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

Elizabeth POWELL, et al., Plaintiffs,
v.
Thomas A. COUGHLIN III, et al., Defendants.

No. 74 Civ. 4628(CES). | Aug. 25, 1993.

Opinion

MEMORANDUM DECISION

STEWART, District Judge.

***1** Presently before the Court is defendants' Thomas A. Coughlin III, Commissioner of the New York State Department of Correctional Services, and Elaine Lord, Superintendent of the Bedford Hills Correctional Facility of the New York State Department of Correctional Services (collectively the "defendants") motion, pursuant to Rule 60(b)(5) of the Federal Rules of Civil Procedure, to terminate the injunction in the above entitled case.

BACKGROUND

In 1974, plaintiffs, inmates at the Bedford Hills Correctional Facility ("Bedford Hills") commenced this class action in order to require officials at Bedford Hills to bring disciplinary proceedings into conformity with procedural due process requirements. The following year, this Court issued a preliminary injunction requiring the prison officials at Bedford Hills to conduct disciplinary proceedings in conformity with the procedural due process requirements of *Wolff v. McDonnell,* 418 U.S. 539 (1974). *See Powell v. Ward,* 392 F.Supp. 628 (S.D.N.Y.1975). Powell required the prison officials to adopt *Wolff* procedures for all disciplinary proceedings that could result in an inmate's confinement in a Special Housing or Segregation Unit. With limited modification, the Court of Appeals affirmed the *Powell* Order. *See Powell v. Ward,* 542 F.2d 101 (2d Cir.1976).

In 1977, three members of the plaintiff class moved to hold defendants in contempt for their failure to comply with the *Powell* Order. At that time, this Court expressed concern that "our prior order has not been fully complied with and [we] will consider future violations of the order as matters of utmost seriousness." *Powell v. Ward,* 74 Civ. 4626, (S.D.N.Y. June 24, 1977).

In 1979, plaintiff class moved to hold defendant in contempt for failure to comply with the *Powell* Order. This Court found that:

> the defendant has failed to comply in significant respects with virtually every provision of our order. This is not the first time it was necessary to hold that the procedures employed at Bedford Hills did not comply with our order. We are troubled by defendant's lack of diligence and commitment in taking the steps necessary to achieve compliance.

Powell v. Ward, 487 F.Supp. 917, 933 (1980). We also found that defendants had, in various instances, adopted interpretations of the 1975 Order that were at odds with both the clear language and the intent of the Order, *Id.* at 933–34, and that certain disciplinary procedures contravened provisions of the Order. This Court stated that:

> We are left with the impression that, rather than making all reasonable efforts to afford inmates the required due process protections, the defendant instituted superficial changes in policy that cut off consideration of the necessity of altering basic practices to comply with the letter and spirit of the order.... We are also disturbed by the defendant's [Superintendent Phyllis Curry] apparent ignorance of our order until September 1978. [Phyllis Curry assumed the position of Superintendent at Bedford Hills in December 1977].

***2** *Id.* at 934.

As a result of the above findings, this Court converted the preliminary injunction into a permanent injunction. *Id.* at 937. In addition, pursuant to Federal Rule of Civil Procedure 53, a special master was appointed "to oversee the compliance process and to report to the Court on a periodic basis concerning defendant's progress ... until [the Court is] satisfied that the due process protections required by [the] order have been incorporated into the prison routine." *Id.* at 935.

In her First Report, issued on July 11, 1980, Linda R. Singer, Esq., the Special Master, determined that defendants had made a good faith effort to comply with the Court's Order, but that further monitoring was necessary to determine whether defendants were in full compliance.

Upon commencement of compliance hearings in December 1980, and with the assistance of the Special Master, the parties agreed to settle their respective claims relating to the Court's 1980 contempt finding by Stipulation and Order of February 27, 1981. *See* Stipulation and Order, 74 Civ. 4628. The Stipulation provided for continued monitoring by the Special Master; the creation of a manual for hearing officers concerning the proper method of conducting disciplinary proceedings; and the establishment of a settlement fund in the amount of $125,000.00, in lieu of a contempt fine, to be used for the compensation and benefit of the plaintiff class. The parties also agreed to additional protection for inmates confined on the Satellite Unit pending a disciplinary hearing. *Id.*

Since that time, the Special Master has monitored defendants' disciplinary system and, to date, has filed nine reports on their compliance with this Court's Orders. Over time, the Special Master's monitoring has gradually decreased in its scope of review as defendants have achieved compliance in various aspects of our Orders.

