IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 10-cv-01005-RBJ-KMT

TROY ANDERSON,

Plaintiff,

v.

STATE OF COLORADO, DEPARTMENT OF CORRECTIONS, *et al.*,

Defendants.

MOTION FOR ENFORCEMENT OF JUDGMENT AND FURTHER RELIEF OR, IN THE ALTERNATIVE, FOR HEARING ON ORDER TO SHOW CAUSE

Plaintiff, by and through his undersigned counsel, hereby moves the Court for enforcement of its Final Order and Judgment of August 28, 2012 and the further relief set forth in the attached [Proposed] Addendum to Final Order and Judgment ("Proposed Order"). In the alternative, Plaintiff respectfully requests a hearing on an order to show cause why the attached Proposed Order should not enter.

1. On May 3, 2010, Plaintiff filed the instant lawsuit against, among others, the Colorado Department of Corrections ("CDOC") asserting, among other claims, that Defendants had violated his rights under the Eighth Amendment by denying him access to outdoor exercise during his then-12-year confinement in administrative segregation and by denying him adequate mental health care, and had violated his rights under the Due Process Clause by maintaining an arbitrary system of chronological reporting on which Plaintiff's continued stay in administrative segregation was based. ECF 1.

2. This matter was tried to the Court between April 30 and May 8, 2012.

3. During trial, Defendants announced that the CDOC would be promulgating an amendment to Administrative Regulation ("AR") 650-03, which they believed would address Plaintiff's due process concerns. This Court held the evidence open to permit Defendants to submit this new AR, and permitted both parties to file briefs addressing its effect. ECF 106, 107.

4. On August 28, 2012, this Court issued its decision, holding in favor of Plaintiff on his Eighth Amendment outdoor exercise claim, requiring a "second look" at his mental health treatment, and otherwise holding in favor of Defendants. ECF 109, 110.

5. Specifically, the Court ordered:

> The Court enters judgment in favor of the plaintiff and against defendants on plaintiff's Fourth Claim for Relief. The Court orders that within 60 days the CDOC must develop and present to plaintiff's counsel and the Court a plan that ensures that Troy Anderson has access for at least one hour, at least three times per week, to outdoor exercise in an area that is fully outside and that includes overhead access to the elements, e.g., to sunlight, rain, snow and wind, unless inclement weather or disciplinary needs make that impossible. Plaintiff may file objections, if any, to the plan within 21 days. Defendants may reply within 14 days following plaintiff's submission of objections.
>
> The Court orders defendants to assign a CDOC physician to take a fresh look at Mr. Anderson's medication and treatment needs as set forth in this Order. With that exception, the Court enters judgment in favor of the defendants on plaintiff's Third Claim for Relief.
>
> Plaintiff has brought to the Court's attention legitimate concerns about how chronological reporting and administrative reviews have functioned in the past. Administrative Regulation 650-03 has addressed some of those concerns expressly, and it appears to the Court that others are addressed implicitly. In the spirit of giving the new policy and those who will implement it a fair chance, the Court enters judgment in favor of the defendants on plaintiff's First Claim for Relief.

Final Order and Judgment, ECF 109, at 38-39, ¶¶ 1-3. These holdings were embodied in a Final Judgment. ECF 110.

6. On October 23, 2012 Defendants filed their Notice of Compliance with Final Order and Judgment. ECF 118. Defendants claimed to have complied with the Final Order and

Judgment by moving Mr. Anderson to the Sterling Correctional Facility ("Sterling"). Mr. Anderson has been housed at Sterling since approximately October 19, 2012. Decl. of Troy Anderson ("Anderson Decl.") ¶ 4.

7. On April 30, 2013 Plaintiff filed his Objections to Defendants' Notice of Compliance with Final Order and Judgment. ECF 147. Mr. Anderson argued that Sterling's exercise rooms did not provide outdoor exercise in compliance with the Court's Final Order and Judgment, and also noted that many of the mental health programs and supports on which the Court had based its judgment on that claim in Defendants' favor were not available at Sterling.

