KeyCite Red Flag - Severe Negative Treatment
Affirmed in Part, Reversed in Part by Harris v. City of Philadelphia, 3rd Cir.(Pa.), February 15, 1995

1993 WL 209582
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United States District Court, E.D. Pennsylvania.

Martin HARRIS, et al., Plaintiffs,
v.
Theodore LEVINE, et al., Defendants.

No. CIV. A. 82-1847. | June 14, 1993.

Opinion

MEMORANDUM AND ORDER

SHAPIRO.

***1** The plaintiff class in this prison overcrowding action filed a "Motion for Contempt Sanctions Against Defendants for Failure to Comply With the Court's Order of March 11, 1991." The City filed its Response in Opposition, and the District Attorney filed Objections in the Nature of a Response to Parties' Positions on Contempt Sanctions.[1] The parties submitted Stipulated Facts, and the court also heard argument.

I. BACKGROUND.

This action, seeking relief for allegedly unconstitutional prison overcrowding, was filed in 1982. The plaintiff class consists of inmates, present and future, incarcerated in the Philadelphia prison system. Defendants are the City of Philadelphia and various City officials. An initial Settlement Agreement was approved and entered as a Consent Decree on December 30, 1986. *See Harris v. Pernsley,* 654 F.Supp. 1042 (E.D.Pa.1987). The court approved a new Stipulation and Agreement, revising and replacing the earlier Consent Decree in part, on March 11, 1991. *See Harris v. Reeves,* 761 F.Supp. 382 (E.D.Pa.1991).[2]

The Stipulation and Agreement provides for long-term solutions to overcrowding in Philadelphia prisons. These include construction of a 1000–bed prison in Northeast Philadelphia, and development of a comprehensive planning process for prison population, control, and management.

The Stipulation and Agreement also addresses short-term solutions; these include expanded capacity and early release procedures. The Maximum Allowable Population ("MAP") for the prison system was continued at 3750 inmates, as established in the Consent Decree. During periods when the MAP is exceeded, the Stipulation and Agreement mandates the use of an Early Release Mechanism for pretrial detainee. The plaintiff class moves for imposition of sanctions for the City's alleged contempt of this provision.

The parties' Stipulations of Fact are adopted by the court and are of record in this action at Docket No. 853.

II. DISCUSSION.

A. *THE EARLY RELEASE MECHANISM.* The Early Release Mechanism was established by Order of April 18, 1989. Paragraph 17 of the Stipulation and Agreement revises that Order and other intervening Orders. Under the Early Release Mechanism of ¶ 17, the City is required to designate inmates who meet specified release conditions; a list of their names and other relevant information is submitted to the Special Master, who determines whether the inmates are eligible for release under the terms of the Stipulation and Agreement and, if so, orders their release. The City is required to "submit no fewer than thirty-five (35) names per day, at least five (5) days per week [or, 175 names per week], whenever the population is in excess of 3,750." Stipulation and Agreement ¶ 17(b).[3] Since the Consent Decree was entered, the MAP has been exceeded continuously, except for a brief period in 1988.[4]

The criteria for listing pretrial detainees are set forth in ¶ 17(a) of the Stipulation and Agreement:

> ***2** a. Defendants shall designate and submit to the Special Master the names of inmates who meet the criteria of Paragraph 4.E. (1)(3) of the September 21, 1990, Order which provides for the release of:
>
> (1) all persons admitted to the prisons under prior orders of the court who are still detained but who would not be admitted under the provisions of this order as now modified;
>
> (2) prisoners held in default of the lowest amount of percentage bail as necessary to reduce the population in all institutions to the maximum allowable populations. If inmates considered for release under this paragraph are held in default of equal amounts of bail, preference shall be given to the inmate held the longest time. Persons charges with offenses enumerated in paragraph 3A and B [of the September 21, 1990, Order] shall not be released pursuant to this paragraph.