Among the most significant vehicles utilized by defendants to achieve compliance was an internal monitoring system which they established in order to reverse defective hearings and correct defects in the disciplinary process. Such a monitoring system was recommended by the Special Master in her Fifth Report.

In her Seventh Report, issued January 9, 1986, the Special Master found the internal monitoring system to be "effective in discovering and correcting errors promptly." Seventh Report at 43. She recommended that "the Court rule 'that the due process protections required by [its] Order have been incorporated into the prison routine.' " The Special Master further stated that:

> Defendants' compliance with the Court's Orders has not been perfect; but perfection is not—nor can it be—the standard. It has taken five years for defendants to achieve this level of compliance. They, and particularly Superintendent [Elaine] Lord, are to be congratulated for their efforts and their achievement.

Id. at 43–44. As a result of the above finding, the Special Master recommended that she cease regular monitoring of defendants' compliance and investigate only complaints of non-compliance received from plaintiffs. By Order dated June 13, 1986, this Court adopted the Special Master's findings.

***3** On September 30, 1987, the Special Master issued her Eighth Report which contained a detailed evaluation of a series of hearings arising out of a "serious incident" which occurred at Bedford Hills on June 22, 1987. *See* Eighth Report at 30–44. Of the eight hearings resulting from the incident, the Special Master recommended that six be reversed in whole or in part, due to a variety of *Powell* defects. *Id.* at 30.

As a result of the defective hearings arising out of the June 22 incident, the Special Master concluded that defendants had not yet achieved compliance with this Court's Orders. She stated that:

> The Special Master recognizes that the June 22 incident was extremely unusual and that it presented issues related to defendants' compliance with the Court's Orders ... that the institution does not encounter regularly. Nevertheless, the incident tested the extent to which the Court's Orders have become incorporated into the prison routine. Defendants' handling of the hearings arising from the June 22 incident reveals that the due process protections required by the Court's Orders have not been incorporated fully into the prison routine.

Id. at 45.

In her Ninth Report, issued on September 5, 1990, the Special Master stated that she "believes that defendants are in substantial compliance with the Court's Orders" and that "[t]he Special Master also believes that the due process protections required by its Orders have been incorporated into the prison routine." Ninth Report at 74.[1] She recommended that she "continue to monitor defendants' compliance until the Court holds a hearing and satisfies itself as to defendants' commitment to follow the Court's Orders once monitoring has ceased." *Id.* at 74. By Memorandum Decision dated March 19, 1991, this Court adopted the Special Master's recommendation and ordered a hearing to determine whether continued monitoring was necessary. The Second Circuit, in *Powell v. Coughlin,* 953 F.2d 744 (2d Cir.1991) agreed that a "prompt hearing should be held to consider ending the Special Master's monitoring role." *Id.* at 752. The Second Circuit further stated that:

> Defendants appear to be making sustained efforts to comply with the injunction, and their own internal monitoring efforts seem adequate to detect irregularities requiring correction. Indeed, it is likely that the time is fast approaching when the injunction itself, not merely its monitoring, may safely be terminated. (citations omitted).

Id.

Since the Special Master's Ninth Report, her review has been limited to those complaints addressed to her by plaintiffs or by plaintiffs' counsel and to compliance with the mental health review requirements set forth in the February 27, 1981 Stipulation and Order.[2] With regard to mental health review procedures, the Special Master has found pervasive violations of the February 1981 Stipulation and Order. In her "Findings and Recommendations of the Special Master Concerning Disciplinary Hearings of Inmates Admitted to the OMH Satellite Unit" issued on August 20, 1991, the Special Master recommended that defendants "be ordered to submit a plan of how they intend to come into compliance with the Stipulation and Order of February 27, 1981." Findings of August 20, 1991 at 9. In their May 1992 "Objections and Responses to the Review of the Special Master's Recommendations in Light of the Decision of December 27, 1991 by the United States Court of Appeals for the Second Circuit," defendants argue that the issue is one of interpretation of the February 1981 Stipulation and Order and not for the Special Master to resolve. They maintain that, for the purposes of considering whether they are in substantial compliance with the injunction, the Special Master's August 1991 Findings do not reflect a systemic failure to provide procedural due process at disciplinary hearings at Bedford Hills. Defs.' Post Hearing Mem.Law at 22. Defendants have therefore not complied with the Special Master's recommendation that they submit a plan.

