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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JOHN ARMSTRONG, et al.,

Plaintiffs,

v.

GAVIN NEWSOM, et al.,

Defendants.

Case No. C94 2307 CW

PLAINTIFFS' REPLY TO DEFENDANTS' RESPONSE TO NEW MATERIAL IN PLAINTIFFS' REPLY IN SUPPORT OF RJD MOTION AND RENEWED REQUEST TO RESCIND RVRS AGAINST INMATE 2

Judge: Hon. Claudia Wilken
Date: August 11, 2020
Time: 2:00 p.m.
Crtrm.: Remote

INTRODUCTION

Defendants' Response to New Material in Plaintiffs' Reply in Support of RJD Motion ("Defs.' Suppl. Resp."), Dkt. 3045, presents only two arguments, both of which relate to the Revised Proposed Order that Plaintiffs filed on July 29, 2020, Dkt. 3024-6.

First, Defendants object that the provisions of the Revised Proposed Order regarding reforms to the staff complaint, investigation, and discipline process sweep too broadly because they require Defendants to develop a plan to reform the entire system, not just the system as it applies to *Armstrong* class members at RJD. Plaintiffs have, however, submitted substantial evidence that the problems with the system are state-wide in nature and require state-wide relief. Limiting the necessary reforms to one prison would be inefficient and waste scarce State resources.

Second, Defendants present a host of hypothetical objections to the 60-day deadline in the Revised Proposed Order for Defendants to implement body-worn cameras at RJD. Defendants, however, fail to present any evidence to support their contention that the 60-day deadline is not achievable. In contrast, Plaintiffs' correctional expert submitted a declaration that body-worn cameras could be up and running at RJD within 60 days. Body-worn cameras are necessary to remedy the ADA violations at issue here and the Court should mandate their implementation within 60 days.

At the Court's request, Defendants submitted data regarding the distribution of ADA appeals filed by *Armstrong* class members. As with prior data presented by Defendants, this data is meaningless because it lacks any context or point of comparison over time or with other institutions. Taking the data at face value, it cannot support Defendants' contention that the misconduct at RJD has not chilled *Armstrong* class members from requesting accommodations. More than half of the class members submitted zero ADA appeals from 2017 through 2019.

Separately, Plaintiffs reiterate their request that the Court rescind the false and retaliatory Rules Violation Reports (RVRs) against Inmate 2. On August 13, just two days after this Court's hearing on the RJD Motion, Defendants found Inmate 2 guilty of both

RVRs. This Court has already determined that Inmate 2's version of events is credible, that Defendants' is not, and that the RVRs were likely falsified. Moreover, the RVR hearings were rife with procedural improprieties, including a failure by the hearing officer to call Inmates 1 and 3 as witnesses, to consider the declarations from Inmates 2, 1, and 3, or to take into account this Court's order granting in part the preliminary injunction. Defendants did not, as they represented to the Court at the RJD Motion hearing, wait to conduct the hearings until they obtained the cell phone video of the incident; instead, they moved forward mere hours after the RJD hearing. And Defendants did not provide Plaintiffs' counsel with notice of the RVR hearing until after finding Inmate 2 guilty. Because the RVRs violate the Court's prior orders, 42 U.S.C. § 12203, and Inmate 2's due process rights, they should be set aside.

I. THE EVIDENCE REGARDING PROBLEMS WITH THE STAFF COMPLAINT, INVESTIGATION, AND DISCIPLINE PROCESS SUPPORTS GRANTING STATE-WIDE RELIEF

Defendants' Supplemental Response objects to Plaintiffs' Revised Proposed Order to the extent it requires Defendants to develop a plan to reform the staff complaint, investigation, and discipline process for *Armstrong* class members at all prisons, not just at RJD. *See* Defs.' Suppl. Resp. at 2-4.