8. On September 4, 2013, this Court held a hearing on, among other things, Defendants' compliance with the Final Order and Judgment. In that hearing, the Court stated, "[i]n my opinion, based on what I've seen and read, the Department is not in compliance with my order with respect to outdoor exercise." Reporter's Transcript, Hearing on Pending Motions, at 20:24 - 21:1, *see also id.* at 33:23-25. In addition, while noting that Defendants were compliant with the Court's order to take a "second look" at Mr. Anderson's mental health treatment, including medication, *id.* at 22:1-6, the Court expressed concern that Mr. Anderson was not receiving the mental health treatment to which Defendants had testified at trial, *see id.* at 22:6 - 23:11, 24:21-24, 25:2-4; *see also id.* at 27:16-17 ("I am very much affected by what the professionals think his needs are.").

9. This Court concluded the September 4, 2013 hearing by ordering the parties to meet and confer and attempt to resolve their differences and report back in 30 days. *Id.* at 40:18 - 41:9. The parties have jointly requested that that deadline be extended several times to permit them to continue to discuss this matter. ECF 168, 171, 173, 175.

10. On January 20, 2014, the parties met at Sterling to discuss Mr. Anderson's status and his concerns, as well as the CDOC's plan to issue further amendments to its ARs that it believed would address some of these concerns. Decl. of Amy F. Robertson ("Robertson Decl.") ¶ 3.

11. On January 28, 2014, Plaintiff, through counsel, sent a letter to Defendants setting forth a proposal to resolve the outstanding issues in this case. *Id*.

12. On April 18, 2014, Defendants responded to this proposal. Defendants did not accept Plaintiff's proposal, but did state their belief that a number of Mr. Anderson's requests might be addressed through upcoming revisions to the CDOC's policies relating to high-risk offenders. *Id*. ¶ 4.

13. On June 30, 2014, the CDOC issued two revised ARs. The first was a revision to AR 650-03, governing "Restrictive Housing." Robertson Decl. Ex. A. This AR revised the version of AR 650-03 that was issued in May 2012, just following trial of this matter and on which this Court's due process decision was based.

14. The second revised regulation was AR 600-09, governing "Management of Close Custody Offenders;" it replaced an AR that had just been promulgated on April 1, 2014. Robertson Decl. Ex. B.

15. On August 1, 2014, the Department issued a revised AR 550-01, governing the "Integrated Case Management System." Robertson Decl. Ex. C. This appears to be the regulation now governing the chron system. For example, paragraph IV(G) addresses chronological records and paragraph IV(E) provides for "meaningful contacts."

16. Mr. Anderson is currently housed at Sterling and has the status and designation "Close Custody - Management Control Unit" ("MCU"). Anderson Decl. ¶¶ 2-3.

17. Prior to this spring, Mr. Anderson was required to remain in his cell 23 hours per day and was not permitted to interact with or be around other inmates. Starting this spring, he has been permitted to come out of his cell for approximately four hours each day, initially with three other inmates, and more recently with seven other inmates. While this was a difficult transition at first, Mr. Anderson believes it is going more smoothly now and appreciates the opportunity to interact with others. *Id*. ¶ 5.

18. Prior to approximately July 1, 2014, the only exercise Mr. Anderson was permitted at Sterling was alone in a narrow concrete area attached to his living unit with a partial mesh ceiling. *Id*. ¶ 6. This is the exercise area this Court held not to comply with its Final Order and Judgment. *See supra* ¶ 8.

19. Starting on approximately July 14, 2014, Mr. Anderson has been permitted to exercise in a larger, open-air yard near his living unit with first three and later seven other inmates. He has enjoyed the ability to be fully outdoors and has not missed many if any opportunities to go to the yard. Earlier this week, he testifies in his declaration, he "felt the rain on [his] face for the first time in 15 years" and found it to be "a remarkable experience " *Id*. ¶ 7.

20. On or about May 14, 2014, Defendants conducted a Privilege Level Review of Mr. Anderson. Defendants issued the document attached as Exhibit 2 to the Proposed Order documenting that Level Review. Anderson Decl. ¶ 8 & Ex. A.

21. On or about June 13, 2014, Dr. Bryce C. Willson, PhD, a licensed psychologist in Clinical Services at Sterling Correctional Facility, put in place a treatment plan for Mr. Anderson. Proposed Order Ex. 3; Anderson Decl. ¶ 9 & Ex. B.

