

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SUFFOLK, ss.

No. SJC-12935

STEPHEN FOSTER, et al.,)
Plaintiffs,)
)
v.)
)
CAROL MICI, COMMISSIONER OF CORRECTION, et al.,)
Defendants.)

DEFENDANT CAROL MICI'S PROPOSED STATEMENT OF AGREED FACTS

Department of Correction Standards

1. The Commissioner of Correction is responsible for administration of all state correctional facilities. M.G.L. c. 124, § 1.
2. The Department of Correction (DOC) and the Massachusetts Parole Board (Parole) are state agencies that fall under the Executive Office of Public Safety and Security. G.L. c. 6A, § 18.
3. All 16 DOC facilities are accredited by the American Correctional Association (ACA).
4. ACA standards include requirements for sanitation and hygiene, and in order to prove compliance, the Department must maintain accreditation folders that contain samples of required documentation.
5. DOC has achieved "Eagle" status with the ACA, which is only bestowed upon correctional departments that have achieved 100 percent institution and central office accreditation.
6. Once every three years, auditors from the ACA audit each institution to determine compliance with these standards.

7. The correctional institutions in the Commonwealth of Massachusetts are subject to external and internal regulations that govern sanitation and hygiene.
8. Externally, the Department of Public Health (DPH) inspects Department of Correction facilities twice per year.
9. These comprehensive DPH inspections are conducted by sanitation code compliance experts. 105 CMR 451.
10. 105 CMR 451 contains standards for diverse operations such as food services, housekeeping, living area requirements, washroom minimum requirements, etc.
11. At the conclusion of these inspections, each institution must submit a plan of corrective action addressing each deficiency cited in the inspection report.
12. These plans of action are submitted to DPH for review and acceptance.
13. Certain DPH regulations are recommendations and not requirements. Among these is 105 CMR 451.320, Cell Size: Existing Facilities, which suggests, but does not require, that each inmate cell be at least 60 square feet.
14. In addition to the external inspections, each institution is required to have a trained environmental health and safety officer (EHSO).
15. Department policy requires that these officers conduct a comprehensive monthly inspection of the entire institution to identify and address sanitation and hygiene concerns.
16. These officers are also tasked with training other institution staff members to conduct required weekly sanitation and hygiene inspections throughout the entire institution.
17. The Department conducts a comprehensive training course for all new EHSOs.

DOC's Response to COVID-19

18. Upon the declaration of a State of Emergency by Governor Baker on March 10, 2020, the Department began implementing its COVID-19 epidemic control plans.
19. The Department also used the Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities, issued by the Centers for Disease Control and Prevention (CDC) on March 23, 2020, as a guide to implementing procedures for preventing the spread of the virus in its correctional facilities. Affidavit of Carol Mici (Mici Affidavit), ¶ 19.
20. The Department had already implemented most of the recommendations contained in the Interim Guidance. The Department has continued to adjust its operations during the pandemic.
21. Since March 12, 2020, inmates and staff have received several directives regarding COVID-19 and efforts to prevent its spread.
22. On March 12, 2020, employees received an advisory from the Commissioner describing the coronavirus's symptoms, and who was most at risk of exposure. The advisory also provided the necessary steps to be taken to prevent infection by the virus, as detailed by the CDC and the Massachusetts Department of Public Health (DPH). Mici Affidavit, ¶ 22.
23. On March 13, 2020, the Commissioner issued a COVID-19 preparedness advisory (in English and Spanish) to all inmates and patients. The advisory assured them that all necessary steps were being taken to provide them with a safe, secure environment. Among the information given to inmates and patients: the importance of frequent hand washing, social distancing, use of soaps and cleaning supplies, availability of additional

information about the virus, additional cleaning plans, and access to medical providers.

Mici Affidavit, ¶ 23.