Plaintiffs have presented substantial and largely unchallenged evidence of fundamental problems with every part of Defendants' process for holding officers accountable for their abuses of *Armstrong* class members at RJD. Those problems include: biased, incomplete, and poorly conducted inquiries; the inexplicable exclusion of some staff complaints regarding use of force incidents from the new Allegation Inquiry Management System ("AIMS"); improper rejections of requests for investigations by the Central Intake Unit of the Office of Internal Affairs ("OIA"); biased, incomplete, and unprofessional investigations by OIA; failures by OIA to open criminal investigations and make referrals to prosecuting agencies when officers engage in criminal conduct; improper and inconsistent exercise of discretion by wardens to determine whether staff have violated policy and what discipline to impose; and serious shortcomings in the advice provided by

headquarters-level attorneys regarding imposition of discipline. *See, e.g.*, Decl. of Jeffrey Schwartz in Supp. of Statewide Mot. ("Schwartz Decl."), Dkt. 2948-4; Decl. of Gay Crosthwait Grunfeld in Supp. of RJD Mot. ("Grunfeld RJD Decl."), Dkt. 2922-1, Exs. EE, GG, KK; Decl. of Gay Crosthwait Grunfeld in Supp. of Statewide Mot. ("Grunfeld Statewide Decl."), Dkt. 2948-1, Ex. V; Reply Decl. of Gay Crosthwait Grunfeld in Supp. of RJD Mot. ("Grunfeld Reply Decl."), Dkt. 3024-1, ¶¶ 80-82 & Exs. VV-XX; Suppl. Reply Decl. of Gay Crosthwait Grunfeld in Supp. of RJD Mot. ("Grunfeld Suppl. Reply Decl."), filed herewith under seal, Ex. O (August 19, 2020 report by Office of Inspector General ("OIG") detailing grossly improper advice provided by headquarters legal staff regarding staff discipline). Each of these problems occurs within a part of the system that is state-wide in nature and is in no way unique to RJD. AIMS, the Central Intake Unit, OIA, and the attorneys at headquarters are centralized units that play a role in misconduct investigations and discipline at all California prisons. All wardens have the exact same discretion as the wardens at RJD. And the officers who are subject to the discipline system transfer between prisons and interact with each other—reforms at one prison alone will be insufficient to ensure accountability for and end discrimination against all *Armstrong* class members.

Because Plaintiffs have proved the existence of foundational and systemic problems with Defendants' state-wide system and because the ADA violations at RJD cannot be remedied until those problems are ameliorated, Plaintiffs have asked that the Court issue relief on a state-wide basis. *See* Revised Proposed Order at 17-18.

Defendants also suggest that Plaintiffs' Revised Proposed Order is improper because it was raised for the first time in Plaintiffs' Reply. *See* Defs.' Suppl. Reply at 2. But Defendants did not suffer any prejudice from the timing of the submission of the Revised Proposed Order because the Court provided Defendants with an opportunity to submit their Supplemental Response. Moreover, like the Revised Proposed Order, Plaintiffs' initial Proposed Order included a request for reform of the staff complaint, investigation, and discipline process, albeit a less detailed proposal that did not include the

request for oversight by a court expert.[1] And Defendants should not have been surprised by the discipline-related provisions in the Revised Proposed Order, as they are copied nearly verbatim from the proposed order submitted in support of the Statewide Motion on June 3, 2020. *Compare* Revised Proposed Order at 17-18 *with* Dkt. 2948-6, at 17-19. In any event, in a case involving injunctive relief, it is appropriate for a plaintiff to submit a revised proposed order that reflects developments that occur following the filing of the motion. *See Reveal Energy Servs. Inc. v. Dawson*, No. 4:17-CV-459, 2017 WL 5068459, at *1 (S.D. Tex. Aug. 21, 2017) ([T]he filing of the amended proposed order was appropriate given the development of the case since the original filing of the preliminary injunction request."); *Armstrong v. Schwarzenegger*, 395 F. App'x 365, 367 (9th Cir. 2010) (affirming order of this Court where Plaintiffs submitted revised proposed order shortly before the hearing). Here, Plaintiffs needed to submit a Revised Proposed Order because Defendants failed to produce staff discipline files in advance of the filing of the RJD Motion. *See* Grunfeld Reply Decl., ¶ 5; Grunfeld Statewide Decl., ¶¶ 11-15.