22. On or about July 30, 2014, Defendants conducted a multi-disciplinary staff meeting, which included Dr. Willson, Assistant Warden Scherbarth, Capt. Whitney, Lts. Long

and Tavner, Case Managers Peterson and Dick, Ms. Hotz (interim mental health supervisor), and Nurse Fuller. The results of that staffing are set forth in Exhibit 4 to the Proposed Order. Anderson Decl. ¶ 10 & Ex. C.

23. Mr. Anderson believes he is able to interact with others and that things are going more smoothly because CDOC is, at this time, providing the mental health treatment he needs and is allowing mental health staff to manage his situation as set forth in Exhibits A, B and C to his Declaration. *Id*. ¶ 11.

24. The document attached as Exhibit 5 to the Proposed Order was provided by counsel for Defendants to counsel for Plaintiff, and describes "examples of basic Programs and Services that are available to Close Custody offenders. Robertson Decl. Ex. D.

25. The documents attached as Exhibits 6 and 7 to the Proposed Order were made available to Mr. Anderson and others in his unit in early July 2014, after promulgation of the new ARs. Anderson Decl. ¶¶ 12-13 & Exs. D & E.

26. On August 22, 2014, Plaintiff sent Defendants a draft of the Proposed Order -- styled as a "Consent Order" -- with a cover email stating that

> we propose to resolve the outstanding issues in Anderson v. Colorado -- the August 24, 2012 Judgment ordering outdoor exercise and the September 4, 2013 hearing in which Judge Jackson found the CDOC was not in compliance with that order -- through the attached consent order.
>
> In crafting this proposal, we wanted to respect both the progress the CDOC has made, and your stated desire that we not attempt to dictate CDOC policy. Thus, as you'll see, our proposed consent order consists entirely of CDOC regulations and CDOC's stated approach to Mr. Anderson and inmates with his classification and status. It does not go beyond stated CDOC policy.

Robertson Decl. ¶ 9.

27. On September 5, 2014, counsel for Defendants responded that the Department "respectfully declines [this] proposal at this time." Defendants did not propose an alternative or suggest alternative means to reach resolution. *Id*. ¶ 10.

ARGUMENT

This Court has "ancillary jurisdiction to enforce its own orders and judgments." *Metzger v. UNUM Life Ins. Co. of Am.*, 151 F. App'x 648, 651 (10th Cir. 2005) (citing *Peacock v. Thomas*, 516 U.S. 349, 356 (1996) (recognizing "use of ancillary jurisdiction in subsequent proceedings for the exercise of the court's inherent power to enforce its judgments") and *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 380 (1994) (court has ancillary jurisdiction to "manage its proceedings, vindicate its authority, and effectuate its decrees")); *cf* . *Brown v. Plata*, 131 S. Ct. 1910, 1931 (2011) ("When a court attempts to remedy an entrenched constitutional violation through reform of a complex institution, such as this statewide prison system, it may be necessary in the ordinary course to issue multiple orders directing and adjusting ongoing remedial efforts"); *Hutto v. Finney*, 437 U.S. 678, 690 (1978) ("In exercising their prospective powers . . . federal courts are not reduced to issuing injunctions against state officers and hoping for compliance. Once issued, an injunction may be enforced"); *Battle v. Anderson*, 708 F.2d 1523, 1537 (10th Cir. 1983) ("a court should exercise supervisory power over the suit until it can say with assurance not only that eighth amendment violations do not presently exist but that there is no reasonable expectation that unconstitutional conditions will recur.")

While Mr. Anderson believes that the outdoor exercise, mental health treatment plan, and canteen reflected in Exhibits A through E to his Declaration satisfy this Court's Final Order and Judgment and the concerns and holdings of the Court at the September 4, 2013 hearing -- and he

believes that his situation is going smoothly because of it -- he respectfully submits that, in order to ensure continued compliance, these measures need to be incorporated into an order of the Court. There are several reasons for this request.

First, although Defendants were informed, in an October 2011 report that the outdoor exercise provided to inmates in administrative segregation was inadequate, *see* ECF 109 at 10, they did not attempt to provide outdoor exercise to Mr. Anderson until ordered to do so by this Court.

