

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division**

BROOKE WHORLEY, et al.,

Plaintiffs,

v.

Case No. 3:20-cv-255

RALPH S. NORTHAM, et al.,

Defendants.

NOTICE OF SUBSTANTIAL NON-COMPLIANCE

Virginia remains in the midst of a pandemic that poses a particularly heightened risk to people incarcerated in Virginia’s correctional facilities. To date, the ongoing crisis has resulted in approximately 1,500 confirmed cases of the novel coronavirus and at least 10 confirmed deaths among people incarcerated in facilities operated by the Virginia Department of Corrections (VDOC). On May 12, 2020, the Court dismissed the above-captioned case while retaining jurisdiction to enforce the Stipulated Settlement Agreement (“Settlement”) entered into by the parties. Since that time, Plaintiffs have made several good faith requests for documents to evaluate Defendants’ compliance with its terms. Defendants, however, have shown little sense of urgency in providing Plaintiffs with access to documents to which they are entitled under the Settlement and have failed in other material respects to meet their obligations under the Settlement.

Therefore, Plaintiffs, by and through undersigned counsel, hereby identify the following areas of substantial non-compliance with the Settlement.

1. Failure to provide documents to assess compliance with the Settlement since May 29, 2020 – The Settlement requires that:

Plaintiffs’ counsel shall have reasonable access to the documents and information necessary to properly evaluate whether Defendants are complying with the provisions of this Agreement. Defendants agree to provide counsel to the Plaintiffs with access to policies, procedures, plans, regulations, rules, guidance, or directive implementing the terms of this agreement. Defendants agree that if there is a material change to the terms of their existing COVID-19 policies and procedures, including but not necessarily limited to the specific policies discussed above, those changes shall be communicated to counsel for the Plaintiffs. The parties shall cooperate as best as possible to accommodate any additional requests for documents and information by Plaintiffs in a timely manner, without unduly burdening Defendants.

Defendants have not provided any documents to Plaintiffs' counsel since May 29, 2020, despite requests on June 3, June 9, June 10, and June 17 for specific documents relating to improper transfers, Early Release Plan review and communications, attorney legal calls, and conditional pardons, among other topics. Defendants provided some incomplete information regarding improper transfers on June 10 but have failed to respond to Plaintiffs' follow-up request on June 17 for clarifying information and supporting documents. Plaintiffs specifically requested documents, or an estimate of when such documents could be provided to them, by June 21. To date, Defendants have not provided Plaintiffs with any response to this email.

Based on the failure to provide any documents since May 29, and failure to reply to any emails since June 10, Defendants are failing to meet their obligation to provide reasonable access to documents and information necessary to demonstrate compliance with the Settlement.

- 2. Failure to undertake a reasonable review of individuals eligible for the Early Release Plan** – Plaintiffs have significant concerns that Defendants are not complying with their obligations under the Settlement to “make all reasonable efforts to review eligible individuals prior to the expiration of the declaration of emergency.” Counsel for Defendants represented to Plaintiffs' counsel and Judge Novak that VDOC had capacity to review between 20-30 individuals per day (between 100-150 individuals per week). In their recent status reports to the Court, however, Defendants indicated that 49 individuals were reviewed for release between May 24-30, 2020; 50 individuals between June 7-12; and a mere 27 individuals from June 14-20. Other status reports demonstrate Defendants are capable of reviewing well over 100 individuals in a single week. The number of individuals reviewed in these three weeks falls significantly short of VDOC's own proposed pace of review.

After sharing our concerns with Defendants' counsel, Plaintiffs were told on June 10 that the low number of individuals reviewed for release from May 24-30, 2020 was due to the Memorial Day Holiday and an internal audit. On June 17, Plaintiffs again requested information regarding the low number of individuals reviewed from June 7-12 but have not received a response. Instead, Defendants filed a status report on June 23 demonstrating an even lower number of reviews from June 14-20. No explanation has been provided for this additional precipitous drop.

Based on these status reports and their failure to provide any justification regarding these low numbers, Defendants are failing to meet their obligation to make all reasonable efforts to review eligible individuals for release.

