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| **DISTRICT COURT, EL PASO COUNTY, COLORADO**<br>Court address: **P.O. Box 2980**<br>**270 S. Tejon**<br>**Colorado Springs, CO 80901-2980**<br>Phone Number: **(719) 448-7502** | |
| THOMAS SPITZ, Plaintiff,<br><br>v.<br><br>DIRECTOR, COLORADO DEPARTMENT OF CORRECTIONS and WARDEN, BENT COUNTY CORRECTIONAL FACILITY, Defendants. | **COURT USE ONLY**<br>Case Number:<br><br>**09CV470**<br><br>Division **7** Courtroom **402** |
| **FINAL ORDER OF JUDGMENT GRANTING PLAINTIFF'S CLAIM FOR INJUNCTIVE RELIEF PURSUANT TO C.R.C.P. 106** | |

This matter comes before the Court on Plaintiff's Complaint for issuance of an Order for injunctive relief pursuant to C.R.C.P. 106. Trial was heard on the matter June 1, 2011 and the Court submits the following findings:

STATEMENT OF FACTS

Plaintiff was sentenced in April of 2001 to serve an indeterminate sentence of two years to life in the Department of Corrections based on a conviction for a sex offense. While incarcerated at DOC, the Plaintiff completed Phase I of the Sex Offender Treatment and Monitoring Program (SOTMP). While participating in Phase II of sex offender treatment (otherwise referred to in Exhibit W of Defendant's Motion for Summary Judgment as "the Arrowhead Sex Offender Therapeutic Community") defendant inadvertently failed to return a CDOC identification card before reporting to his job in the greenhouse, thereby causing the facility to have to interrupt operations to redo the inmate count. The staff member describing the event noted, "No one is suggesting that the incident was in some way deliberate…" Regardless of the rule violation, on April 13, 2005, Plaintiff's sentence was modified to a probationary sentence

with Community Corrections incarceration ordered as a condition of probation. On February 17, 2006, the probationary sentence was revoked and Plaintiff was resentenced to his original indeterminate DOC sentence after violating terms of the drug and alcohol portion of his probationary sentence.

Plaintiff has spent his DOC time in the Bent County Correctional Facility (BCCF), a private facility under contract with the DOC. After being returned to BCCF following revocation of the probationary sentence, Plaintiff sought to recommence sex offender treatment. Plaintiff submitted new applications to be accepted back into treatment in June of 2006. No evidence was produced to demonstrate that the facility or the SOTMP ever made a clear decision whether to accept or reject Plaintiff's application or whether Plaintiff would be able to start with Phase II treatment or would be required to start again with Phase I. Clinical notes from Plaintiff's mental health file beginning in 2008 through 2010 state that Plaintiff "remains recommended for SOTMP" or even specifically Phase II treatment. See Exhibits H,I,J,K,M,O to Defendant's Motion for Summary Judgment.

Plaintiff alleges that he has been denied the opportunity to participate in sex offender treatment which is a statutory prerequisite to allow plaintiff to "proceed through the system and to parole". (Complaint p.4 ¶9.) Plaintiff's claim is in the nature of extraordinary relief pursuant to C.R.C.P. 106 from the defendants' denial to allow him to participate in certain sex offender treatment programs.

Defendants allege that they have no record of applications for sex offender treatment being properly submitted by Plaintiff, that if any applications were submitted they were applications for the wrong type of treatment, that if any applications were

submitted they were defective or subject to rejection and that Plaintiff refused treatment in various ways.

ANALYSIS AND CONCLUSIONS

A sex offender is required to undergo "appropriate" treatment to be eligible to be released on parole from his indeterminate sentence. See C.R.S. § 18-1.3-1004(3) and 16-11.7-105. Colorado law further provides certain standards be followed to provide suitable treatment options. See C.R.S. § 16-11.7-106. Pursuant to C.R.S. § 16-11.7-103(4)(b) CDOC has created and administers a program for the treatment of sex offender inmates pursuant to a mandate that such treatment be made available to and utilized by offenders who are sentenced to probation, community corrections or prison. In addition, administrative rules exist (AR 700-19) for the process of screening, identifying, classifying and prioritizing inmates for placement in treatment. Pursuant to C.R.S. § 18-1.3-1006, participation and progress in sex offender treatment is a central consideration in the parole board's decision whether to grant parole. "In determining whether to release the sex offender on parole, the parole board shall determine whether the sex offender has successfully progressed in treatment and would not pose an undue threat to the community…" C.R.S. § 18-1.3-1006(1)(a). An individual, therefore, arbitrarily denied the opportunity to participate in sex offender treatment is denied the opportunity to be considered for parole based on the relevant law.

Federal Courts have examined the issue and have determined that inmates subject to Colorado's sex offender treatment requirements have a procedural and substantive due process right "to participate in treatment and in being provided due process before being terminated from the treatment program…" *Beebe v. Heil*, 333 F.Supp. 2d 1011, 1018

(D.Colo. 2004). See also, *Doe v. Heil,* __F.Supp.2d, 2011 WL1043573 (D.Colo.). At a minimum, this Court finds that Defendants had a duty to respond to applications for sex offender treatment submitted by Plaintiff by either granting or denying the application and by communicating any decision and reasoning regarding a refusal within a reasonable period of time. Colorado law does not guarantee Plaintiff treatment but does require he be given an opportunity for treatment under the statutory scheme.