***4** In February, 1992, defendants moved for an order, pursuant to Federal Rule of Civil Procedure 60(b)(5) terminating the permanent injunction entered in April 1980. Plaintiffs opposed the motion and any questions of fact relevant to defendants' compliance were left to the hearing which was held on April 6 and 7, 1992 and May 18 and 19, 1992.

At the hearing, defendants proffered evidence relevant to the issue of their compliance. They maintained that they have been in substantial compliance for a reasonable period of time and that there is now a state-wide disciplinary system in place which would assure that the procedural due process required by the federal Constitution would be provided to plaintiffs at future disciplinary proceedings.

Plaintiffs introduced testimony concerning four hearings in order to establish that defendants are not yet in compliance with the Court's Orders concerning impartial hearing officers and, consequently, monitoring. Plaintiffs also introduced the aforementioned affidavit submitted by Superintendent Lord, *See supra* footnote 1, to establish that defendants would not comply with the injunction in the future.

DISCUSSION

A. *The Applicable Standard*

Relying on *Board of Education of Oklahoma City v. Dowell,* 498 U.S. 237, 111 S.Ct. 630 (1990), defendants argue that the dissolution of an injunction is appropriate based upon a finding of compliance for a reasonable period of time. In that case, the District Court had entered a comprehensive remedial decree to implement desegregation of the school system. The United States Supreme Court found that once desegregation, the purpose of the decree, had been achieved, the school board should be freed from the obligations of the decree. *Id.* at 247–48. The Court stated that:

> The legal justification for displacement of local authority by an injunctive decree in a school desegregation case is a violation of the Constitution by the local authorities. Dissolving a desegregation decree after the local authorities have operated in compliance with it for a reasonable period of time properly recognizes that "necessary concern for the important values of local control of public school systems dictate that a federal court's regulatory control of such systems not extend beyond the time required to remedy the effects of past intentional discrimination." (citation omitted).

Id. at 248. While *Dowell* involved school desegregation, defendants maintain that the United States Supreme Court in *Rufo v. Inmates of Suffolk County Jail,* 112 S.Ct. 748 (1992), applied its principles to injunctions covering penal institutions.[3]

Indeed, the Supreme Court in *Rufo* adopted the flexible test for modification of consent decrees.[4] The Court in *Rufo* held that a party seeking to modify a consent decree must demonstrate that there has been a significant change in the circumstances that gave rise to the consent decree. *Rufo,* 112 S.Ct. at 760. Thus, the Court announced that the *Swift* "grevious wrong" standard, *see supra* footnote 3, does not apply to modification of consent decrees

involving institutional reform litigation. Rather, the Court adopted a flexible standard whereby "a party seeking modification of a consent decree must establish that a significant change in facts or law warrants revision of the decree and that the proposed modification is suitably tailored to the changed circumstance." *Rufo,* 112 S.Ct. at 765.

***5** Plaintiffs correctly note that, under *Rufo,* since it is defendants who seek to modify the injunction, it is defendants' burden to convince the Court that a significant change in fact or law has occurred to justify the proposed modification which, in this case, is the termination of the permanent injunction.[5] *Rufo,* 112 S.Ct. at 760. Clearly, there has been no change in law since the initial injunction; the constitutional requirements of *Wolf* remain in force. We therefore must determine whether there has been a change in fact to justify the proposed modification.

Plaintiffs argue that since compliance with the decree was an event that was anticipated at the time of entry of the decree, such compliance alone cannot constitute a change in fact sufficient to form a basis for modification. Plts.' Mem.Law in Opposition to Defs.' Motion at 21–22.