Second, even following this Court's August 24, 2012 order to provide Mr. Anderson "access for at least one hour, at least three times per week, to outdoor exercise in an area that is fully outside and that includes overhead access to the elements, *e.g.*, to sunlight, rain, snow and wind, unless inclement weather or disciplinary needs make that impossible," ECF 109 at 39, Defendants simply moved Mr. Anderson to Sterling, where his outdoor exercise -- as this Court found in the September 4, 2013 hearing -- continued to be inadequate. Crucially, the larger, fully-outdoor yards where Mr. Anderson now exercises were available at Sterling when he was first moved there in October, 2012. Robertson Decl. ¶ 11. Despite this and despite the Court's order recited above, Mr. Anderson was not permitted to exercise in those yards, but was limited to the largely enclosed concrete areas held by this Court not to comply with its order.

Third, while the current regime of exercise, mental health treatment, and privileges may be the result of newly-promulgated regulations, Defendants amend their regulations frequently. The newly issued AR 650-03, for example, amends the May 15, 2012 version this Court held open the evidence at trial to review. Similarly, as this Court noted in the September 4, 2013 hearing, the Offenders with Mental Illness program that Defendants touted at the June 2012 trial -- both for the quality of the program and for Mr. Anderson's potential to return to the program,

Trial Tr. (5/2/12) at 142:21-23 -- had, by the time of the September 2013 hearing, been completely rejected and replaced by a "Residential Treatment Program," for which Defendants asserted Mr. Anderson was ineligible,*see* Defs.' Reply in Supp. of the Notice of Compliance with Final Order and Judgment, ECF 153, at 10.

In light of this, there is no assurance that, in the absence of the requested Proposed Order, Mr. Anderson will continue to receive the outdoor exercise, mental heath treatment, and privileges that he is currently receiving. He remains in the same living unit to which he was transferred in October 2012, and in which -- for a period of almost two years -- he was provided only inadequate exercise in the concrete rooms adjoining his pod, despite the availability of the exercise yards in which he has been permitted to exercise for the past two months, and the programs and regulations that now govern him could change again in the near future. Under these circumstances, Court action is required to ensure compliance. *See, e.g., Longstreth v. Maynard*, 961 F.2d 895, 900-01 (10th Cir. 1992) (holding inmates' claims not moot where their rights were violated even under allegedly compliant policy and policies varied considerably over time because it was not "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.").

In light of the above, Plaintiff respectfully requests that this Court enter the attached Proposed Order, requiring that:

1. Mr. Anderson will have access for at least one hour, at least three times per week, to outdoor exercise in an area that is fully outside and that includes overhead access to the elements, *e.g.*, to sunlight, rain, snow and wind, unless inclement weather or disciplinary needs make that impossible.

2. While Mr. Anderson is housed in the "Cloverleaf" area of SCF, the outdoor exercise will be provided, pursuant to Paragraph 1 above, in one of the two open-air yards adjacent to Units 5 and 6.

3. If Mr. Anderson is transferred to another facility, outdoor exercise will be provided, pursuant to Paragraph 1 above, in an area with exposure to the elements that is equivalent to or greater than that of the yards referenced in Paragraph 2.

4. While classified as MCU, Mr. Anderson will be governed by AR 600-09, Exhibit 1 to the Proposed Order. With respect to Plaintiff's conditions of confinement, canteen, and mental health treatment, Defendants will, at a minimum, comply with

a. the Level Review attached as Exhibit 2 to the Proposed Order;

b. the treatment plan attached as Exhibit 3 to the Proposed Order;

c. the Multidisciplinary Staffing attached as Exhibit 4 to the Proposed Order;

d. The list of programs and services attached as Exhibit 5 to the Proposed Order;

e. The MCU/MCUHR/MCUPC Orientation Sheet attached as Exhibit 6 to the Proposed Order; and

f. The canteen list attached as Exhibit 7 to the Proposed Order.

5. With respect to review of his placement and the use of chronological records, Defendants will, at a minimum, comply with AR 550-01, Exhibit 8 to the Proposed Order.

Respectfully submitted,

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Attorneys for Plaintiff

Dated: September 12, 2014

CERTIFICATE OF SERVICE

I hereby certify that on September 12, 2014, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following e-mail address:

Chris W. Alber
chris.alber@state.co.us

/s/ *Sophie P. Breene*
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