In this case, Plaintiff testified that he submitted an application for treatment in approximately June of 2006 and was subsequently told that he was on the waiting list to be readmitted to treatment. Plaintiff's testimony regarding submission of the treatment application is supported by clinical notes authored by a DOC clinician dated 1-11-10 which confirm that "There is a copy of Phase I appl dated 6-19-06 in the [mental health] file that inmate Spitz returned. The status of this application is unclear, as I didn't find a memo from the SOTMP treatment team in the MH file stating their reception of this application." See Exhibit E to Defendant's Motion for Summary Judgment ¶ 5. Defendant's sole witness at trial was a SOTMP manager who testified generally about the documents in Plaintiff's file but had little or no knowledge of Mr. Spitz or his progress at DOC personally. Defendants' evidence did not support the claim that Plaintiff failed to submit applications. The Court determines that later arguments that ensued regarding whether Phase I was the right treatment for Plaintiff is irrelevant to the fact that Defendants simply failed to process the application or respond to it in any way.

More than 3 years after submission of the treatment application, Plaintiff filed a *pro se* Complaint alleging that he was being denied the opportunity to participate in treatment. Plaintiff has continued to make efforts to be readmitted to treatment but for

reasons unclear to the Court and which appear to be undocumented, Plaintiff has still not been considered for treatment. While Defendants suggest that a notation on a Mental Health Consultation form from March of 2008 states that Plaintiff was refusing to participate in treatment (See Ex. G), no testimony was offered in support of the note and the entry appears to be contradicted by other documents submitted that state that the inmate "remains recommended for SOTMP" throughout 2008 to 2010. See Ex. H,I,J,K,M,O.

Defendants' failure to respond to Plaintiff's treatment application denied him the opportunity to seek treatment as a prerequisite to requesting parole as contemplated by the indeterminate sex offender sentencing scheme applicable here. Plaintiff has a legal right to pursue sex offender treatment and he was denied that right by Defendants. The Court determines that the only remedy available to correct the violation is the imposition of injunctive relief in the form of a Writ of Mandamus (within the limitations of C.R.C.P. 106) to compel Defendants to provide sex offender treatment to Plaintiff.)

A dispute exists with regard to whether Plaintiff shall be placed in Phase II treatment or should be required to start anew with Phase I. It should be noted that in 2006, Plaintiff himself was the one who suggested that, due to the passage of time, he would voluntarily retake Phase I if it would help him get back into Phase II. Defendants appear to have debated the issue over the years since 2006, but failed to clearly communicate a decision with regard to that issue to Plaintiff within a reasonable time. Based on this failure, the Court elects to require that Plaintiff be admitted to Phase II treatment based on his reasonable reliance, according to the evidence, on Defendants' representation that he was on the waiting list for Phase II treatment. To require Plaintiff

restart the program after Defendants abject failure to work with Plaintiff, communicate with Plaintiff, and deal fairly with him, would, in the Court's opinion compound the injustices already committed.

The Court notes that admission into the Phase II program with an opportunity to participate does not guarantee that Plaintiff will successfully complete the program. Plaintiff will be subject to all rules and requirements, including testing requirements that go along with that treatment. Based on the history of this case, the Court will require that, just as Plaintiff shall be held to account for the rules and requirements of treatment, Defendants will be required to demonstrate good faith and reasonable compliance as well.

While the Court is concerned that an order mandating Plaintiff be provided his opportunity for Phase II treatment could impact others also waiting for such treatment, the Court determines that Plaintiff has effectively been on the waiting list since June of 2006 for said treatment, on Plaintiff's 2 years to life indeterminate sentence. Defendants' witness stated that an individual with such a short mandatory minimum sentence would typically be given a high priority for treatment. Plaintiff is entitled to begin his treatment immediately.

WHEREFORE, the Court Orders:

1. Defendants will immediately commence the process of enrolling Plaintiff in and beginning Phase 2 sex offender treatment for Plaintiff.

2. If Plaintiff is not participating in Phase II treatment within 10 days of this Order, Defendants shall provide a status report to the Court within 10 days containing a

detailed description of the reason the treatment has not commenced regardless of whether Defendants allege the problem originates with Plaintiff or Defendants and describing Defendants' plan to start Plaintiff in the program.

3. Defendants shall provide a status report as described in 2. above at the end of each 10 day period until Plaintiff has started his Phase 2 program.

4. If treatment has not commenced within 180 days, the Court will entertain Motions for Sanctions and/or Contempt Citations (to the extent available under Colorado Law) or other appropriate relief from Plaintiff. The Court will allow all supplemental submissions to be filed under this case number without requiring a new case be filed regarding this subject matter.

5. After Plaintiff has begun the Phase 2 program, Defendants shall file all written communications regarding Plaintiff's progress in the program including any complaints, rule violation reports, positive or negative progress reports of any kind in Monthly status reports with the Court (copied to Plaintiff's counsel) to allow the Court to monitor the progress of treatment.

6. The Court declines to grant a stay of execution regarding this order. If Defendants seek a stay of execution it should be pursued in the appellate courts.

Done this first day of June, 2011

BY THE COURT

David A. Gilbert
District Court Judge