The September 21, 1990, Order referred to in ¶ 17(a) of the Stipulation and Agreement states at ¶ 4.E.:

E. Release categories shall be:

(1) a person admitted to prison under prior orders of the court who is still detained but who would not be admitted under this order as now modified;

(2) a prisoner held in default of the lowest amount of percentage bail as necessary to reduce the population in all institutions to the maximum allowable. If inmates considered for release under this paragraph are held in default of equal amounts of bail, preference shall be given to the inmate held the longest time.
(3) a person charged with offenses enumerated in paragraphs 3A and B shall not be released pursuant to this paragraph.[5]

The court explained how the Early Release Mechanism was to function in its Memorandum of March 26, 1991, *Harris v. Reeves,* 761 F.Supp. at 391 92:

The early release mechanism for pretrial detainees, originally established by Order of April [18], 1989, is revised. The City must now submit to the Special Master names of 35 pretrial detainee per day, five days per week, whenever the overall MAP is exceeded. (¶ 17(b)). The criteria cover those in custody who no longer would be admissible and those in custody on the lowest amount of bail for the longest time *not* charged with murder, attempted murder, forcible rape, attempted rape, involuntary deviate sexual intercourse, corrupting the morals of a minor, arson, kidnapping, aggravated assault, a crime of violence committed or attempted with a firearm, knife or explosive, escape or domestic violence and abuse. (¶ 17(a)).

Names will be provided concurrently to the District Attorney who will have 72 hours to object in writing. (¶ 17(d)). The District Attorney may object if there have been errors in the application of the release criteria or for the considerations of public safety. The Special Master will direct the release of pretrial detainee meeting the court's formulated criteria. (¶ 17(e)). If the District Attorney objects to a particular release for public safety considerations, that inmate will not be released if the District Attorney designates the name of another eligible pretrial detainee, not already submitted. The Special Master's findings of fact will be final.... Defendants must comply with a release order within 24 hours of receiving it. (¶ 17(f)). Finally, if the court or the Special Master is unavailable, the court will designate a judicial officer to review the names submitted by the [Population Management Unit]. (¶ 17(g)).

***3** The City may formulate and submit to the court other criteria and procedures for release of inmates as a possible alternative or concurrent mechanism with that provided in Paragraph 17. (¶ 30).

The Early Release Mechanism superseded the procedures in ¶¶ 4A–C of the court's Order of September 21, 1990. *Harris v. Reeves,* 761 F.Supp. at 392 n.1. "Otherwise, [the] Stipulation and Agreement [does] not affect the operation of the September 21, 1990 Order...." Stipulation and Agreement ¶ 18.

For the 15 week period ending the week of June 29, 1992, the defendants submitted 175 names per week to the Special Master. Beginning the week of July 6, 1992, defendants submitted fewer than 175 names per week. According to the 38th Report of the Special Master, the numbers submitted for the weeks noted were (*see also* Stipulation Nos. 42, 69):

Similarly, the 39th Report of the Special Master noted the following numbers submitted for the weeks shown (*see also* Stipulation Nos. 42, 79, 80):

The MAP was exceeded at all times during this period. (Stipulation Nos. 46, 78, 79). The plaintiff class moves this court to hold the City in contempt for failure to list 175 names per week during this period.[6]

B. *LEGAL STANDARD.* This court has the power to enforce an order, including a consent decree, if it is determined that a party is in contempt. *See, e.g., Interdynamics, Inc. v. Firma Wolf,* 653 F.2d 93, 97 (3d Cir.1981) (party found in contempt for violation of consent decree), *cert. denied,* 454 U.S. 1092 (1981). "The power to punish for contempt is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders and writs of the courts and, consequently, to the due administration of justice." *Ex parte Robinson,* 19 Wall. (86 U.S) 505, 510 (1874). Liability for civil contempt attaches when a person violates a court order of which there is actual notice. *See Quinter v. Volkswagen of America,* 676 F.2d 969, 972 (3d Cir.1982). The proponent in a contempt proceeding must demonstrate that respondent's conduct constitutes contempt. *See id.* at 969. Proof of the violation must be clear and convincing, but no finding of wilfulness is necessary. *See* 11 Charles Wright & Arthur Miller, *Federal Practice & Procedure* § 2960, at 591 92 (1973); *Fox v. Capital Co.*. 96 F.2d 684, 686 (3d Cir.1938). *See also Quinter,* 676 F.2d at 973 (" 'It is not necessary that ... there be intent to violate the court order.' ").[7] A finding of contempt is not precluded because the acts were done in good faith. *See Thompson v. Johnson,* 410 F.Supp. 633, 640 (E.D.Pa.1976), *aff'd,* 556 F.2d 568 (3d Cir.1977). Bad faith violations of a court order provide a sound basis for a finding of contempt. *See, e.g., Hutto v. Finney,* 437 U.S. 678 (1978) (sanction for bad faith equated with contempt sanction). The court's civil contempt power is discretionary, and where there is ground to doubt the wrongfulness of respondent's conduct, there should be no finding of contempt. *See Littlejohn v. Bic Corp.,* 851 F.2d

673, 686 (3d Cir.1988); *Quinter,* 676 F.2d at 974. Ambiguities in an order "redound to the benefit of the person charged with contempt." *Ford Motor Co. v. Summit Motor Products,* 930 F.2d 277, 286 (3d Cir.1991), *cert. denied,* 112 S.Ct. 373.

