IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 00-F-612(OES)

NEW TIMES, INC.,
ASSOCIATION OF ALTERNATIVE NEWSWEEKLIES,
DARK NIGHT PRESS,
CLAY DOUGLAS,
LARRY RICE,
DORET KOLLERER,
CHRISTINE DONNER,
MAOIST INTERNATIONAL MOVEMENT,
BARRIO DEFENSE COMMITTEE,
ANTHONY LUCERO,
MAXWELL THOMAS,
DANIEL HERNANDEZ,
ARTHUR MCCRAY,
GEORGE MOORE,
TRAVIS COLVIN, and
MARTIN WILLIAMS,

Plaintiffs,

v.

JOE ORTIZ, in his official capacity as EXECUTIVE DIRECTOR OF COLORADO DEPARTMENT OF CORRECTIONS,

Defendant.

PLAINTIFFS' MOTION TO ENFORCE SETTLEMENT AGREEMENT AND FOR ORDER TO SHOW CAUSE WHY DEFENDANT SHOULD NOT BE FOUND IN CONTEMPT AND CERTIFICATE OF COMPLIANCE

Since entering into the Settlement Agreement nearly eight months ago, the DOC repeatedly has ignored its obligations, complying months late with even the most simple of the Agreement's terms and only after repeated requests by Plaintiffs to comply with the Agreement. The DOC now is in breach of critical provisions of the Agreement, one of which goes to the

heart of the settlement. Plaintiffs seek judicial intervention to enforce the terms of the Court's Order with respect to the DOC's present breaches, through a finding of civil contempt and the entry of appropriate sanctions.

INTRODUCTION

As the Court is aware, Plaintiffs and the DOC entered into a Settlement Agreement, effective August 10, 2004. The Settlement Agreement was approved by the Court on August 18, 2004, and its terms were incorporated into the Court's Order of that date. *See* August 18, 2004 Order, attaching Settlement Agreement, Ex. 1 hereto. The Court expressly retained jurisdiction to enforce the Settlement Agreement. *See* August 18, 2004 Order, ¶ IV.[1]

Seven months after the settlement, the DOC has missed every single deadline of its various obligations under the Settlement Agreement. The first was the DOC's agreement to adopt the new version of the censorship regulation, AR 300-26, Exhibit A to the Settlement Agreement, by September 9, 2004. *See* Settlement Agreement, ¶ II.B.1. The new AR 300-26 was not adopted until October 6, 2004. *See* AR 300-26, as adopted, Ex. 2. The DOC's second breach was of its agreement to distribute fifteen publications specifically identified in the Settlement Agreement to various inmates, also by September 9, 2004. *See* Settlement Agreement, ¶ II.F.3. The DOC did not give those publications to the respective inmates until

[1] Paragraph II.E.2 of the Settlement Agreement provides that "[t]he Court have the power to enforce this Settlement Agreement upon appropriate motion, after due notice and hearing."

December 21, 2004, and did so only after repeated requests by Plaintiff's counsel. *See* Young letters to DOC counsel, Exs. 3(A) through 3(D).[2]

The Settlement Agreement also obligates the DOC to provide quarterly reports of censorship decisions. The DOC ignored this obligation for seven months after the DOC's first report was due. *See* Settlement Agreement, ¶ II.C.2. These reports are essentially printouts of the database of individual censorship decisions made by each of the DOC facilities, a database that the DOC created about two years before the settlement and which its facilities are required to update monthly and maintain under Section IV.H.2 of the revised AR 300-26. The first of those reports was due upon entry of the Settlement Agreement last August. The DOC, however, did not produce any reports until March 11, 2005, and only after Plaintiffs requested these reports on at least five occasions. *See* Young letters of November 2 and December 20, 2004, and February 14 and March 7, 2005, attached as Exs. 3(C) through 3(F).[3]

The DOC now is in breach of its obligation to provide Plaintiffs' counsel with drafts of the new training program curriculum and training materials that the DOC Training Academy is required to prepare. The DOC was required to provide the drafts of these materials to Plaintiffs by February 7, 2005. *See* Settlement Agreement, ¶¶ II.B.4 and II.C.2. To date, the DOC has not provided these materials, nor provided any reason to Plaintiffs as to why they are in breach of this term of the Agreement. Plaintiffs' counsel also have received letters recently from inmates

[2] The DOC's breach of this term of the Agreement is even more egregious in light of Plaintiffs' counsel's providing the originals of these fifteen publications to DOC counsel in separate envelopes, with the inmate's name on the outside of each envelope.

