

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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KADIAN MCBEAN, et al.,

Plaintiffs,

02 Civ. 05426 (GEL)(THK)

-against-

THE CITY OF NEW YORK, et al.

Defendants.

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JOEL RAMOS, et al.,

Intervenor-Plaintiffs,

-against-

THE CITY OF NEW YORK, et al.

Defendants.

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STIPULATION AND ORDER

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This Stipulation and Order is made and entered into this 4th day of October, 2007, by and between the City of New York and its Department of Correction (hereinafter “City Defendant” or “DOC”) and Foster Thomas, Daniel Velazquez, Kenneth Williams, Arthur Wallace, Julio Phitts, Chareama Bolds and David Sanchez (hereinafter “plaintiffs”) (collectively the “parties”), and is made and entered into with reference to the following facts.

WHEREAS, the plaintiffs have a pending action (*Kadian McBean, et al. v. City of New York; Joel Ramos v. City of New York, et al.*, 02 Civ. 0546 (GEL)(THK)(the “Action”)) against City Defendant and others for a variety of individual and class claims relating to strip search practices and two individual claims for forced gynecological exams;

WHEREAS, the parties desire to resolve their dispute solely with respect to issues that were to be addressed at a factual hearing and accordingly wish to (1) agree to the certification of three classes; (2) agree to address remedial relief for the “Admission Injunctive Class” as defined below; and (3) to resolve certain matters; and,

NOW THEREFORE, in consideration of the covenants and promises contained herein, the Parties, through their attorneys, agree, and the Court orders, as follows:

DEFINITIONS

For purposes of this injunction, the following terms shall have the following meaning:

- a. “New Admission Non Felony Detainees” shall mean all individuals who are members of the Settlement Class defined in Section I as the “Admission Injunctive Class.”
- b. “ECBA” shall mean Emery Celli Brinckerhoff & Abady LLP, counsel for plaintiffs.

c. A search shall be considered a “strip search” when there is exposure of the genital and/or anal areas, and/or in the case of a female, the breasts, for the purpose of visual inspection.

d. “Drug or Weapon Charges” shall mean the list of drug- and weapon-related charges listed in paragraph 2 of the Stipulation and Order of Class Action Settlement, dated June 21, 2005 in this action and any the following charges: § 205.20, Promoting Prison Contraband (2nd Degree); § 240.40, Appearance in Public Under the Influence of Narcotics or Drugs, other than Alcohol; § 265.10, Manufacture, Transport, Disposition & Defacement of Weapon and Dangerous Instrument and Appliances; § 265.35C, Prohibited Use of Weapon; § 270.05, Possession or Sale of Noxious Mater; § 400.00, Firearms License Violations; VTL § 1193, Driving Impaired (3rd Offense); and VTL § 1192(1), Driving Impaired.

e. “Effective Date” shall mean the date that the Court “so orders” this injunction.

f. “Class period” shall mean July 23, 2002 to October 4, 2007.

FINDINGS AND STIPULATIONS

- City Defendant concedes that the record in this Action demonstrates that the members of the New Admission Non Felony Detainees Without Drugs or Weapons Class and the New Admission Non-Felony Detainees Drug and Weapons Class were subjected to a pattern and practice of strip searching upon admission. Class counsel concedes that City Defendant may still establish that a particular individual class member was subjected to a permissible strip search, by bearing the burden of proof and through production of a Visual Body Cavity Search Report (Form 443) or other reliable documentary evidence

for the individual in question that demonstrates that the strip search was based on a determination that reasonable suspicion required the search.

- Pursuant to the pattern and practice of strip searching members of the New Admission Non Felony Detainees Without Drugs or Weapons Class and the New Admission Non-Felony Detainees Drug and Weapons Class upon admission, DOC officers and supervisory personnel strip searched members of the aforementioned classes without making any determination or knowing whether they had been arraigned on a charge under the New York Penal Code that was related to possession or use of a drug and/or weapon.
- The parties agree that the injunction herein conforms to the requirements of the Prison Litigation Reform Act, 18 U.S.C. § 3626 (“PLRA”), and that the relief herein is narrowly drawn, extends no further than necessary to correct the violation of the federal rights of the class, and is the least intrusive means necessary to correct the violation of their federal rights.