***4** A consent decree is both a judicial act and also a voluntary contractual one. *See United States v. Wheeling–Pittsburgh Steel Corp.,* 818 F.2d 1077, 1088 (3d Cir.1987). "[A] party to a consent decree, having made a 'free, calculated and deliberate choice to submit to an agreed upon decree rather than seek a more favorable litigated judgment,' bears a burden which is 'perhaps even more formidable than had they litigated and lost.' " *Id.* (quoting *United States Steel Corp. v. Fraternal Ass'n of Steel Haulers,* 601 F.2d 1269, 1274 (3d Cir.1979)).

Because "consent decrees and orders have many of the attributes of ordinary contracts, they should be construed basically as contracts." *United States v. ITT Continental Baking Co.,* 420 U.S. 222, 236 (1975). However, it is of paramount importance in enforcing a consent decree "to construe [it] as to give effect to the intention of the court, not to that of the parties." *Ford Motor Co.,* 930 F.2d at 286 (citation omitted). The court should discount an interpretation which would "do injustice to the overall tenor of the order," or would "render meaningless a specific provision." *Id.* at 287. This court's opinion stating its decision to adopt the Stipulation and Agreement as an Order of this court is particularly relevant to the determination of whether defendants' conduct was in contempt of said Order. *See Harris v. Reeves,* 761 F.Supp. 382 (E.D.Pa.1991).

The court also rejects the District Attorney's argument that the court may not consider "what PMU's practice used to be" prior to the events underlying this Motion. (Vandenbrk, Tr. 12/18/93, at 159). "A consent decree is essentially a settlement agreement subject to continued judicial policing." *Williams v. Vokovich,* 720 F.2d 909, 920 (6th Cir.1983), *quoted in Halderman by Halderman v. Pennhurst State School & Hosp.,* 901 F.2d 311, 318 (3d Cir, 1990), *cert. denied,* 498 U.S. 850 (1990).

C. *CONTEMPT DETERMINATION.* In a memorandum dated August 5, 1992 ("Memorandum, 8/5/92," Stipulations Ex. H), from James B. Jordan, Esq.[8] to Jeanne Bonney, Esq.,[9] the City directed certain changes in its procedures for listing the names of inmates submitted to the Special Master for release under ¶ 17 of the Stipulation and Agreement. Mr. Jordan stated: "[w]hile we are required to comply with the various orders regarding the release mechanism, there should be no presumption of releasability." (Memorandum, 8/5/92, ¶ III). This action was taken, on the advice or at the instance of the District Attorney, without notice to or consultation with the plaintiff class, the Special Master, or this court, notwithstanding this court's regular communication with counsel at status hearings, and through the Special Master.[10]

An important feature of the new procedure was the direction to:

> "[L]ist by defendants, not by charge. This means that only defendants eligible for release under the criteria of the relevant orders should be listed. Please discontinue the prior practice of listing by the charged offense irrespective of whether the defendant in question is absolutely ineligible for release under the applicable criteria. Thus, you should not list any defendant with any outstanding charge or other matter which would disqualify that inmate from release under the provisions of the relevant *Harris* orders.

***5** (Memorandum, 8/5/92, ¶ I). The memorandum directed the PMU to discontinue listing four categories of detainees previously included on release lists: (i) inmates who have "other holds"; (ii) inmates held on enumerated charges who have state or federal detainers; (iii) inmates who on the face of their charges are not eligible for release; and (iv) inmates who are a danger to themselves or the community. Detainee in these categories "would have been listed under the prior practices" of the PMU. (Stipulation No. 30). The PMU instituted these changes as directed.

Mr. Jordan's memorandum "w[as] intended ... to change prior practices of ... The [People's] Bail Fund that ... were inconsistent with the requirements of the Consent Decree," that is, "that we were going beyond its requirements and we did not have to continue doing so." (Tr. 12/18/92, at 136 –37). However, there was no effort to determine whether the court shared this understanding of the Stipulation and Agreement before the changes were unilaterally implemented.