II. THE 60-DAY DEADLINE FOR IMPOSING BODY-WORN CAMERAS IS APPROPRIATE

The only other part of the Revised Proposed Order to which Defendants object is Plaintiffs' change in the deadline to implement body-worn cameras from 180 to 60 days. *See* Defs.' Suppl. Resp. at 4-5. In support of Plaintiffs' Reply, Eldon Vail, Plaintiffs' corrections expert, stated that, based on his discussion with representatives from a body-worn camera company, CDCR could obtain and begin implementing body-worn cameras at RJD within "a couple of months." *See* Reply Decl. of Eldon Vail in Supp. of RJD Mot., Dkt. 3024-3, ¶ 70. Defendants have presented a number of hypothetical reasons—

[1] Dkt. 2922-8, at 16-17 ("CDCR must come up with a plan to enhance accountability at RJD through greater OIA referrals, discipline of employees who engage in or fail to report misconduct, prosecution of employees who commit crimes against incarcerated people, increased [OIG] oversight, and discipline consistent with the Accountability Order and Department Operations Manual Employee Discipline Matrix.").

procurement, public bidding requirements, the need to develop policies—for why they might not be able meet a 60-day deadline. *See* Defs. Suppl. Resp. at 4-5. But in so arguing, Defendants commit the same error that suffused their opposition to the RJD Motion: they fail to introduce admissible evidence to support their contentions. The record before the Court establishes that body-worn cameras are necessary to put an end to the ongoing violation of the ADA rights of *Armstrong* class members at RJD and that Defendants can implement body-worn cameras within 60 days.

III. THE DATA PROVIDED BY DEFENDANTS TO THE COURT CONFIRMS THAT MOST CLASS MEMBERS AT RJD FILED ZERO OR ONE APPEALS SINCE JANUARY 1, 2017

At the Court's request, Defendants submitted data regarding the distribution of the number of ADA appeals and requests for accommodation filed by *Armstrong* class members at RJD from 2017 to 2019. *See* Dkt. 3050. The data remain meaningless because they are devoid of context. Defendants provide no analysis of appeals at RJD over time or comparison of appeals at RJD to appeals at other institutions.

Even if the Court considers the data, however, it does not support Defendants' position that the rampant misconduct at RJD has had no chilling effect on class members' willingness to request accommodations. More than half (54%) of the 2,232 class members housed at RJD from 2017 through 2019 did not file a single ADA request for accommodation. *See* Grunfeld Suppl. Reply Decl., ¶¶ 28-29. And 71% of class members filed one or fewer appeals. *Id.* Meanwhile, Plaintiffs have submitted voluminous evidence showing that the retaliatory and violent environment at RJD, tolerated by Defendants for years, has made people with disabilities afraid to request the help they need. *See* RJD Mot. at 18-20; Statewide Mot. at 10 n.19; RJD Reply at 3-5. As Inmate 2 testified: "I will not stick my neck out again and try to help in the *Armstrong* case because the harassment is not worth dying for." Grunfeld Reply Decl., Ex. C, ¶ 12.

IV. THE COURT SHOULD ORDER THAT CDCR RESCIND THE RVRS FOR INMATE 2

Two days after the hearing on the RJD Motion, on August 13, 2020, Defendants

found Inmate 2 guilty of the two Rules Violation Reports ("RVRs") related to the June 17, 2020 incident. *See* Grunfeld Suppl. Reply Decl., Exs. H, I. The hearing officer reduced the RVR for "assault on a peace officer" to "behavior which could lead to violence" and mitigated the RVR into a counseling chrono. *See id.*, Ex. H, at 0010. Though Inmate 2 was not punished with loss of credits or privileges, the counseling chrono will negatively affect his eligibility for parole. *See* Decl. of Thomas Nolan in Supp. of Pls.' Suppl. Reply in Supp. of RJD Mot. ("Nolan Suppl. Reply Decl."), filed herewith, ¶¶ 4-10. The hearing officer found Inmate 2 guilty of the RVR for possession of alcohol and issued a punishment of 120 days loss of credits, 10 days confined to his cell, and a one-year disqualification from any paid work. Grunfeld Suppl. Reply Decl., Ex. I, at 009-10.