I. Class Certification

The Parties hereby agree, subject to the Court's approval, to certify certain classes pursuant to Fed. R. Civ. P. 23(b)(2) or (b)(3) and to have ECBA appointed as Class Counsel for each. The Classes shall be:

All pretrial detainees arraigned solely on non-felony charges:

- (a) who have been or will be admitted to DOC custody, but were/are not also simultaneously admitted on: (i) any felony charges; (ii) a parole violation; (iii) an outstanding warrant for a felony offense; (iv) a violation of felony probation or (v) a City sentence of less than one year and who are not already serving at State sentence at the time of their admission (the "Admission Injunctive Class" pursuant to Fed. R. Civ. P. 23(b)(2));
- (b) who were admitted to DOC custody between July 23, 2002 and October 4, 2007 but were not also simultaneously admitted on: (i) any felony charges; (ii) a parole violation; (iii) an outstanding warrant for a felony offense; (iv) Drug or Weapon Charges; (v) a violation of felony probation; (vi) a City sentence of less than one year; or (vii) who were not already serving a State sentence at the time of their admission (the "New Admission Non Felony Detainees Without Drugs or Weapons Class" pursuant to Fed. R. Civ. P. 23(b)(3));
- (c) who were arraigned on Drug or Weapon Charges and who were admitted to DOC custody between July 23, 2002 and October 4, 2007 but were not also simultaneously admitted on: (i) any felony charges; (ii) a parole violation; (iii) an outstanding warrant for a felony offense; (iv) a violation of felony probation; (v) a City sentence of less than one year; or (vi) who were not already serving a State sentence at the time of their admission (the "New Admission Non Felony Detainees Drug and Weapon Class" pursuant to Fed. R. Civ. P. 23(b)(3)).

II. Remedies for the Admission Injunctive Class

1. City Defendant will not subject any member of the Admission Injunctive Class to a strip search upon admission into DOC custody without reasonable suspicion.

A. Revisions to Written Policies

2. City Defendant shall incorporate revisions to DOC written policies such that there is a uniform and plain language message across all relevant policies concerning the

prohibition of strip searching New Admission Non Felony Detainees without reasonable suspicion. In particular, Directive 4508R-C, Operations Order 16/89, and Command Level Orders concerning 4508R-C and Operations Order 08/02 and any other relevant written policies (“Relevant Written Policies”) concerning the manner and means of processing New Admission Non Felony Detainees and/or the manner and means of searching inmates generally will be revised to reflect in plain language the fact that Operations Order 08/02 governs the search of New Admission Non Felony Detainees and will be revised to ensure that conflicting directions or instructions shall be eliminated.

3. Within two weeks of October 4, 2007, ECBA will provide City Defendant with the Relevant Written Policies marked up to reflect suggested changes to ensure that paragraph 2 is implemented.

4. City Defendant will work in good faith with ECBA to incorporate such suggested changes as appropriate. Draft revised policies will be provided to ECBA within twenty-one (21) days of the receipt of suggested changes from ECBA. ECBA will return policies with comments within fourteen days.

5. City Defendant will promulgate revised policies (“Revised Written Policies”) within three weeks of receiving ECBA’s final comments, and will ensure full and proper dissemination of such policies through all appropriate channels.

6. Within two weeks of the Revised Written Policies being fully disseminated, City Defendant shall provide an affidavit of compliance to the Court and to ECBA setting forth specifically how and when the Revised Written Policies were promulgated and distributed, and attaching copies of all the final Revised Written Policies. Copies of the final Revised Written Policies may be redacted to the extent the policies do not concern search procedures.

B. Training

7. *Immediate training of intake personnel at new admission facilities:*

Within four months of October 4, 2007, trainings concerning how to conduct searches of New Admission Non Felony Detainees shall be completed for *all* personnel whose regular post is the intake area of any DOC new admission facility, and no officer will work an intake search post in a new admission facility who has not completed new admission search training (“Intake Personnel Training”).

8. *Training module:* Within one month of October 4, 2007, an in-service training module shall be created and put into use that will be devoted exclusively to instructing in-service personnel on how to conduct searches of New Admission Non Felony Detainees (“Module”).

9. The Module shall also be included in every round of in-service personnel training (whether it is of Corrections Officers, Captains, or Assistant Deputy Wardens) that occurs after the Module is finalized (“In Service Training”).

10. An applicable job knowledge package incorporating all elements of the Module must also appear in every training packet/disk that is provided to personnel who are applying for a promotion.

11. Until two years from the Effective Date, the Module dedicated to this training shall be included in every round of training at the DOC Academy for new hires (“New Hire Training”).

12. The Intake Personnel Training, Promotion Training, and New Hire Training (and any other training conducted pursuant to paragraphs 7-11 of this subsection) shall be comprised of, at a minimum, the following components. In-Service Training shall include

the same components set forth below, except that the information set forth in sub-paragraph (ii) may be conveyed via classroom instruction rather than a walk-through.