[3] The first request for the censorship reports was made during a telephone conference between Ms. Young and Mr. Quinn in October, 2004.

indicating that privately-owned prisons that house Colorado DOC prisoners on a contract basis ("the contract facilities") are not following the revised regulation or terms of the settlement, despite the DOC's responsibility under the Settlement Agreement to ensure their compliance. *See* Settlement Agreement, ¶ II.F.2.

In this motion, Plaintiffs seek the assistance of the Court in enforcing the training program and contract facility compliance requirements of the Settlement Agreement. Due to the DOC's apparent cavalier attitude toward its obligations, demonstrated by its course of conduct thus far, Plaintiffs also seek sanctions, under the Court's authority to remedy civil contempt, for these continuing breaches. As sanctions, Plaintiffs seek an Order (a) extending Plaintiffs' monitoring period in an amount of time equal to the time ultimately lost to Plaintiffs by the DOC's delay in implementing the required training program, (b) requiring the DOC to provide Plaintiffs with written confirmation of the implementation of the training program, and (c) requiring the DOC to provide Plaintiffs with written certification every quarter of its contract facilities' compliance with the revised AR 300-26 and the terms of the Settlement Agreement.

ARGUMENT

I. THE DOC'S PRESENT, CONTINUING BREACHES ARE SUBSTANTIAL.

A. The Required Curriculum And Training Materials Have Not Been Provided.

The DOC has failed to provide Plaintiffs' counsel with the draft curriculum and training materials that the DOC is to use in the new training program it agreed to institute on the censorship process and criteria. Paragraph II.B.4 of the Settlement Agreement required the DOC to provide those materials to Plaintiffs on February 7, 2005. Plaintiffs have requested these materials on at least two occasions, with absolutely no response from DOC counsel. *See* Young

letters to Sanzo and Quinn, dated February 14 and March 7, 2005, attached as Exs. 3(E) and 3(F).

Under the terms of the settlement, Plaintiffs had thirty days within which to provide their comments to the draft training program materials, or by March 9; the DOC then was to institute the comprehensive program agreed to by April 7.[4] Settlement Agreement, ¶ II.B.4. The DOC's complete disregard of its obligation under the Settlement Agreement to provide the draft materials to Plaintiffs' counsel, and its apparent failure to develop the required training program, is a substantial breach of the Court's August 18, 2004 Order incorporating those obligations.

B. The DOC Apparently Is Not Requiring Its Contract Facilities To Comply With AR 300-26.

The DOC is obligated to confirm, through its Private Prison Monitoring Unit, that the contract facilities housing DOC inmates are complying with the revised AR 300-26 and the Settlement Agreement. *See* Settlement Agreement, ¶ II.F.2. Plaintiffs' counsel raised this apparent breach with DOC counsel in her March 7, 2005 letter to DOC counsel; the DOC has not responded to these allegations. *See* Ex. 3(F).

Crowley County Correctional Facility, owned and operated by the Correctional Corporation of American (CCA), is the largest of five private prison facilities that house Colorado inmates under contract with the DOC. *See* DOC web pages on its Facilities, Ex. 4. Recent letters from inmates at Crowley indicate that that facility is not complying with the censorship procedures or criteria required in the revised AR. *See* inmate February 23, 2005

[4] The DOC's breach of the training program deadlines is inexcusable, as Plaintiffs, very reluctantly, agreed during the settlement negotiations that the DOC could delay the implementation of a program for eight months from the settlement date.

letter, Ex. 5(A), and letters and documents provided by inmate David Suddarth, Ex. 5(B) hereto. These communications indicate that Crowley is in violation of the Settlement Agreement and new AR in at least the following respects: (1) the Reading Committee does not meet at least once every two weeks, as required by Section III.D. of AR 300-26; (2) the Reading Committee members are not from the different positions or disciplines within the facility, as required by Section IV.C.1.a. of AR 300-26; (3) the facility may not be following the censorship process at all or at all times, as reading materials appear to have been intercepted and deemed contraband by the mailroom, without going through the process of review and decision by the Reading Committee and Warden, as required by Section IV.C. of AR 300-26; (4) the facility is not informing inmates that the new Central Review Committee, established in Section IV.D.1. and E. of the Administrative Regulation, is the only avenue of appeal, as the inmates are continuing to file the three-step intra-facility grievances, abolished by the new AR for censorship decisions; (5) the facility is not reporting censorship decisions in the state-wide database, or the new quarterly reports, as required by Section IV.H.2. of AR 300-26;[5] and (6) the facility apparently is failing to follow the new criteria contained in AR 300-26.