24. On March 20, 2020, the Commissioner issued a COVID-19 update (in English and Spanish) to all inmates and patients. This update informed inmates that they would be provided two free 30-minute phone calls a week, that phone privileges for inmates serving a loss-of-phone sanction would be restored, that all medical co-pays were waived, the importance of social distancing, and letting them know that mental health services, as always, were available to them. Mici Affidavit, ¶ 24.
25. Also on March 20, 2020, the Commissioner issued an update to all staff. Among the steps taken by the Department to assist staff: screening of all staff prior to entry in accordance with CDC/DPH guidelines; limiting of inmate transports and transports between facilities; authorizing staff in areas with high risk of infection to wear personal protective equipment (PPE), based on specific evaluations of need; working with individual facilities to ensure sufficient infectious disease plans are in place; upgraded cleaning/disinfection protocols; determining what staff might telecommute; and allowing staff to bring in their own disinfecting wipes. The March 20, 2020 update also included flyers illustrating the CDC's recommended infection control procedures and the proper use of PPE. Mici Affidavit, ¶ 25.
26. On March 27, 2020, the Commissioner issued an updated memo (in English and Spanish) to inmates, supplementing her March 20, 2020 memo, informing them that: all staff are required to wear masks; PPE would be provided to inmates at the Massachusetts Treatment Center (MTC) working in infected areas; all persons entering DOC facilities would be screened for health, including self-administered temperature checks; hand

sanitizer would now be alcohol based; and attorney visits would continue; inmate transfers and releases would continue. Mici Affidavit, ¶ 26.

27. Also on March 27, 2020, the Commissioner issued an update to DOC staff regarding efforts to prevent the virus. Among the steps: delivery of multiple gallons of hand sanitizer to all facilities; screening tents being set up at most facilities; requirement that all staff wear masks while in areas where inmates are active; requirement that all staff take their own temperature before entering a facility; limiting inmate transportation details; upgrading of cleaning plans; and allowing staff to bring their own disinfectant wipes. Mici Affidavit, ¶ 27.

28. On April 3, 2020, the Commissioner issued a memo to inmates regarding a 14-day lockdown being implemented as a safety precaution. Inmates were reminded to seek medical attention if they showed any symptoms of COVID. Mici Affidavit, ¶ 28.

29. On April 3, 2020, DOC issued a poster for staff outlining all the precautions that had been taken to date to protect them and inmates at all facilities. This included PPE distribution, including N95 respirators for security staff, screening tents outside each facility, and access to hand sanitizer. It also explained staff requirements such as wearing masks and self-administered temperature testing. Mici Affidavit, ¶ 29.

30. On April 10, 2020, the Department issued an information sheet updating inmates on COVID-19 prevention, including hand-washing, the availability of soap and hand sanitizer, and social distancing. Mici Affidavit, ¶ 30.

31. In addition to the Department-wide memoranda and flyers, the Commissioner also issued facility specific memos to inmates and staff indicating the precautions being taken at each facility.

32. On April 1, 2020, in response to an inmate testing positive at MCI-Shirley, the Commissioner informed inmates that the facility would be locked down for 14 days to prevent the spread of the virus. The inmate who tested positive, who was believed to have contracted the virus while at an outside hospital, was placed in quarantine. The inmates were informed that food and medicine would be provided in housing units, showers and telephone use would be provided, and laundry, mail, and other services would not be interrupted. Additionally, the Commissioner also reminded inmates of ways to prevent the virus, such as handwashing and social distancing. Mici Affidavit, ¶ 32.
33. On April 4, 2020, patients and persons served at Bridgewater State Hospital (BSH) were informed by a memo from the Commissioner that movement would be restricted for 14 days to slow the spread of the virus and prevent infection. Patients were also reminded to wash their hands frequently and to keep their living areas clean and sanitary. Mici Affidavit, ¶ 33.
34. On April 3, 2020, Secretary of Public Safety Thomas Turco informed DOC staff that priority COVID-19 testing would begin on April 5, 2020 for correction officers who were experiencing one or more specific symptoms of the virus. Mici Affidavit, ¶ 34.
35. On April 7, 2020, Secretary Turco notified DOC staff that testing sites would assist correction officers, regardless of whether they had symptoms of COVID. Mici Affidavit, ¶ 35.
36. On April 22, 2020, all inmates at MCI-Framingham and South Middlesex Correctional Center were offered voluntary COVID-19 testing via mobile testing. Of the 191 inmates at MCI-Framingham, 123 agreed to be tested. At South Middlesex Correctional Center, 46 of 52 inmates agreed to be tested.