- (i) a training session of at least one hour devoted exclusively to how to conduct searches of New Admission Non Felony Detainees, including instructions (a) that specifically forbid New Admission Non Felony Detainees from being strip searched unless reasonable suspicion is found, and (b) that gowns are to be provided for a New Admission Non Felony Detainee's privacy;
- (ii) a walk-through demonstration inside an intake area, directing personnel specifically during the walk-through:
 - (a) how to identify and separate inmates into pens according to whether or not they are New Admission Non Felony Detainees,
 - (b) when and how New Admission Non Felony Detainees are given a gown,
 - (c) where they are permitted to change into the gown,
 - (d) how their clothes are placed on a line scan machine,
 - (e) what procedures are followed while the New Admission Non Felony Detainees are wearing the disposable gown,
 - (f) where and how they are permitted to put their clothes back on,
 - (g) where disposable gowns are kept within the search room or search area,
 - (h) how to re-order or replenish supplies of gowns if they are in short supply or not present,
 - (i) who within a command is responsible for ensuring supply of gowns,

- (j) how to conduct a search that ensures privacy for New Admission Non Felony Detainees, and which does not involve a strip search as defined herein, in the unlikely event no gowns are available during intake,
 - (k) what constitutes reasonable suspicion as a basis for strip searching a New Admission Non Felony Detainee, including specific examples,
 - (l) what forms and procedures must strictly be followed when reasonable suspicion is determined, and
 - (m) what logbooks must be filled out and how;
- (iii) a handout that summarizes in plain language a checklist of all the things that must be done to search a New Admission Non Felony Detainee; and
 - (iv) a simple one-page test that each DOC staff member being trained must fill out and pass concerning the relevant search procedures for New Admission Non Felony Detainees, and which each staff member must sign legibly and on which s/he must print his/her name and shield number.
 - (v) In the event a New Admission Non Felony Detainee refuses the offer of a disposable gown during intake, such refusal shall be documented and DOC shall not be considered to be out of compliance with the provisions of this Stipulation and Order.

13. DOC shall adopt a policy regarding discipline concerning failure to follow the procedures set forth in Operations Order 08/02, and the Module and other relevant training shall also include a clear statement of this policy. The disciplinary procedures shall follow established command discipline procedures, duly negotiated with the applicable labor unions. Such violation will be deemed a schedule "D" violation.

14. Within four months of the Effective Date, City Defendant shall provide the Court and ECBA with an affidavit of compliance with respect to all steps taken to implement the paragraphs in this subsection and attaching all training, testing, and disciplinary materials created and being used therefor. Attachments provided to the Court and/or ECBA may be redacted insofar as they do not relate to the provisions concerning search training, testing, or discipline. City Defendant shall also retain copies of the one-page test completed by DOC staff until two years after the Effective Date.

III. Special Master for the Admission Injunctive Class

15. Within 30 days of October 4, 2007, the parties shall mutually agree upon a Special Master who shall be appointed to ensure that DOC is not routinely strip searching New Admission Non Felony Detainees and that the City Defendant is not violating this Stipulation and Order (the "Special Master"). Non-compliance under this injunction shall not be based on isolated or sporadic events. Additionally, non-compliance shall not be based on an inmate's documented refusal of a gown. In the event that the parties cannot agree upon a Special Master within 30 days of October 4, 2007, the parties shall each present five suggested Special Masters to Judge Lynch, who shall select the Special Master or choose his own. The Special Master shall serve for two years after the Effective Date, and may hire a reasonable number of staff or assistants to help him/her, and his/her fees and the fees of his/her staff shall be paid for by City Defendant on a monthly basis.

16. The Special Master shall provide written reports to the Court and both parties concerning City Defendant's compliance as the Court directs.

17. City Defendant shall provide the Special Master access to any and all materials for purposes of making determinations about compliance with this injunction.

18. City Defendant shall also freely grant the Special Master access to people and places within DOC for purposes of the Special Master's ensuring DOC's compliance with this injunction, and shall cooperate with the Special Master to ensure the freedom of his/her movement and conversations with DOC staff, within constraints required for security reasons – including escorts in the jails, and provisions for the privacy of inmates, as needed. For example, the Special Master shall be permitted to inspect intake areas, to speak with search room or intake area officers, supervisors and inmates leaving a search room area or a DOC facility, to inspect where and how gowns are kept both in intake areas and with respect to DOC's supplies area, and to view logbooks and post-order folders located in intake areas. These are examples only and are not meant to limit in any way areas which the Special Master may choose to inspect or people with whom the Special Master may wish to speak. To the extent City Defendant has security concerns, the Special Master may be required to sign a confidentiality statement that shall not impede his/her ability to report effectively on City Defendant's compliance.