We do not agree. The purpose of this Court's permanent injunction was clearly stated thirteen years ago:

> In the case before us, we are concerned first and foremost with achieving and maintaining disciplinary proceedings which are in accordance with the constitution. Continued non-compliance prolongs the harm to inmates caused by deprivation of fundamental rights without due process of law. We have found that the defendant has failed to comply in significant respects with virtually every provision of our order.

Powell v. Ward, 487 F.Supp. 917, 933 (S.D.N.Y.1980). We further stated, regarding the appointment of the Special Master, that:

> We think that compliance efforts here will be expedited by the appointment of a master to monitor compliance until we are satisfied that the due process protections required by our order have been incorporated into the prison routine.

Id. at 935. This Court made the injunction permanent and appointed a special master for the sole purpose of bringing Bedford Hills into compliance with constitutional standards. It was not only contemplated, indeed, it was the sincere hope of this Court that the day would come—and the sooner the better—when it would no longer be necessary to oversee conditions at Bedford Hills.

In the area of desegregation, which is analogous to the instant case, the Supreme Court has stated that "the court's end purpose must be to remedy the violation and in addition to restore state and local authorities to the control of a school system that is operating in compliance with the Constitution." *Freeman v. Pitts,* 112 S.Ct. 1430, 1445 (1992), quoting *Milliken v. Bradley,* 433 U.S. 267, 280–281 (1977) ("[T]he federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution.").

Thus, it would be utterly senseless to hold out the fact that defendants' compliance was contemplated, indeed was the very goal of the injunction, as a bar to eventual termination of the injunction. We find that such an interpretation of *Rufo* would strain common sense and belie the very purpose of institutional reform. Rather, this Court interprets *Rufo* as providing for substantial compliance as a change in fact sufficient to warrant modification of the injunction. Any other interpretation would dictate that the parties embark upon an endless cycle wherein the means—in this case the injunction—incessantly confound the ends—that is, a finding of compliance and thus, a conclusion to this litigation.

***6** We therefore turn to the question whether defendants are in substantial compliance to warrant termination of the injunction.

B. *The Issue of Compliance*

There can be no question that defendants have made major strides toward achieving compliance over the past thirteen years. In her Ninth Report, the Special Master stated that she believed that defendants were in substantial compliance.

There are however, significant areas with which this Court is concerned. While the Special Master's Eight and Ninth Reports show a decrease from the Seventh Report in reversals of Tier II disciplinary hearings (from 30% to 15%), there has been a significant increase in reversals of the more serious Tier III superintendent hearings (from 15% to 25%). Thus, during the last two reporting periods, inmates facing more serious charges and therefore more severe penalties have a one in four chance of receiving a defective hearing. When one includes the hearings

reversed due to OMH confidentiality issues (with the rate of reversal of Tier III hearings), the reversal rate rises to 33% which is a significant increase over the 15% reversal rate found in the Seventh Report. *See* Plts.' Post Hearing Mem. at 7 and applicable Special Master's Reports.

Another area of concern is the difficulty defendants are having in complying with the February 27, 1981 Stipulation and Order regarding mental health review procedures. Defendants have failed to be responsive to the Special Master's request that they submit a plan of correction.

Based upon evidence proffered at the hearing, we also find that there are still significant instances of hearing officer bias which have gone unrecognized and uncorrected by the defendants. Further, defendants still have no system by which hearing officers are advised of their errors when their hearings are reversed. This Court found the testimony of hearing officer Pico quite troubling in his denial that he ever discussed a case reversal with anyone. Also disturbing was Mr. Pico's statement that a reversal would not cause him to change his thinking. *Transcript* at 176, 177; 121, 152, 153.

In conclusion, we find that while defendants are clearly on their way toward achieving compliance, there are several areas in which this Court finds that improvement is needed before the injunction can be safely terminated.

Mindful of the "line between enforcement of constitutional requirements and excessive involvement of the judiciary in the details of state administrative matters," *Powell v. Coughlin,* 953 F.2d at 752 (quoting *Bell v. Wolfish,* 441 U.S. 520, 548, 99 S.Ct. 1861 (1979)), this Court recognizes the need to return to the prison authorities control of their system. Such was and remains, the ultimate goal of our involvement.