37. On April 24, I issued a memo to staff, alerting them that, beginning April 25, 2020, mobile testing sites are being set up at MCI-Shirley and then the Massachusetts Treatment Center. Voluntary testing will be available for all staff and inmates. Exhibit Mici Affidavit, ¶ 37.
38. As of April 23, 2020, 136 inmates and 72 staff across 16 DOC facilities have tested positive for the virus.
39. As of April 23, 2020, of the 23 who contracted the virus, 10 inmates and 17 staff members have recovered.
40. Should additional inmates test positive, DOC has plans in place to designate additional areas for quarantine and isolation purposes.
41. Additionally, the Department delivered a shipment of surgical masks to all superintendents this afternoon for distribution to the inmate/civil populations. Each inmate/civil commitment will receive a mask. The receiving facilities (MCI Cedar Junction, MCI Framingham and MASAC) will receive an additional 100 masks, each of which is intended to be used for any new admissions going forward.

COVID Prevention in DOC Facilities

42. Under procedures enacted in response to COVID-19, all persons entering a correctional facility—whether employee, vendor, contractor, or attorney—must successfully pass an enhanced entrance screening prior to access being granted. Mici Affidavit, ¶ 42.
43. Each facility has reduced access points to one Single Point of Entry (SPE). The National Guard has assisted the Department at the SPEs by setting up tents, generators, lighting, and heaters to run the SPE. Mici Affidavit, ¶ 43.

44. At the SPE, a staff member and a manager are assigned to supervise an entrance screening of every individual seeking entrance into the facility.
45. Staff members assigned to the SPE are clothed in PPE consisting of gloves and a mask.
46. Screening is based on CDC/DPH recommendations, and consists of a series of health-related questions and a self-administered non-intrusive temperature check for fever conducted by the employee, visitor, or vendor. Mici Affidavit, ¶ 46.
47. Each person entering is required to fill out the questionnaire and a thermometer is available for each employee to take their own temperature. The thermometer is disinfected between each use. Mici Affidavit, ¶ 47.
48. Completed questionnaires are handed to the on-site manager and upon review, the manager makes the final determination to approve/deny the person entrance.
49. No person with a temperature reading above 99.9 degrees Fahrenheit is permitted to enter the facility. Any person denied entrance is advised to consult with a medical professional. Mici Affidavit, ¶ 49.
50. All correctional staff and medical personnel are wearing appropriate PPEs. Masks are mandatory for all staff working in facilities. Supervisors and security personnel are monitoring PPE use to ensure compliance by all staff. Visitors are also required to wear masks. Mici Affidavit, ¶ 50.
51. All non-attorney visits were suspended, to prevent visitors from introducing COVID-19 into the facilities. Mici Affidavit, ¶ 51.
52. Due to COVID-19, all new admissions are being quarantined for 14 days as a precaution. Mici Affidavit, ¶ 52.

53. Inmates suspected of COVID-19 infection are quarantined away from the general population, meaning they are placed in a separate housing unit set aside only for inmates who have tested positive or who are suspected of having the virus.
54. Inmates testing positive for COVID-19 are being housed away from uninfected inmates.
55. Units housing COVID-19-positive inmates are quarantined.
56. To the extent possible in correctional facilities, the Department is meeting its responsibility to enable social distancing.
57. Inmates in two-person cells are directed to sleep head-to-foot to limit exposure to one another, per CDC guidelines
58. Alcohol-based hand sanitizer is available for staff and inmates. Facilities receive regular deliveries of hand sanitizer per CDC guidelines for correctional facilities.
59. Inmates are being served their meals in their cells to avoid gathering them in inmate dining halls.
60. Medication lines have largely been eliminated. At most facilities, all medications are being provided either in cell or on a one-person-at-a-time basis in a common area.
Inmates must wear masks and stand at least six feet away from each other.
61. All medical staff wear appropriate PPE when interacting with others, as recommended by the CDC and other health officials. Mici Affidavit, ¶ 40.
62. Inmates requiring insulin are either injected by medical staff in their cells or individually in a private, secure area. Medical personnel change their gloves before injecting each inmate.