19. DOC shall within thirty days of October 4, 2007, place permanent signs which are (i) at least two feet by two feet in length and width, (ii) clearly legible and in plain English and Spanish, (iii) placed in a secure manner (through bolts or screws) to a prominent and easily viewed location in the search room (e.g., on the front or side of an x-ray machine which is easily viewable to an inmate entering the room or area) and inside the holding pens in the intake areas and (iv) which state "FOR YOUR SAFETY AND THE SAFETY OF OTHERS, ALL INMATES ARE SUBJECT TO SEARCH UPON ADMISSION. NON-FELONY NEW ADMISSION DETAINEES WILL BE PROVIDED A PAPER GOWN FOR PRIVACY, AND WILL NOT BE SEARCHED FULLY UNDRESSED UNLESS THERE IS REASONABLE SUSPICION TO BELIEVE THAT YOU POSSESS DRUGS, WEAPONS AND/OR OTHER

CONTRABAND. IF YOU BELIEVE YOU HAVE BEEN SEARCHED IN VIOLATION OF THIS RULE, PLEASE CALL 1-800 _____.” An equivalent alternative form of notice may be agreed upon by the parties or approved by the Court.

20. A toll free number shall be created and paid for by City Defendant, and the Special Master shall administer it, including by leaving a voicemail message requesting that callers clearly state and spell their names, their book and case number or NYSID number, the facility at which they were strip searched and what date, and a means of contacting them again (e.g., a mother or brother’s phone number). The Special Master alone shall also be able to access and listen to the recordings on this toll free number and consider such information in writing his/her reports and recommendation. The Special Master or his/her staff shall also keep a log book noting the details of such messages.

21. Both sides may speak with the Special Master freely and without the other party present, and may present the Special Master with evidence concerning DOC’s compliance or non-compliance with respect to this Stipulation and Order and with respect to any potential routine strip searching of New Admission Non Felony Detainees.

IV. Attorneys’ Fees

22. Within sixty (60) days of October 4, 2007, City Defendant shall pay ECBA interim reasonable attorneys’ fees and costs of 50% of Class Counsel’s lodestar, based on Class Counsel’s current rates, for work conducted by ECBA in the Action to date, without prejudice to ECBA to seek the remaining 50% and reasonable attorneys fees and costs that the Court may award pursuant to 42 U.S.C. § 1988 at some later date for the entire Action. For purposes of this interim payment only, Class Counsel shall provide a summary bill and good faith representations and respond to any further reasonable requests for information and documentation by City

Defendant. With respect to the consideration of fees for the entire Action, Class Counsel will submit a detailed bill and City Defendant reserves the right to any and all legal arguments concerning fees, including good faith challenges to reasonableness of certain entries. The interim amount paid shall be credited to the City Defendant at the time of any future award. After Court approval of the Stipulation and Order, Plaintiffs shall also be entitled to an additional award of fees, costs, and disbursements to be fixed by the Court or agreed to by and between the parties hereto to monitor and enforce compliance with the Stipulation and Order.

V. Procedural Matters

23. With respect to each class set forth in Section I, the parties shall work expeditiously together to create a plain language notice form in English and Spanish, and shall work in good faith together to seek final approval from the Court through a fairness hearing.

24. Nothing contained herein shall in any way limit the ability of the City Defendant and DOC to strip search New Admission Non Felony Detainees or any other detainee or inmate in custody upon reasonable suspicion that the detainee or inmate possesses drugs, weapons or contraband.

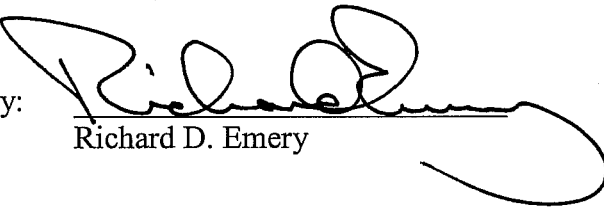
25. None of the obligations other than class certification shall be enforceable after two years from the Effective Date.

26. This Stipulation may be executed in counterparts, and exchanged by facsimile or email.

Dated: New York, New York
October 4, 2007

Richard D. Emery
Emery Celli Brinckerhoff & Abady LLP
75 Rockefeller Plaza, 20th Floor
New York, New York 10019
(212) 763-5000
Attorney for Plaintiffs

MICHAEL A. CARDOZO
Corporation Counsel of the
City of New York
Attorney for City Defendant
Muriel Goode-Trufant
100 Church Street, Room 3-164
New York, New York 10007
(212) 788-8681

By: 
Richard D. Emery

By: 
Muriel Goode-Trufant

SO ORDERED:

Hon. Gerard Lynch

Dated this _____ day of _____, 2007