The most troubling of the Crowley inmates' communications are Mr. Suddarth's statement in his January 10, 2005 letter that he was "instructed to remove all Administrative Regulations from [the facility's] manuals as I was instructed we are going to be governed by C.C.A. Policy and Procedures now" and Mr. Gooley's relating of a similar statement by

[5] Crowley's failure to report its censorship decisions directly into the system-wide database is evidenced by the single entry for the facility in the database printout provided by the DOC for decisions made between August 18, 2004 and March 9, 2005, the page of which is attached at Ex. 6 ("CCCF").

Crowley's Captain in charge that Crowley "is not bound by the settlement agreement, even though CDOC has delivered, and this facility has implemented AR 300-26 as required under CCA/CDOC contract." *See* Suddarth's January 10, 2005 letter and inmate February 23, 2005 letter, Ex. 5.

As noted above, the DOC is required to obtain written confirmation from the Private Prison Monitoring Unit every three months that every contract facility is implementing and adhering to AR 300-26 and the Settlement Agreement. The information Plaintiffs have received indicates that these private prisons are not complying, and that the management at Crowley plans to substitute its own policies for the DOC Administrative Regulations and the other specific terms of the Settlement Agreement. Unless the DOC can produce evidence to the contrary, it is in substantial breach of its monitoring obligations under the Settlement Agreement.

II. PLAINTIFFS ARE ENTITLED TO A FINDING OF CIVIL CONTEMPT AND THE IMPOSITION OF SANCTIONS FOR THE DOC'S CONTINUING BREACHES OF THE COURT'S AUGUST 18, 2004 ORDER.

Plaintiffs seek a finding of civil contempt and appropriate equitable sanctions to ensure the DOC's compliance with the Settlement Agreement, as to its continuing breaches and in the future. Courts have the inherent power to enforce compliance with their lawful orders through civil contempt, and to fashion appropriate remedial sanctions. *See Shillitani v. United States*, 384 U.S. 364, 370 (1966). "Civil contempt where appropriate serves to preserve and enforce the rights of private parties to suits, and compel obedience to orders and decrees made to enforce the rights and administer the remedies to which the Court has found them to be entitled." *Alberti v. Klevenhagen*, 610 F.Supp. 138, 141 (S.D. Tex. 1985) (internal quotations omitted).

To establish civil contempt, the moving party must prove by clear and convincing evidence that a valid court order existed, the defendants had knowledge of the order, and the defendant disobeyed the order. *See FTC v. Kuykendall*, 371 F.3d 745, 756-57 (10th Cir. 2004) (affirming contempt order where there was evidence of magazine telemarketing enterprises' violations of injunction entered as part of settlement in a civil enforcement action). Plaintiffs have established each of these elements: (1) the Court's August 18, 2004 Order is a valid Order incorporating the terms of the Settlement Agreement, (2) the DOC certainly is aware of the Court's Order, and (3) the DOC has failed to comply with the Settlement Agreement and continues to be in breach of its obligations related to the adoption of a training program and monitoring of the contract facilities' compliance with the revised AR and the Settlement Agreement. *See Kuykendall*, 371 F.3d at 756-57. Entry of an order requiring the DOC to comply with these terms is therefore appropriate.

Awarding remedial sanction is also appropriate. *See Local 28 of Sheet Metal Workers' Int'l v. EEOC*, 478 U.S. 421, 443-4 (1986); *Essex County Jail Inmates v. Amato*, 726 F.Supp. 539, 545 (D.N.J. 1989). When constructing a civil contempt sanction to enforce a party's compliance with a settlement agreement, the court must consider "the character and magnitude of the harm threatened by continued contumacy and the probable effectiveness of any suggested sanction in bringing about the desired result." *United States v. United Mine Workers of America*, 330 US 258, 304 (1947) (where the purpose of the contempt sanction is to make the defendant comply, the court may exercise "its equitable powers in this respect, . . . [and] enter an order such that the sanction applied will remedy the problems underlying or resulting from the circumstances upon which the contempt finding was based"). Modification of the terms of the