Although the new procedures were formalized by the August 5, 1992, memorandum, the policy changes (with differences not material to determination of this Motion) were instituted by the PMU, at the direction of the City, the week of July 6, 1992. *See* Stipulations Nos. 17 46.

The four categories, their treatment prior to the change in City procedures, and the appropriateness of the changes in relation to the Stipulation and Agreement are discussed below:

1. Inmates With Other Holds.

This category includes inmates who are detained on enumerated charges and at least one non-enumerated charge. For some time prior to July 6, 1992, such inmates were included in the proposed release orders submitted by the City. "In this way, if and when all enumerated charges (or other holds) were subsequently dropped [or the inmate made bail on those charges], the inmate could be released immediately, instead of waiting approximately three to four weeks from that point to go through the release process." (Stipulation No. 18).

In a December 6, 1991, memorandum to the plaintiff class, the Special Master summarized the release procedures under the Stipulation and Agreement (*see* Stipulations Ex. A). A copy of this letter was received by both the City and its PMU. (Stipulation No. 5). The Special Master contemplated that a detainee in the "other holds" category would be listed for release on non-enumerated charges even if held on some other enumerated charge: "Many of the approved orders will not result in immediate release for the following reasons: ... the inmate has other holds such as ... more serious charges, and will remain in custody until the other holds are disposed." (Stipulations Ex. A.).

The Special Master's function with respect to the release mechanism is primarily "ministerial," *Harris v. Reeves,* 761 F.Supp. at 397, but his explanation comports with the court's understanding, expressed at the inception of the Stipulation and Agreement, that: "[T]he City will be able to submit the names of those inmates who were admitted to the prisons because they were charged with excepted offenses, [and who] are now eligible for release because the excepted charges have been dismissed but [who] are still held on non-excepted charges." *Harris v. Reeves,* 761 F.Supp. at 398.

***6** Ms. Bonney testified that this policy was an effective means of ensuring that detainees were released from the prisons as soon as possible under the Early Release Mechanism: "We had internal documents to explain that ... it made a difference. And as part of the statistics that we provide to the City that go to the Special Master it gives the breakdown of all the people discharged under the category of other holds and how long it takes for them to get out and how they get out." (Bonney Dep., at 49). The Special Master provided statistics confirming Ms. Bonney's testimony. *See* 37th Report of the Special Master, Appendix K. The City stipulated that under its revised procedure, an inmate with "other holds" spends an additional "three to four weeks" in prison waiting for release under the *Harris* mechanism after bail is posted for enumerated charges or they are dismissed. (Stipulation No. 18).[11]

The arguments of the City that the prior policy was "wasteful" and "ridiculous" (Memorandum of City, at 2) and of the District Attorney that it merely "create[d] a massive paperwork shuffle" (Objections of District Attorney, at 3) cannot be credited. Indeed, both the City and the District Attorney have previously recognized that releasing detainees subject to other holds is an effective means of accomplishing the letter and the spirit of the Stipulation and Agreement. *See* Memorandum from the Special Master, August 19, at 2 (Stipulations Ex. D).[12]

The Philadelphia courts have followed such a procedure since September 18, 1992, when the Municipal Court Bail Commissioners were instructed by Chief Deputy Court Administrator Kevin R. Murray to mark non-enumerated charges as *HvL*–SOB at arraignment. (Stipulation No. 62). Formerly, Municipal Court practice required "good bail" on all charges for any individual charged with at least one enumerated offense. (Stipulation No. 61). Because the Municipal Court has adopted the PMU policy in effect prior to the August 5, 1992, memorandum, "other holds" should no longer be an issue as to persons admitted to the prisons after September 18, 1992. However, the Municipal Court procedure does not affect detainees already in prison on both enumerated and non-enumerated charges. (Tr. 12/18/92, at 145).[13]

The court finds the City in contempt for its unilateral decision to modify the release mechanism with respect to detainees with "other holds." The City will be ordered to return to the practice prior to the August 5, 1992, memorandum and list for release inmates with "other holds," so long as that practice is necessary to enable the City to list 175 inmates per week. This procedure shall remain in place until the prison population is reduced below the MAP, or until court approval of a modification to the Stipulation and Agreement.