We therefore hold today that while, in the words of the Special Master, perfection is not—nor can it be—the standard, there are certain discrete areas in which defendants fall short of the achievement of substantial compliance necessary to constitute a change of fact under *Rufo* sufficient to terminate the injunction. Given the gradual trend toward improvement, this Court will revisit the question of compliance in six months. At that time, it will be presumed that a finding of substantial compliance is all that is necessary for the termination of the permanent injunction.

***7** We strongly urge the parties to view the next six months as a transition phase in which to cure the present defects and prepare for a relinquishment of this Court's supervisory role. It is clear that the Special Master, who has been so instrumental in bringing the defendants to their current level of compliance, ought also to play an active role in the process of this transition.

While it is the expectation and the sincere hope of this Court that our findings in six months lead us to deem defendants in substantial compliance, this Court will not hesitate to extend the period of the injunction if, after such time, there has been no improvement or worse, a regression to past levels of noncompliance. We are bound by our commitment of thirteen years to ensure that due process protections have been incorporated into the prison routine at Bedford Hills.

CONCLUSION

Accordingly, defendants' motion, pursuant to Federal Rule of Civil Procedure 60(b)(5) for an order terminating the permanent injunction is denied at this time. In six months, the Court will, however, entertain a motion to reconsider the appropriateness of terminating the injunction.

SO ORDERED.

Footnotes

1 The Special Master expressed concern over statements made by Superintendent Lord in an affidavit submitted in another case, *Patterson v. Coughlin et al.,* 88 Civ. 1739 (S.D.N.Y.) (SWK) which involved a disciplinary hearing held at Bedford Hills on June 5, 1987. Ninth Report at 70. The Special Master's concerns related to various statements made by the Superintendent, including that *Powell* Orders do not constitute "clearly settled law" and that Superintendent Lord "at no time" regarded herself as under a duty to establish a meaningful internal monitoring of the facility's compliance with *Powell* Orders.

In her testimony at the hearing before this Court, Ms. Lord explained that the affidavit in question was prepared for her by an attorney. She thereby denied taking the position that the Orders in this case were not clearly established law. Having heard Ms. Lord's explanation, this Court is satisfied that her statements do not, as plaintiffs feared, "indicate a very real question as to defendants' intentions to follow the Court's orders absent monitoring." Ninth Report at 72. On this point, we agree with defendants that "what should be of concern is not the Superintendent's view on qualified immunity, but whether the state-wide disciplinary system provides that federal due process will be accorded at future disciplinary hearings." Defs.' Post Hearing Mem.Law at 25.

2 During this period of limited review, the Special Master has recommended the reversal of 5 hearings for non-mental health related

issues and 118 for mental health related issues.

3 *Rufo* is the most recent in a line of cases instituting the "flexible" approach to modifications of injunctions. The flexible approach displaces the stringent "grevious wrong" test announced by Justice Cardozo in *United States v. Swift & Co.,* 286 U.S. 106 (1932). Under *Swift,* "[n]othing less than a clear showing of grevious wrong evoked by new and unforeseen conditions" could occasion the modification or termination of an injunction or consent decree. *Id.* at 119.

4 Plaintiffs correctly note that there is no distinction to be made between judicial decrees and consent decrees in the standard necessary for modification. *See United States v. Swift,* 286 U.S. at 114, 115 (1932); *United States v. United Shoe Machinery,* 391 U.S. 244 (1968); *New York State Association for Retarded Children, Inc. v. Carey,* 706 F.2d 956, 968 (2d Cir.1983), *cert. denied,* 464 U.S. 915 (1983).

5 This Court is unpersuaded by defendants' contention, in response to plaintiffs' allegation that defendants have failed to meet the applicable standard for modification, that, since they [defendants] seek *termination* and not *modification* of the injunction, they therefore need not meet the standard for modification. See Defs.' Post Hearing Mem.Law at 3–4. Clearly, the standard for termination of an injunction must be at least as high as that for modification and it is therefore undoubtedly necessary to meet the burden of a less drastic measure.