The Court previously indicated it was waiting for the results of the RVRs before deciding whether to rescind them. *See* Dkt. 3042, at 9:14-19, 10:2-8; 71:18-22. Now that CDCR has found Inmate 2 guilty of both charges, the Court should intervene and set aside the false and retaliatory RVRs. This is especially critical because Inmate 2's Comprehensive Risk Assessment ("CRA"), an important component of the Board of Parole Hearing's consideration of parole eligibility, must be completed no later than October. *See* Nolan Suppl. Reply Decl., ¶ 11. The CRA relies heavily on the discipline history of an incarcerated person in determining whether release is appropriate. *Id.*

The Court has already found that Inmate 2's version of the incident—that Officer Montreuil attacked Inmate 2 in retaliation for his participation in the RJD Motion and then falsified an RVR claiming that Inmate 2 assaulted him and that other officers falsified an RVR about Inmate 2 possessing alcohol—is credible. *See* Dkt. 3025, at 14 ("The Court finds the description of the June 17 incident in the declarations of Inmates 2, 1, and 3 to be credible."); *id.* at 20 ("The Court also finds credible that Officer Montreuil's use of force against Inmate 2 was in retaliation for Inmate 2 submitting a declaration in support of the enforcement motion."). The Court has also found that Defendants' version of events—that Inmate 2 threw bodily fluids at Officer Montreuil, was intoxicated, and possessed alcohol in his cell—is not credible. *Id.* at 16 ("Defendants' description of the June 17 incident

lacks credibility."); *id.* at 18 (finding that Defendants' statements in incident reports and other documents that Inmate 2 possessed and smelled like alcohol "are not credible"); *id.* at 19 ("[T]he Court finds that Defendants' description of the June 17 incident … lacks credibility."). Since the RVRs are false and were issued in retaliation for Inmate 2's being a witness in support of the RJD Motion, the Court should rescind them to remedy Defendants' violations of the Inmate 2's rights under the ADA, the Constitution, and this Court's Preliminary Injunction Order and Anti-Retaliation Order. *See* 42 U.S.C. § 12203; *Wolff v. McDonnell*, 418 U.S. 539, 563-67 (1974) (requiring adequate notice of and opportunity to present a meaningful defense in disciplinary proceedings); *Morrison v. LeFevre*, 592 F. Supp. 1052, 1073 (S.D.N.Y. 1984) ("The introduction of false evidence [to discipline an incarcerated person] in itself violates the due process clause."); Grunfeld Suppl. Reply Decl., Ex. O (OIG Sentinel Report finding that officers issued a retaliatory RVR to a person on whom the officers used unnecessary force).

Not only are the RVRs false and retaliatory, the procedures used to find Inmate 2 guilty were also deeply flawed. The only evidence the hearing officer relied upon to find Inmate 2 guilty was the RVR incident packets, which consist primarily of the incident reports this Court has already deemed to be not credible. *See* Grunfeld Suppl. Reply Decl., Ex. H, at 0024-0050; *id.*, Ex. I, at 0010. The hearing officer could not consider evidence of the liquid purportedly thrown by Inmate 2 at Officer Montreuil or the alcohol allegedly found in Inmate 2's cell because CDCR did not preserve or even take pictures of any such evidence. *See* Grunfeld Suppl. Reply Decl., Ex. H, at 012 ("[T]here is no pictorial evidence to support the reporting employees claim that fluid was thrown at him …."); *id.*, Ex. I; *see also* Dkt. 3025, at 18 ("Defendants did not photograph or retain the alcohol allegedly found in Inmate 2's cell."); *id.* at 16 ("There are no photographs of the contents [allegedly thrown at Officer Montreuil]."). Neither the medical records nor the RVR for assaulting Officer Montreuil mention any smell of alcohol. Dkt. 3025, at 17-18. The hearing officer did not consider the declarations signed under penalty of perjury by Inmate 2, 1, or 3 or this Court's order granting the preliminary injunction. See Grunfeld Suppl.