settlement agreement can be an appropriate remedy. *See Local 28 of Sheet Metal Workers' Int'l*, 478 U.S. at 443-4 (affirming as proper remedies for civil contempt a sanction requiring modification of court ordered affirmative action plan to require fines be placed in fund to increase nonwhite membership in the union and its apprenticeship program); *Alberti*, 610 F.Supp. at 141 (ordering filing of detailed staffing plan and monetary sanction where contemnor sheriff failed to comply with injunctive order). In litigation involving prison conditions, state authorities found in contempt of their obligations under existing court orders have been ordered to perform affirmative acts, acts beyond merely complying with their obligations under the prior court order. *See Essex County Jail Inmates*, 726 F.Supp. at 545 (ordering defendant county, as a civil contempt sanction for violation of settlement consent judgment, to create bail fund to which county was required to contribute for each instance of violation of settlement agreement embodied in consent judgment requiring reduction in inmate populations); *Inmates of Allegheny County Jail v. Wecht*, 573 F.Supp. 454, 457 (W.D.Pa. 1983) (ordering county to release prisoners where county failed to comply with order to ease over-crowding).

III. APPROPRIATE SANCTIONS FOR THE DEFENDANT'S CONTEMPT MUST INCLUDE MODIFICATION OF THE SETTLEMENT AGREEMENT THAT ADDRESSES THE NATURE OF THE DOC'S BREACHES.

The only meaningful way to remedy the DOC's past and continuing breaches of the settlement is to fashion a remedy that will put Plaintiffs in the position that they bargained for with respect to these provisions in settling this case. Plaintiffs therefore request the following as sanctions for Defendant's contempt:

- compelling the DOC to provide immediately the draft curriculum and training materials to Plaintiffs for their review and comment

- compelling the DOC to take immediate, affirmative action to bring Crowley in full compliance with AR 300-26 and the terms of the Settlement Agreement
- extending the Plaintiffs' monitoring period after the training program is implemented equal to the time Plaintiffs have been deprived of that monitoring by the DOC's delayed implementation
- requiring the DOC to provide Plaintiffs' counsel with written confirmation that the training program it ultimately develops in fact is in place and being followed at every facility, including contract facilities, and that all employees involved in the censorship process in fact have completed the training
- requiring the DOC to provide Plaintiffs with written confirmation, every quarter for the next two years, that the contract facilities are in fact complying with all provisions of the revised AR 300-26 and the Settlement Agreement
- requiring the DOC to provide Plaintiffs with written confirmation that the DOC has put in place its own monitoring program, due to be implemented on April 7, 2005, pursuant to ¶ II.C.1 of the Settlement Agreement

Plaintiffs also seek their attorneys' fees and costs, pursuant to paragraph II.E.2 of the Settlement Agreement, incurred in its attempts to enforce the terms of the Settlement Agreement, including the preparation and filing of this motion.

CONCLUSION

For these reasons, Plaintiffs respectfully request that the Court enter an Order to show cause why Defendant should not be held in contempt for its violation of the terms of the Settlement Agreement. After a hearing on the same, Plaintiffs request that the Court enter and Order compelling the DOC to comply with its obligations under the Settlement Agreement by immediately providing the draft curriculum and training materials for the DOC's proposed system-wide training program and requiring the DOC to demonstrate, in writing, that all contract facilities in fact are complying with all aspects of the revised AR 300-26 and Settlement Agreement. As sanctions for the DOC's breaches, Plaintiffs also request that the Court include

in its Order the additional requirements identified in Section III above, as well as Plaintiffs' attorneys' fees and costs incurred in bringing this motion.

CERTIFICATE OF COMPLIANCE

Pursuant to D.C.Colo.LR 7.1(A), undersigned counsel for Plaintiffs Gwen Young has conferred with counsel for Defendant James Quinn on several occasions by telephone or in correspondence, some of which are identified in this Motion, for the purpose of securing the DOC's compliance and resolving the present disputes before filing this motion. In their final phone conversation on March 31, Mr. Quinn informed Ms. Young that the training materials would be sent shortly and that the allegations concerning Crowley would be investigated. Attached as Exhibit 7 is a letter received as this motion was being copied for filing.

Mr. Quinn, however, offered no explanation for why he or his office did not respond to her requests for compliance at any time after her February 14 and March 7 letters regarding the same. Given the history of the DOC's delayed performance under the agreement to date, undersigned counsel is filing the motion so as not to subject the Plaintiffs to any further delay. In the event the DOC in fact immediately cures the present breaches and agrees to the sanctions requested, Plaintiffs will immediately advise the court and withdraw this motion.

Dated: March _____, 2005 Respectfully submitted,

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