2. Inmates Held on Enumerated Offenses Who Have State or Federal Detainers.

(a) Prior to the August 5, 1992, memorandum, inmates charged with enumerated offenses but subject to detainers from other jurisdictions, i.e., for parole or probation violations, were included in the proposed release orders submitted by the City. "PMU listed these individuals because it believed those individuals were eligible for release and there were other jurisdictions to which they could be sent." (Stipulation No. 20). As Ms. Bonney explained:

> ***7** We would list people that had ... enumerated charges or in some cases people that were sentence deferred under the local charge if as a result of the *Harris* order being entered, they would be released to

> another jurisdiction to be returned for their next court date if the court date was more than two weeks away, because under local understanding it's acceptable to move someone out whose court dates are more than two weeks away. If they paid their own bail they would have gone [to the other jurisdiction].

(Bonney Dep. at 50 51).[14]

The August 5, 1992, memorandum asserted that "[s]uch persons are not required to be listed on the *Harris* release orders." However, in a letter dated January 17, 1992, the City notified this court that it "did not object to transferring inmates with state parole detainers pursuant to the March 11, 1991, Consent Order, whose underlying charges are enumerated in Paragraph 3A and B of the September 21, 1990, Order." (Letter from First Deputy City Solicitor T. Michael Mather to the Special Master, January 17, 1992, Stipulations Ex. D.) (*see also* Stipulation No. 21).

Because the City agreed to the procedure under the Early Release Mechanism, it was not appropriate for the City unilaterally to decree that it would be discontinued.

(b) This category also includes inmates brought to the Philadelphia prisons from other institutions, "on writ," for court appearances and other reasons, who have not been returned to the originating jurisdictions. "PMU listed inmates in this category if such an inmate were kept in the Philadelphia prison system two weeks after the event for which they were transferred." (Stipulation No. 22).

Persons in this category may be admitted to the Philadelphia prisons under the terms of the qualified admissions moratorium only "for immediate court appearances." *See* Order of October 7, 1991.[15] However, defendants "had an informal agreement ... under which plaintiffs did not object to the transfer of inmates to Philadelphia for such purposes if the length of stay did not extend unreasonably beyond the trial date." (Stipulation No. 22). Accordingly, on May 20, 1992, the Special Master was informed that the City did not object to transfer of detainees in this category. (Stipulation No. 23). Beginning about May 29, 1992, the PMU included on release lists persons "who had come to Philadelphia on a writ of some kind and had not yet been returned to the jurisdiction in which they were incarcerated." (Bonney Dep., at 29). The Special Master would then order such persons returned to the originating jurisdictions. (*See, e.g.,* Stipulation No. 24). The court was aware of this and considered it consistent with the Stipulation and Agreement.

The manner in which the plaintiff class and defendants reached agreement concerning the treatment of persons "on writ" was appropriate. The parties consulted with the Special Master to avoid sanction by the court. As the parties then recognized, the policy agreed to was consistent with the Stipulation and Agreement. The decision of the City unilaterally to alter that policy, and the revised policy it implemented, were not consistent with either the letter or the spirit of the Stipulation and Agreement.

3. Inmates Who On the Face of Their Charges are Not Eligible for Release.

***8** Some detainees charged with aggravated assault—an enumerated offense—have been listed for trial in Municipal Court. "Even though aggravated assault is an enumerated offense, PMU concluded that the aggravated assault charge must have been dropped, without correction of the computer record, because aggravated assault is a felony and felony trials are not assigned to Municipal Court." (Stipulation No. 25)

Some detainees are charged with Possession of an Instrument of Crime ("PIC"), and detained for failure to post bail of less than $50,000. PIC is not an enumerated offense, but commission of a crime with a gun, knife, or explosive is an enumerated offense. "Because charging information regarding the precise weapon alleged was in the hands of the district attorney, but not PMU, PMU listed the detainee with PIC for release, providing an opportunity for the district attorney's office to object to the release if the release criteria were not met." (Stipulation No. 19).[16]

Ms. Bonney testified that "it had been our experience in handling these kinds of records issues that the best information is the court file or the DA's file, and in some cases [that was] the only way to find out, because the court people can't tell from their computers." (Bonney Dep., at 41).

Nevertheless, such persons were not appropriately listed for release. Ms. Bonney testified, "the burden is on the City to actively pursue the information to determine whether a person is eligible or not." (Bonney Dep., at 40). Ms. Bonney, director of the PMU, was acting on behalf of "the City." Shifting "the burden" to the District Attorney in a manner not contemplated by the Stipulation and Agreement, whatever the motivation, was not appropriate.

