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IN THE UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA

CARLOS CASTRO,

Plaintiff,

No. C 98-4877 WHA

v.

CAL TERHUNE, Director, CALIFORNIA
 DEPARTMENT OF CORRECTIONS, G. BONNIE
 GARIBAY, J. BATCHELOR, S. C. WOLHWEND,
 A. SCRIBNER, J. STOKES, M. YARBOROUGH,
 L. HOOD, C. CAMPBELL, A. M. GONZALEZ,
 M. AYALA, E. DERUSHA, c/o ROBERT L. L.
 AYERS, Warden, and J. MARTINEZ,

Defendants.

**ORDER DENYING
 DEFENDANTS' MOTION
 FOR SUMMARY
 JUDGMENT; DENYING
 MOTION FOR
 PROTECTIVE ORDER;
 AND SETTING FURTHER
 CASE MANAGEMENT
 CONFERENCE**

Following a bench trial and subsequent order holding that plaintiff did not receive all of
 the due process to which he was entitled when he was validated as a gang associate in 1997,
 defendants now file a motion for summary judgment, arguing that plaintiff's subsequent
 validation in 2009 moots the need for further relief.

STATEMENT

There is much history to this action. Following an appellate remand, the trial was
 bifurcated, with part one to address the issues remanded and part two to address mootness based
 on a 2009 validation. The trial was held on December 14–17, 2009. The Court's findings of fact
 and conclusions of law held that plaintiff was denied procedural due process when he was
 validated as a gang associate in 1997 (Dkt. No. 237).

1 One might wonder why the mootness question was not considered first, as defendants
2 urged. The reason is that the appellate court had remanded this case *twice* for a trial on the 1997
3 validation. To have leapfrogged over that issue after two remands might have seemed
4 disrespectful. It is worth adding that the appellate court’s instinct proved correct. The trial facts
5 showed that plaintiff had indeed been denied due process in 1997.

6 Now we are at stage two — the mootness issue. Defendants move for summary judgment,
7 urging that the 2009 validation of the plaintiff as a gang associate mooted the need for any further
8 relief. Plaintiff counters that both substantive and procedural due process were not provided in
9 2009. Both parties submitted evidence relevant to defendants’ motion. As requested by the
10 Court, the parties also submitted supplemental briefing concerning the legal standard plaintiff
11 must meet in order to demonstrate a denial of due process by reason of alleged bias in favor of a
12 predetermined outcome. Oral argument was heard on September 2, 2010.

13 Although plaintiff was not due for another prison gang status review, the IGI’s office
14 conducted an entirely new validation in 2009. The parties do not dispute that prison authorities
15 did a new validation “to rectify any alleged procedural-due-process violation” (Br. 10). The
16 parties do dispute, however, whether this motive tainted the effort. Assistant IGI Darrin Short
17 identified twelve items of evidence of prison-gang affiliation, and Assistant IGI Joshua Pieren
18 reviewed the evidence and determined that all twelve met CDCR standards of gang affiliation.
19 Assistant IGI Pieren provided plaintiff with the source items upon which defendants relied in
20 charging him with being a prison gang associate, or a description of them on 1030 forms if they
21 were confidential and thus could not be disclosed to plaintiff directly, on August 20, 2009. The
22 next day Assistant IGI Pieren went to interview plaintiff, who said, “I am not associated with any
23 gang,” and provided written responses concerning each of the twelve source items. IGI James
24 McMillan reviewed the evidence, including plaintiff’s responses, and submitted a
25 recommendation of validation to the Office of Correctional Safety. Plaintiff was validated as a
26 prison gang associate on September 3, 2009.

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1 ANALYSIS

2 Plaintiff has advanced evidence that counsel for defendants orchestrated the 2009 re-
3 validation and worked with some of the players involved to rig the outcome. There would have
4 been nothing wrong, of course, with defense counsel seeking to give plaintiff a new validation
5 hearing so long as it was fair — indeed, that is exactly what plaintiff has been seeking in this
6 case. Nor would there have been anything wrong with defense counsel advising prison
7 authorities and their agents in how to do it in a way that would supply due process. It would,
8 however, be wrong for defense counsel to rig the result. It seems undisputed that IGI James
9 McMillan, who seems to have been the decisionmaker, was unaware of the machinations of
10 defense counsel, but those machinations plainly involved at least Assistant IGI Darrin Short, and
11 perhaps Assistant IGI Joshua Pieren. In turn, IGI McMillan relied on their recommendations and
12 submissions, which arguably were tainted and slanted by the intrusion of defense counsel into the
13 administrative process. This order does *not* find that defense counsel or anyone involved in fact
14 did anything wrong but it cannot rule out such a possibility without a trial.

15 In addition, the e-mails of the IGI office on the subject were all deleted on the CDC
16 server. These e-mails were recent, not ancient. A few of them survived on the e-mail server of
17 the Attorney General’s office. They show machinations, at least arguably. Why were all of the
18 others “lost”? Why wasn’t a litigation hold placed on those communications? Possibly, it was all
19 innocent, but it is too suspicious to excuse without a trial.

20 The Court is inclined to ignore the 2009 validation and simply order that a new validation
21 take place — one that is free of defense counsel’s influence. If, however, defendants really want
22 to have a trial on the fairness of the 2009 validation, then one will be held, but fairness requires
23 further discovery into the deletion of the e-mails. This will include probing under oath the bona
24 fides of defense counsel’s excuse that it did not occur to them to place a litigation hold on the
25 evidence. Defense counsel will be subject to examination on this point. Possibly, this will also
26 include deposing those in charge of the CDC server and the deletion protocol. The Court will
27 also allow the deposition of Jeffrey Hook, as requested by plaintiff. Defendants’ motion for a
28 protective order concerning that deposition (Dkt. No. 325) is therefore **DENIED**. If defendants do

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not wish to have a trial on the fairness of the 2009 validation, then there will be no need for the discovery and counsel and the Court will work out a protocol to ensure that the next validation will be fair and comport with due process.

Defendants' motion for summary judgment (Dkt. No. 306) is **DENIED**. The trial date and pretrial conference are **VACATED**. A further case management conference will be held on **OCTOBER 28, 2010, AT 11:00 A.M.**, by which time the Court expects all further discovery to be completed.

IT IS SO ORDERED.

Dated: September 3, 2010.



WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE