

Circuit balks at S.F. strip search policy

By Dan Levine
RECORDER STAFF WRITER

As San Francisco Sheriff Michael Hennessey fought at the polls for his eighth term in office Tuesday, his lawyer had a different battle on his hands.

An engaged Ninth Circuit U.S. Court of Appeals panel heard arguments Tuesday morning in a civil rights class action over strip searches at the city jails. Northern District Judge Charles Breyer had found in February 2006 that blanket strip searches without reasonable suspicion violate the Fourth Amendment when they involve the arrestees who make up the class — generally those who had not been brought in on drug or weapons charges, and who had not yet been arraigned.

At the start of the arguments, Ninth Circuit Judge Sandra Ikuta questioned whether there was any evidence that



Michael Hennessey

The San Francisco sheriff was sued over the county jail's blanket strip-search policy.

members of this particular class of plaintiffs had smuggled in weapons or drugs. Judge Sidney Thomas picked up on that line.

"The district court was really careful to limit the discussion to the class. What's the best evidence that relates to this class?" he asked Deputy City Attorney David Newdorf.

As Newdorf attempted to discuss examples, Thomas shot them down as not applicable. "There is no evidence that relates to this class," the judge concluded.

Newdorf found a friendlier face in

Judge Richard Tallman. Given that the city stopped applying its blanket strip-search policy to class members in January 2004, Tallman asked if it is the city's position that in light of the overall contraband problem, the current non-blanket policy "simply isn't working."

"I agree with that statement," Newdorf said, adding that the panel did not have to alter Ninth Circuit precedent in order to uphold the blanket searches. Those Ninth Circuit rulings that found strip searches unconstitutional did not contain such an extensive factual record of an overall contraband problem, Newdorf said.

Tallman then pressed plaintiff counsel Mark Merin. "How do you explain all this contraband in the jail if violent offenders are strip searched," the judge asked, and class members aren't?

Merin, a Sacramento-based attorney, See SEARCHES page 8

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replied that the jail had a heavy contraband problem even when the class members were being strip searched.

"If I were the sheriff I would look at other sources of bringing contraband in jail," Merin said, like the prison staff.

Plaintiff attorneys estimated the class at 9,000 members.

Thomas again launched into Newdorf on rebuttal: Since the sheriff has abandoned the blanket strip-search policy, the judge asked whether the case was just about damages.

"Yes," Newdorf said.

But Thomas also wanted to know if the city would return to the old policy if it prevailed in its appeal. Newdorf answered that safety was better served under the old policy.

"So, I guess the answer is yes? Probably?" Thomas said.

"Probably," Newdorf answered.

The case is *Bull v. City and County of San Francisco*, 06-15566.

Reporter Dan Levine's e-mail address is dlevine@alm.com.