As with the other categories, the court regrets that the City unilaterally altered the manner in which the Early Release Mechanism was administered. However, with respect to this category the policy change was not in contempt of this court's Order of March 11, 1991,

because it was consistent with that Order.

4. Inmates Who are a Danger to Themselves or the Community.

The City unilaterally determined to stop listing inmates whose bail is set at $75,000 and higher, or who have mental health problems. (Stipulation No. 58). The Stipulation and Agreement, at ¶ 17(e), states: “Inmates to whose release the District Attorney objects on public safety grounds shall not be released if, but only if, the District Attorney designates for release an equivalent number of inmates who are eligible for release.” (*See* Stipulation No. 15).

Despite this clear provision in the Stipulation and Agreement, the City took the position that “[t]he decrees and orders do not require us to list persons who are a danger to themselves or to the community.” (Memorandum, 8/5/92, ¶ IV). In a letter to the Special Master, dated August 13, 1992, Mr. Jordan stated his “understanding that both by the terms of the Consent Decree, and by longstanding practice, such defendants are not to be listed.” (Stipulation, Ex. L).[17]

***9** In view of the bail practices in effect since implementation of the Stipulation and Agreement, and the temptation to overcome the release of certain pretrial detainees by setting high bail, it cannot be assumed by the City that bail in set amount necessarily marks persons who are a danger to the community. Moreover, the decision not to release for “dangerousness” is expressly that of the Special Master under the Stipulation and Agreement. The District Attorney could prevent such a release by substitution but has never availed itself of the opportunity to do so. Instead, it has occasionally requested special exceptions that have almost always been granted by the Special Master or the court. (*See, e.g.,* Stipulations Ex. L).

The District Attorney argues that “[the] obligation to release defendants as a population control method was limited by the provision [of the December 30, 1986, Consent Decree] that ‘the City defendants agree not to seek the release of any person whose release would constitute an imminent threat to public safety.’ (12/30/86 Consent Decree ¶ 4, p. 8).” (Objections of the District Attorney, at 4). That provision of the 1986 Consent Decree was superseded by ¶ 17(e) of the Stipulation and Agreement, which provides: “Inmates to whose release the

District Attorney objects on public safety grounds shall not be released if, but only if, the District Attorney designates for release an equivalent number of inmates who are eligible for release.” Under the District Attorney’s interpretation, ¶ 17(e) would be surplusage.[18]

In a memorandum from Mr. Jordan to Ms. Bonney, dated September 24, 1992, Mr. Jordan “directed the PMU to resume listing all candidates who might have fallen into the category of ‘persons who are a danger to themselves or the community,’ but to submit those names separately under protest.” (Stipulation No. 65). Subsequently, the City began submitting release lists captioned “B List” and “D List.” On the “B” list the City lists for release those inmates who are held on bail of $75,000 or more, and on the “D” list, the City lists those inmates whose records reflect a need for special mental health treatment. (Stipulation No. 65). Each of these lists includes the following general disclaimer: “Because the defendants named herein pose an even greater than usual potential risk of danger to the community and/or themselves, the City submits this list under protest, pending modification of the decree.” By the September 24, 1992, memorandum, a copy of which was submitted to the Special Master, the City conceded there was no basis under the Stipulation and Agreement for unilaterally excluding this category of detainees from release lists.[19]

Of course the court does not wish dangerous offenders released to the street. Were the District Attorney participating in the process in good faith, the provisions of the Stipulation and Agreement would function to prevent such releases. *See* Stipulation and Agreement, ¶ 17(e). The amount of bail is an inadequate determination of “dangerous” or non-releasable detainees, because whatever the arbitrary limit, the Stipulation and Agreement is too easily circumvented.

***10** With respect to detainees on the “D” list, the court agrees that inmates suffering from mental illness are poor candidates for release; such persons are not appropriately in the general population of the prisons in the first place. Jail is not a mental institution or treatment facility. Such persons should be held, if at all, in the Prison Health Services Wing (PHSW), which is not subject to the Stipulation and Agreement. Were they held there, they would properly be excluded from release lists. If the City was in compliance with the Stipulation and Agreement, there would be no need for a “D” list.

The court finds the City in contempt for its unilateral decision to modify the release mechanism with respect to detainees deemed “a danger to themselves or the community.” The City is directed to discontinue the practice of submitting “B” and “D” lists and of noting general objections. Such practices are not contemplated by the Stipulation and Agreement and are in derogation of ¶ 17.