63. Inmates continue to have access to timely, appropriate medical care, and may request to see medical professionals at any time. The same is true of inmates' mental health needs. Inmates are frequently reminded that mental health care is available to them.
64. Prison recreation areas, such as gymnasiums, have been closed to prevent close contact between groups of inmates.
65. Wellpath providers are closely following CDC and MPH protocols for the prevention and treatment of COVID-19. Mici Affidavit, ¶ 64.
66. This includes procedures for PPE use, triage and quarantine for inmates who may have contracted the virus, protection for health care and correction staff, and techniques for preventing COVID's spread. Mici Affidavit, ¶ 65.
67. These procedures include detailed instructions for health care providers regarding the proper way to use masks and gloves, and how to avoid potential contact with COVID-infected areas. Mici Affidavit, ¶ 66.
68. Based on its own testing and observations, Wellpath's guidelines for returning potentially COVID-positive inmates to general population are more stringent than those recommended by the CDC. Mici Affidavit, ¶ 67.
69. The CDC suggests that a person who shows no symptoms after 72 hours may be returned to population; Wellpath has determined that it will not return an inmate until 7 days after he is asymptomatic. Mici Affidavit, ¶ 68.
70. The mental health of quarantined inmates is a concern for both DOC and Wellpath, and protocols have been initiated to ensure inmates receive optimum mental health care, as needed, while quarantined. Mici Affidavit, ¶ 69.

71. When an inmate is quarantined due to either testing positive or pending test results for the Coronavirus, the medical or mental health team leader immediately notifies the mental health director (MHD) or their designee. [Mici Affidavit, ¶ 70.](#)
72. The MHD or designee conducts a chart review of the inmate, including whenever possible a triage with the inmate's direct providers (e.g., primary care provider, assigned psychiatrist, medical staff who have interacted with the patient most recently, etc.) to establish/update working knowledge of their diagnosis, risk factors, likelihood of accessing mental health if needed, and current mental status. [Mici Affidavit, ¶ 71.](#)
73. Based on a triage with the MHD (or designated mental health leader), mental health staff determines whether an inmate needs an emergent mental health assessment. If the determination is indeed that this inmate needs to be seen emergently by mental health, mental health staff will provide an assessment, carefully observing safety protocols. [Mici Affidavit, ¶ 72.](#)
74. The on-site mental health department continues to monitor these inmates over the course of their quarantine/illness to provide ongoing clinical consultation and assessment for them. For some inmates, the determination may be that they need more frequent evaluation while for others the determination may be that they can be seen per typical crisis protocols until normal mental health operations resume. [Mici Affidavit, ¶ 73.](#)

Cleaning and Disinfection of Facilities

75. Frequent cleaning of areas accessible to inmates and staff is among the most important defenses against COVID-19.
76. As a primary mechanism to ensure sanitation, each correctional facility is required by Department policy to create a housekeeping schedule.