Reply Decl., Exs. H, I. Inmate 2 attempted, but was not able, to call Inmates 1 and 3 as witnesses. Defendants claimed that they could not locate Inmate 1. *See id.*, Ex. H, at 005. Meanwhile, investigators approached Inmate 3, who was housed down the hall from Inmate 2 at the time, to seek his testimony, but failed to inform Inmate 3 about the purpose of the interview. *Id.*, ¶ 16 & Ex. B, ¶ 6. Heeding Plaintiffs' counsel's instructions not to speak to anyone at CDCR about the contents of his declarations without Plaintiffs' counsel present, Inmate 3 refused to participate. *Id.*, Ex. B, ¶ 6. Had Defendants informed him that Inmate 2 had requested his testimony at the RVR hearing, Inmate 3 would have agreed to participate. *Id.*, ¶ 7.

Notwithstanding the Anti-retaliation Order, Defendants contacted Inmate 2 multiple times without Plaintiffs' counsel present and did not provide Plaintiffs' counsel with an opportunity to participate in the hearing or even to prepare Inmate 2. *See* Grunfeld Suppl. Reply Decl., ¶¶ 11-12; Dkt. 2931, at 2 ("Defendants shall not communicate with any of the Declarants regarding matters covered by their declarations or any alleged retaliation related to their participation in the Motion without first providing notice to Plaintiffs' counsel and an opportunity for Plaintiffs' counsel to participate in any interview or communications."). And Defendants far exceeded, without adequate justification, the 30-day deadline for hearing the RVRs. *See* Grunfeld Suppl. Reply Decl., ¶ 22. Indeed, the battery RVR expressly concedes that "[t]he RVR was not heard within 30 days of the hearing postponement resulting in a **due process violation**." *Id.*, Ex. H, at 0010 (emphasis added). The hearings were nothing more than a kangaroo court, designed to cover up the misdeeds of Defendants' officers and retaliate further, in violation of Inmate 2's ADA and due process rights. *See* 42 U.S.C. § 12203; *Wolff*, 418 U.S. at 563-67.

To make matters worse, Defendants have not been forthright with the Court and Plaintiffs' counsel. At the August 11, 2020 hearing on the RJD Motion, counsel for Defendants stated that Defendants were waiting to conduct the RVR hearings until CDCR could determine whether cell phone video of the June 17, 2020 incident existed. Dkt. 3042, at 7:25-8:4 ("MS. HOOD: The RVR hearings I do not believe have taken place yet.

We are still waiting to see if we can retrieve the cell phone video, if the video exists."). Notwithstanding this representation to the Court and without any change in the status of the cell phone video, on August 12, 2020 at approximately 10:00 a.m., CDCR deemed that both RVRs were "ready to hear." Grunfeld Suppl. Reply Decl., ¶ 23; *id*., Ex. F, at 002; *id.*, Ex. G, at 001. And on the following day, August 13, 2020, Defendants conducted both hearings and found Inmate 2 guilty. *Id.*, Exs. H, I. Defendants did not provide Plaintiffs' counsel with any notice that the RVR proceedings were moving forward until nearly midnight on August 13, 2020, after the hearings had already been completed. *Id.*, ¶ 10. Defendants did not provide the final RVRs to Plaintiffs' counsel until six days later, on August 19, 2020. *Id.*, ¶ 19. And during the entire time period Inmate 2 was recovering from being pushed from his wheelchair and swallowing nail clippers, transferring prisons twice, and preparing for the RVR hearing, he has been held on maximum custody status in violation of this Court's prohibition on administrative segregation placement. *See id.*, ¶¶ 24-26.

The Court gave Defendants every opportunity to do the right thing and dismiss the false and retaliatory RVRs. Defendants chose not to do so. Left undisturbed, the RVRs will make it considerably less likely that Inmate 2 will be granted parole. Nolan Suppl. Reply Decl., ¶¶ 9-10. And the RVRs will send an unmistakable message to all *Armstrong* class members that Defendants can retaliate against witnesses in this case with impunity. Put simply, these RVRs cannot stand.

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CONCLUSION

For the aforementioned reasons, Plaintiffs respectfully request that the Court grant the RJD Motion, issue the Revised Proposed Order, and rescind the RVRs issued to Inmate 2 so that they no longer appear in his CDCR file.

DATED: August 25, 2020

Respectfully submitted,

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