrow view in applying them. While we can understand that mistakes will be made in the first instance, we cannot take the same view of the Superintendent's refusal to reverse hearings which are clear violations of our Orders and are identified as such by the Special Master.[8]

We agree with the Special Master that a hearing is necessary to determine whether it is necessary or appropriate to continue monitoring compliance with our Orders. We will be contacting the parties to schedule a hearing in the near future.

CONCLUSION

We adopt the Special Master's findings and recommendations that the following hearings be reversed:

Diane Valentine's May 23, 1989 hearing

Jilliean Walker's May 18, 1988 hearing

Renee Scott's January 29, 1988 hearing

Tina Pointer's March 23, 1988 hearing

In addition, we order the reversal of Donna Hylton's August 31, 1989 hearing, Tanya Cannon's August 9, 1990 hearing, and Marie Foster's hearing on September 28, 1990.

Further, we find that the defendants' new policy regarding the role of Office of Mental Health personnel violates our Orders concerning witnesses. Starting with March 1990 when the new policy was issued and continuing until further notice, defendants are directed to send to the

Special Master the records of any inmate confined to the Mental Health Satellite Unit between the dates of the incident and her disciplinary hearing.

***7** SO ORDERED.

Footnotes

1 Ms. Hylton was charged with possessing seven items of contraband found in her cell. In the course of the hearing she said she had permits for some of the items. The hearing officer adjourned the hearing and went to the package room to review Ms. Hylton's permits. After returning the hearing officer stated that she concluded that there were permits for some of the items alleged to be contraband.

2 Having so decided, we need not address defendants' due process argument.

3 We have addressed this same issue in our February 1980 memorandum opinion on injunctive relief:

> Nor is this problem on non-compliance remedied by the procedure adopted by the defendants, apparently to avoid changing their policy, of postponing the investigation until after the hearing is commenced.... Our concern in issuing this provision was that the hearing officer remain impartial.... The formality of convening and adjourning the disciplinary proceedings does not diminish the possibility that an investigation of the incident by the hearing officer may affect his or her neutrality in rendering a disposition.
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> *Powell v. Ward,* 487 F.Supp. 917, 931 (1980).

4 For example, plaintiffs assert that corrections staff often request a mental evaluation as a prerequisite for an inmate's participation in various corrections programs or transfer to another facility. In addition, mental health staff will provide a status report to the Parole Board upon request. Finally, a mental health worker decides if an inmate should be admitted to the Satellite Unit on an inpatient basis, disrupting the inmate's normal schedule, room assignment, job responsibilities and other directions of corrections staff. In our view, removing the participation of mental health workers from the disciplinary process will not significantly affect the inmates' perceptions of OMH clinicians.

5 For example, in Linda Smith's hearing on July 12, 1990 the hearing officer called OMH personnel on the speaker phone in the inmate's presence and asked a series of questions about her status both at the time of the incident and at present. Before reading from the inmate's records, the OMH personnel asked the inmate's permission to make the disclosure. In addition, the new policy was ignored in two other recent hearings, in Anne Moore's October 29, 1990 Tier III hearing, and in another hearing for a different inmate on November 5, 1990. In only one hearing, that of Michelle Burris in November 1990, does it appear that the new policy has been implemented.

6 Defendants assert that a reversal of this hearing is not warranted even if we find that the statement of evidence violates our Orders since the statement clearly supports the charge of being out of place. We disagree. The charge of creating a disturbance is much more serious than being out of place. At this point we cannot know what the punishment would have been had the hearing officer found her guilty of only being out of place.

7 For example, we recently had to order defendants to provide the Special Master with the records of an inmate, Yolanda Fallen, who had recently been transferred to Bedford Hills. Her disciplinary hearing took place at Bedford Hills but was conducted by officials from the previous institution. Defendants refused to provide the inmate's records to the Special Master. They later acknowledged to the court that in the past they had made such records available to the Special Master. *See* Defts' Obj. II at 16.

8 Defendants criticize the Special Master's practice of not filing with defendants the tapes or transcripts of the hearings discussed in her findings and recommendations. Defendants point out the time and expense involved in obtaining copies of the tapes from the correctional facility. We are surprised to learn that such logistical difficulties remain after years of monitoring by the Special Master. While we may not be able to weigh all the relevant considerations, it seems to us that the problem could be avoided if the administration at Bedford Hills would make a duplicate of the tapes for defendants' counsel at the same time one is made for the Special Master. In any case, the Special Master is the best one to determine when she no longer has need of the hearing records so that they may be returned to defendants.