77. These housekeeping plans outline cleaning schedules for all areas, instructions on proper cleaning, and specific assignments and duties.
78. Ongoing cleaning is happening at all facilities, with inmates and staff ensuring, as much as practicable, that sufficient amounts of bleach and other cleaners are used to kill the virus and prevent its spread.
79. Inmate showers, restrooms, and sinks are kept clean and sanitary. Each facility has implemented protocols for frequent cleaning and disinfecting, during the day and after hours.
80. Additionally, at all facilities, inmate common areas and high-touch areas are frequently cleaned and disinfected with bleach and disinfectants. Facility staff is using sprayers to ensure large areas are regularly disinfected, and Kivac machines with high-powered sprays and disinfectants are used multiple times a week.
81. At all facilities, high-touch areas are sprayed daily with disinfectant and correction officers disinfect high-touch surfaces in the living units.
82. Cleaning supplies are readily available to inmates daily for use in their cells.
83. Cleaning supplies are available in all inmate restrooms and shower facilities, for inmates to use in cleaning after each use. Inmate workers are disinfecting showers and bathrooms every evening.
84. Inmates are required to clean phones with provided disinfectant before and after each use.
85. Inmates are also being provided with bar soap, and are being told that they may request additional soap, at no charge, as needed. Alcohol-based hand sanitizer is readily available to inmates and staff in all areas of the facilities.

MASAC and Hampden County Treatment Facilities

86. The Massachusetts Alcohol and Substance Abuse Center in Plymouth (MASAC), Massachusetts is operated by the Department of Correction. It is a secure facility that houses men civilly committed pursuant to G.L. c. 123, § 35 due to their substance use disorder.
87. The courts, with the assistance of expert testimony, and not the Department of Correction, determine the secure facility to which a person is committed.
88. The Department of Correction has entered into a Memorandum of Understanding with the Hampden County Sheriff's Department to treat and house Section 35 commitments from the counties of Hampden, Hampshire, Franklin, Berkshire and Worcester in two facilities operated by the Hampden County Sheriff, Stonybrook Springfield and Stonybrook Ludlow (Hampden). In 2019, the number of Section 35 commitments to MASAC at Plymouth and Hampden totaled 1643.
89. Although the census at MASAC and Hampden was respectively 159 patients and 108 patients on March 13, 2020, as of April 23, 2020 there are 28 committed patients at MASAC, an 82 percent decline, and 46 committed patients at Hampden, a 57.5 percent decline. Since March 13, 2020, there have been 14 new admissions to MASAC and 31 new admissions to Hampden. The courts, not the Department of Correction, determine the secure facility to which a person is committed with the assistance of expert testimony.
90. As of April 23, 2020, with unlimited testing capacity, no patient has had a positive test result for COVID-19 at either MASAC or Hampden
91. Patients on each unit continue to have access to substance abuse groups, activity groups, and open recreation activities on a rotating basis.

92. On March 30, 2020, the size of group programs was reduced to 15 patients per group to allow for social distancing. This required a temporary reduction in structured substance abuse groups to two per day, one in the morning and one in the afternoon. In addition, patients were provided with homework and individual sessions with Substance Use Disorder Counselors or Mental Health Professionals.
93. Patients are seen individually on a daily basis by Substance Abuse Counselors and are routinely seen by Mental Health Professionals as all patients are viewed as open mental health cases. During these sessions treatment materials are reviewed, reentry plans developed, and coping skills learned.
94. During the week of March 30 through April 3, 2020, patients had the opportunity to participate in a minimum of five hours of treatment each day.
95. For a three-day period during the weekend of April 4 through April 6, 2020 there were no groups held as a Department-wide lockdown took effect and a new operational plan was developed.
96. On April 7, 2020, the size of group programs was further reduced to 10 patients. That same day group activity was restricted so that patients from different housing units did not attend groups together to further reduce the risk of virus spread.
97. The census continued to decrease, and as of approximately April 15, 2020, each patient was able to attend four structured groups instead of two per day. Patients continue to be provided with homework packets containing materials related to substance use treatment, mental health, and wellness.
98. In addition to structured groups, daily individual appointments with Substance Use Counselors and routine sessions with Mental Health Professionals are provided.

Including all of these modalities, the current total treatment time provided per patient is seven hours per day.

99. The Superintendent of MASAC monitors patient participation in groups and, based upon the satisfactory completion of programming, as recommended by clinical staff, an adequate discharge plan determines whether a patient meets the criteria for release.