D. *SANCTIONS.* Both the 1986 Settlement and the 1991 Stipulation and Agreement were entered as Orders of this court. This court has the obligation and the power to compel compliance and punish non-compliance through

contempt sanctions. *See Interdynamics, Inc. v. Firma Wolf,* 653 F.2d 93, 96 (3d Cir.1981) (court has power to enforce consent decrees), *cert. denied,* 454 U.S. 1092 (1981); *Latrobe Steel Co. v. United Steelworkers,* 545 F.2d 1336, 1344 (3d Cir.1976) (coercive civil contempt sanctions "look to the future" to compel compliance; compensatory civil contempt sanctions seek to "compensate the complainant" for damages caused by past disobedience). *See also* Stipulation and Agreement, at ¶ 30 ("Nothing herein is intended to restrict the Court's authority to issue contempt citations or its power under the All Writs Act.").

Determining sanctions for civil contempt is committed to the sound discretion of the trial court. *See Elkin v. Fauver,* 969 F.2d 48, 52 (3d Cir.1992), *cert. denied,* 113 S.Ct. 473 (1992). Here, the parties have stipulated to the manner of imposing sanctions for non-compliance with the Early Release Mechanism. Paragraph 19 of the Stipulation and Agreement provides:

> b. Defendants shall be assessed $100.00 per day for each inmate
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> (1) who is admitted into the Philadelphia Prisons in violation of the qualified admissions moratorium;
>
> (2) who should be designated for release in accordance with Paragraph 17 but is not so designated; or
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> (3) who is not released after receipt of a release order pursuant to Paragraph 17.
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> c. Defendants shall not incur fines pursuant to Paragraph 19.b(2) if they submit to the Special Master at least thirty-five (35) names per day meeting the other requirements of Paragraph 17, even if a greater number of inmates meets the criteria set forth in Paragraph 17.a.
>
> d. The provisions of this paragraph shall apply only on days that the MAP is exceeded, and no penalty shall be assessed with respect to the admission or custody of any inmate which is predicated on erroneous information supplied by a third party on which the defendants reasonably relied.

***11** "[T]he Stipulation and Agreement requires the imposition of fines if the City fails to submit 175 petitions only if there are 175 eligible inmates." *Harris v. Reeves,* 761 F.Supp. at 397 n.17. Beginning the week of August 10, 1992, the PMU began keeping a so-called "A list," which "contain[ed] the names of inmates who would have been listed for release, but for James Jordan's August 5 memorandum." (Stipulation No. 51). During the 15 week period from August 10, 1992, to November 16, 1992, the City submitted lists with a total of 1059 names ("actual submissions"). Had 175 names been submitted for each of those weeks, the total would have been 2625 names ("theoretical maximum submissions"). However, during some weeks, the "A" lists show something less than 175 available names:[20] the total is 2020 ("stipulated maximum submissions") (Stipulation Nos. 70—77, 81 87).[21] In addition, during the 5 week period from July 6 to August 7, 1992—before the August 5, 1992, memorandum, but after informal institution of the new policy—the City listed 866 names ("actual submissions"). Had 175 names been submitted for each of those weeks, the total would have been 965 ("theoretical maximum submissions"). Ms. Bonney testified that under its prior practice the PMU could have listed 175 names for each of those weeks, for a total of 965 ("stipulated maximum submissions"). (Stipulation Nos. 43, 45).

Therefore, 1,060 additional detainees would have been listed by the City had it not unilaterally changed the manner in which these lists were generated.[22] Under ¶ 19 of the Stipulation and Agreement, this shortfall results in a minimum assessment against defendants of $106,000. Since ¶ 19 contemplates a fine of $100 per inmate *per day* for each inmate not listed, the fine might be much higher. However, plaintiff class is seeking a fine of almost precisely this amount: "[W]hat we're seeking from the Court is an order holding the City in contempt, declaring that the changes interposed by Mr. Jordan's memo are not proper interpretations of the order, and, three, granting the plaintiffs fines of $100 per day or per list times the 1,069, or $106,900." (Lebowitz, Tr. 12/18/92, at 131). A fine in excess of this amount is not necessary to compensate plaintiffs for the City's conduct nor to compel the City's future compliance with the March 11, 1991, Order of this court.