- 3. Failure to accurately inform individuals of their eligibility for the Early Release Plan** – The Settlement requires VDOC to “exercise its authority to consider the review and release of eligible individuals on a rolling basis, meaning VDOC will consider those who are or become eligible for release at any point during the period of the emergency declaration, or any emergency declaration that meets the conditions of the Budget

Amendment, not just those who became eligible at a static time period when the policy was adopted,” and to continue to update incarcerated individuals and staff about updates or changes that may occur to the Early Release Plan. Despite this requirement and Governor Northam’s indefinite extension of the State of Emergency on May 26, Plaintiffs have received multiple reports that officials at various VDOC facilities, including Greenville Correctional Center and Caroline Correctional Unit, are telling people incarcerated there that they are no longer processing applications for early release, and have suggested that the early release program came to an end on June 10, the date on which the Governor’s declaration was initially slated to end. We informed Defendants of this apparent misunderstanding on June 17 and requested that they issue updated guidance and clarification on this point. We have not received a response to this request from Defendants. Based on the information we have received, and Defendants’ failure to respond to this report or provide any documentation demonstrating compliance, Defendants are failing to meet their obligation to accurately inform individuals of their eligibility for the Early Release Plan. Even if some corrective information has been disseminated to facilities, Defendants’ failure to provide this information to Plaintiffs is violative of the parties’ Settlement.

4. **Failure to provide any documents or information to demonstrate compliance regarding conditional pardons** – The Settlement requires Defendants “to prioritize conditional pardons at this time, in order to expedite petitions from individuals currently incarcerated” and to “provide the Office of the Secretary of the Commonwealth with any assistance that they might need to complete expedited consideration of conditional pardons requesting release because of the COVID-19 pandemic, including – but not limited to – making sure that information about any new procedures is disseminated to inmates within the custody of VDOC.” Plaintiffs have requested specific documents to demonstrate compliance with this requirement on June 3. Defendants responded on June 10 by refusing to produce any of the requested documents, erroneously asserting executive privilege. On June 17, Plaintiffs asked Defendants to produce *any* documents to demonstrate compliance, as required by the Settlement. Defendants have not responded to that request.

Based on their failure to produce any documents or even respond to a request to do so, Defendants are failing to meet their obligation to provide reasonable access to documents and information necessary to demonstrate compliance.

5. **Failure to make adequate accommodations for confidential legal calls** – The Settlement requires VDOC to require facilities to facilitate communication between people incarcerated in VDOC facilities and legal representatives by:
 - a. disabling the automatic recording system to ensure legal calls are not recorded;
 - b. allowing calls to be of sufficient duration to discuss confidential legal matters;
 - c. expediting requests to add an attorney phone number to the automatic block list, to provide an additional safeguard to ensure confidentiality;

- d. allowing both attorneys and offenders to request the addition of a phone number to the automatic block list;
- e. providing interim access by another avenue if there is a delay of more than 48 hours in providing such access.

Plaintiffs' counsel have informed Defendants that facilities around the Commonwealth have not been complying with these guidelines. For example, attorneys and their agents are unable to unilaterally ask that their numbers be blocked with respect to a given offender, and have at times been told that the process of arranging a call can take between 10 and 30 days, calling into question whether any measures have been taken to expedite calls whatsoever; calls are routinely limited to a maximum of 20 minutes, requiring counsel to arrange for 3 separate calls to have an hour-long discussion; and facilities are not disabling the automatic recording system altogether but are instead relying on the automatic block list to facilitate such calls, as they did before the Settlement was reached. In fact, some facilities, like Greensville, appear intentionally to be making it unacceptably difficult to arrange calls by asking attorneys to fax in their requests and identifications rather than accepting email requests. In short, several of the facilities are complying with few, if any, of the provisions regarding confidential communications. On June 5 and 10, we brought this to Defendants' attention and asked that VDOC distribute additional guidance specific to this issue but have not received a response. We renew our request that Defendants provide such renewed guidance and would ask to see and receive a copy of such guidance before it is distributed.

According to paragraph 5 of the Settlement, Defendants have 5 calendar days to provide a response to this notice, and the parties must confer informally on these issues 5 days after receiving that response. Plaintiffs await Defendants' response and availability to confer no later than June 29.

Sincerely,



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