100. Most civil commitments are currently released around the thirty day point of their commitment.

101. All correction officers will be removed from MASAC on May 10, 2020.

Medical Parole

102. G.L. c. 127, § 119A permits inmates who are “terminally ill or permanently incapacitated” to petition for release from custody on medical parole. Per the statute, “[i]f the commissioner determines that a prisoner is terminally ill or permanently incapacitated such that if the prisoner is released the prisoner will live and remain at liberty without violating the law and that the release will not be incompatible with the welfare of society, the prisoner shall be released on medical parole.” G.L. c. 127, § 119A(e). Mici Affidavit, ¶ 100.

103. Upon receipt of a medical parole petition, the superintendent completes a public safety risk assessment by reviewing the inmate’s file for criminal and institutional history, including circumstances of the crime, disciplinary and classification reports, and the inmate’s participation in education, work and recommended programming. At the same time, the Department’s contracted medical provider, Wellpath, is asked to provide an updated clinical review as to the inmate’s medical condition.

104. The medical parole statute contains definite timelines: the superintendent must issue a recommendation to the Commissioner “*not more than 21 days* after receipt of the petition” and “[t]he commissioner shall issue a written decision *not later than 45 days* after receipt of a petition” (italics added). Mici Affidavit, ¶ 100.
105. These timelines only represent the outer limit of what is permitted; there is nothing preventing superintendents from exercising their discretion and making recommendations in less than 21 days; nor is the Commissioner prohibited from rendering her decision in less than 45 days. Department staff typically expedite decisions on medical parole petitions if the inmate’s condition is significantly dire.
106. Pursuant to the statute, petitioner’s victims and District Attorney (DA) offices have the right to submit written statements or, where a murderer is under consideration, request a hearing. Mici Affidavit, ¶ 104.
107. In order to expedite the process, the Commissioner is requiring victims and DAs’ offices wishing to submit statements for or against the medical parole, or to request a hearing, to respond within five business days of notification that the petition is under consideration.
108. Since March 10, 2020, the Commissioner has granted nine inmate petitions for medical parole. Of these, seven inmates have been released and two more are awaiting community placement.

New Inmate Admissions

109. Male inmates sentenced to Department custody are processed through the Department’s reception center, MCI-Cedar Junction. Female inmates sentenced to Department custody are processed at MCI-Framingham, and, for the most part, remain housed at MCI-Framingham.

110. Inmates are processed in accordance with the Department's Booking and Admissions policy, 103 DOC 401. Mici Affidavit, ¶ 106.
111. The Booking and Admissions policy requires that incoming inmates receive a medical, dental and psychological screening. Mici Affidavit, ¶ 106.
112. This screening is done in accordance with the Department's Medical Service policy, 103 DOC 630, which requires thorough medical screening and physical examination. Mici Affidavit, ¶ 107.
113. This screening includes the questions asked of anybody entering the facility, and should determine whether any new admissions are at risk of COVID-19.
114. All new commitments to the Department receive a complete physical examination within seven days of admission; the contents of this examination are in compliance with American Correctional Association and N.C.C.H.C. standards, as well as the contract between the Department and its medical vendor.
115. Finally, both the Booking and Admissions and Medical Services policy provide for the quarantining of incoming inmates with proper medical authorization.

Respectfully submitted,
NANCY ANKERS WHITE
Special Assistant Attorney General

/s/ Stephen G. Dietrick

Stephen G. Dietrick
Deputy General Counsel
Department of Correction
Legal Division
70 Franklin Street, Suite 600
Boston, MA 02110-1300
(617)727-3300 x1116
BBO No. 123980
stephen.dietrick@doc.state.ma.us

CERTIFICATE OF SERVICE

I, Stephen G. Dietrick, hereby certify, under the penalties of perjury, that on April 24, 2020, I caused a true and accurate copy of the foregoing to be filed and served on all counsel of record by email.

/s/ Stephen G. Dietrick
Stephen G. Dietrick