

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN**

KENNETH FOSTER-BEY, *et al.*,
on behalf of themselves and all others
similarly situated,

Plaintiffs,

vs.

BARBARA SAMPSON, *et al.*,
in their official capacities,

Defendants.

File No. 05-CV-71318-DT

Hon. Marianne O. Battani

U.S. Mag. Judge Virginia Morgan

Paul D. Reingold (P27594)
Michigan Clinical Law Program
Attorney for Plaintiffs
363 Legal Research Building
801 Monroe Street
Ann Arbor, MI 48109-1215
(734) 763-4319

Kevin Himebaugh (P53374)
Assistant Attorney General
Attorney for Defendants
Corrections Division
P.O. Box 30217
Lansing, MI 48909
(517) 335-7021

ORDER ON THE DEFENDANTS' SECOND REMEDIAL REPORT

The defendants filed their second remedial report on April 30, 2009. (DE #262.) Pursuant to the Court's briefing schedule, the plaintiffs filed a response on August 31, 2009. (DE #265). The defendants filed a reply on September 21, 2009. (DE #266.) The Court then held a review hearing on October 19, 2009. The Court having reviewed the documents and having heard the arguments of counsel,

IT IS ORDERED:

I. Voting

1. The defendants shall provide to the plaintiffs and the Court the voting records of

the parole board on all *Foster-Bey* cases. The voting records shall show, for each case:

- a. who conducted the interview;
- b. the interviewer's initial recommendation to the board (to approve the case, deny it, or pend it for further investigation);
- c. how each member of the board voted on the case (*i.e.*, yes, no, abstention, did not participate, or vote unknown/not recorded); and
- d. for those cases that go to public hearing, how each member of the board voted on the case (*i.e.*, yes, no, abstention, did not participate, or vote unknown/not recorded) following the public hearing.

2. If, in the past, all votes have not been recorded, that practice must change. The votes of all members shall be recorded for each *Foster-Bey* approval or denial for public hearing, and for each approval or denial after public hearing.

II. Monthly Data Reporting

3. The defendants shall supply to the plaintiffs and the Court a monthly updated report showing, for each quarter of the class (for which interviewing has begun):

- a. the composition of the quarter by prisoner number and name;
- b. the date of the *Foster-Bey* interview;
- c. the decision on the case (to approve or deny public hearing);
- d. the date of the decision;
- e. in approval cases, whether or not the approval was vetoed by the judge;
- f. in approval cases, the date the public hearing occurred or is scheduled;
- g. the decision following the public hearing; and
- h. the date the parole occurred or is scheduled.

4. In judicial veto cases, the defendants should identify the objecting judge and report the status of any commutation proceeding.

5. In denial cases, the defendants should continue to provide to the plaintiffs the parole summary, together with the psychological records referenced in Part IV below, as well as the *Foster-Bey* denial form.

III. Prisoners Approved by the Old Board But Denied Under *Foster Bey*

6. The defendants shall review the cases of those prisoners who were approved for

public hearing by the old board but were denied following their *Foster-Bey* interview.

7. The defendants shall explain to the Court why these prisoners were denied in 2008-09 (assuming that the board was using the pre-1992 standards), when they were approved for public hearing by the old board (using those same standards) some 16-25 years ago.

8. The list of prisoners to be reviewed includes:¹

- a. Scola #121986
- b. Gaddie #129053
- c. Middleton #121894
- d. Fulgham #124071
- e. Anderson #137843
- f. Rohn #142544
- g. Barfield #144360
- h. Koss #144943
- i. Hernandez #148497
- j. Rodriguez #149675

9. The defendants may wish to review the cases of prisoners who had very favorable comments by the old board – in some cases even stronger parole files than the files of those listed above – but whose cases were denied under *Foster-Bey*. These include:

- a. Deruyscher #120313
- b. Sutherland #122877
- c. Branoff #125417
- d. Lange #134456
- e. Hickman #135237
- f. Carson #136681
- g. Meagher #137209
- h. Valiroso #139042
- i. Carter #140137
- j. Foster #142187
- k. Bolden #142399
- l. Robins #151306

¹ This list comes from comparing the list of 47 prisoners who were recommended for public hearing by the old board (*see* DE #130, Plaintiffs' Summary Judgment Exh. #49), with the list of *Foster-Bey* denials reported to date (*see* Defendants' Second Remedial Report, cited above). It is possible that some of the listed people have since been commuted or released, or died.

IV. Psychological Records

10. In every case in which the interviewing board member recommends denial based in part on subjective reasons (*e.g.*, lack of remorse, lack of insight, failure to take responsibility for the crime, lack of sympathy for the victim, failure to understand the crime, and so forth), the prisoner's complete psychological reports shall be attached to the parole summary and be available for on-line review by all other members of the board *before* they vote on the case.

11. Regardless of the initial recommendation, in every case in which the board denies a public hearing based in part on these subjective reasons, the prisoner's complete psychological reports shall be attached to the parole summary and be available for on-line review by all other members of the board *before* they vote on the case.

V. Report

12. By November 19, 2009, the defendants, through the board chair, shall file a report to the Court addressing the following issues:

- a. why there is such a long lag time between the *Foster-Bey* interview and the decision on the case (in those cases that are not denied immediately);
- b. why so few approved *Foster-Bey* cases have been set for public hearing, (especially compared to commutation and drug-lifer cases since 1/1/08);
- c. why some interviewing board members are quickly denying a high percentage of their *Foster-Bey* cases, while other board members are quickly approving or pending for further investigation a high percentage of their *Foster-Bey* cases;
- d. why – despite this disparity in initial recommendations – in denial cases the vote to deny is unanimous in nearly every case (based on the voting records produced to date);
- e. why – despite this disparity in initial recommendations – in approval cases the vote to approve is unanimous in most cases (based on the voting records produced to date);
- f. why in denial cases the next review date is automatically set out five years from either the last regular parole review date or the *Foster-Bey* interview date (if more than five years have passed since the last regular review date);
- g. how the board can determine which are the strong cases and which are the

- weak cases, if there are no close votes and no file notes that distinguish among the cases for purposes of setting the next review date 1-5 years out;
- h. if a case is initially recommended for denial by the interviewer, what the process has been for review by the entire board – that is, have “initial denial” cases been discussed in executive session.

13. For each of these items the report should discuss what steps the board will take to address the problem or issue identified.

VI. Other Relief

14. The Court’s first remedial order remains in effect, supplemented by this order.

15. The Court will reserve for another day the plaintiffs’ suggestion that the *Foster-Bey* cases be handled by a five-member panel of the board (which would make a recommendation to the full board).

16. The plaintiffs suggest that such a process would result in faster and more consistent decision-making, and would allow for comparative judgments that would permit the board to assess which cases should be set for early review and which can be set for longer review without risk of extra punishment.

17. The Court will reserve for another day the plaintiffs’ suggestion that the *Foster-Bey* cases be reviewed by two members of the board, the same as in LID (long indeterminate) cases, to ensure greater consistency of decision-making among the members of the board.

VII. Next Review

18. The Court has set a telephone conference for Thursday, December 3, 2009, at 3:30 p.m., to address the issues set forth above.

SO ORDERED.

s/Marianne O. Battani
Hon. Marianne O. Battani
U.S. District Judge

Dated: November 3, 2009

Approved as to form:

s/ Paul D. Reingold
Attorney for Plaintiffs

s/ Kevin Himebaugh
Attorney for Defendants