As to the category of detainees referred to as "inmates who on the face of their charges are not eligible for release," the court found no contempt. However, the impact of the policy change with respect to this category was *de minimis. See* Stipulation No. 57. Nevertheless, imposing a lower fine than that urged by the plaintiff class takes into account that the plaintiff class did not fully prevail on this Motion.

At ¶ 30, the Stipulation and Agreement states:

> As a possible alternative or concurrent mechanism to the release mechanisms provided in Paragraph 17, defendants shall formulate, for submission to the Court, other criteria and procedures for the release of inmates (*e.g.,* those inmates who are not afforded a speedy preliminary hearing, trial, or sentencing).

***12** At the hearing on this Motion, the court stated that it did not "intend to disregard" the sanctions scheme set forth in ¶ 19, but that it was not clear "that the only appropriate sanction is monetary." (Tr. 12/18/92, at 177). "One possible sanction is to compel the City to comply with [¶ 30]," (Tr. 12/18/92, at 132), that is, "to order the City to formulate and submit to the Court other criteria and procedures for the release of inmates." (Tr. 12/18/92, at 177). Such an additional requirement is appropriate and justifies imposition of less than the maximum fine.

Accordingly, the court will order a fine in the amount of $106,000, of which $55,000 is to be paid forthwith. These funds will be used for the benefit of the plaintiff class. The court will allow the City until July 30, 1993, to comply with ¶ 30 of the Stipulation and Agreement. Upon satisfactory compliance, the remainder of the fine may be discharged. In the event that compliance with ¶ 30 is not forthcoming by that date, the City will be required to pay the balance of the fine. In this way the plaintiff class will be compensated for the City's disobedience of the court's March 11, 1991, Order, the authority of this court will be vindicated, and the City will be compelled to comply with the Stipulation and Agreement in the future, and to propose any desired changes in accordance with the method provided by the Stipulation and Agreement.

In civil contempt cases, "[c]ompensatory sanctions ... must not exceed the actual loss suffered by the party that was wronged." *Elkin,* 969 F.2d 52. It is not necessary to determine the "actual loss," because the Stipulation and Agreement provides a form of liquidated damages, and here the court is imposing sanctions in an amount less than that to which the parties stipulated. Moreover, these sanctions are not only compensatory, but seek to coerce the City's compliance with the Stipulation and Agreement in the future.

III. CONCLUSION.

This action has been before this court for over ten years; the parties have sought to achieve a workable solution to a seemingly "intractable" state of affairs, (Jordan, Tr. 12/18/93, at 150), by a long term planning process, new construction, and short term relief. The City voluntarily entered into the Consent Decree and the subsequent Stipulation and Agreement, including the Early Release Mechanism. "The Mayor has concluded that the City cannot afford the moral, social or economic cost of holding too many inmates in jails designed to accommodate many fewer.... By accepting the provisions of the Stipulation and Agreement, the City, through its Mayor, has weighed competing concerns and has chosen to strike a balance where the 'public interest' is deemed best served." *Harris v. Reeves,* 761 F.Supp. at 399 401.

The City, not merely its past administration, remains party to the Stipulation and Agreement. The present administration may wish to strike a new "balance between the legitimate interest in public safety ... versus the need to create proper and decent conditions within the prisons," (Jordan, Tr. 12/18/93, at 156 57), but that is no justification for implementing procedural changes under the Stipulation and Agreement without consultation with the plaintiff class or prior approval of this court.

***13** The Stipulation and Agreement, at ¶ 30, includes a procedure whereby the parties may propose changes. The City could have exercised this provision if it found the Early Release Mechanism undesirable.[23] "[As with] any other contract, the breaching party will not be heard to say that performance on its part proved more burdensome ... than it had anticipated." *Public Interest Research Group of New Jersey, Inc. v. Ferro Merchandising Eqpt. Corp.,* 680 F.Supp. 692, 694 (D.N.J.1987). Mr. Jordan, the City's attorney directly responsible for dealing with this court on this matter, has stated: "[T]he Mayor understands and respects [that] our best guarantee of completion of our [prison population] projects is the Court's continued stewardship." (Tr. 12/18/92, at 140). The City's decision unilaterally to alter the manner in which the Early Release Mechanism was administered was in derogation of its duty to the plaintiff class and to this court

An appropriate Order follows.

ORDER

AND NOW, this ______ day of June, 1993, upon consideration of Plaintiffs' Motion for Contempt Sanction Against Defendants for Failure to Comply With the Court's March 11, 1991 Order, Defendants' Response in Opposition, the District Attorney's Objections in the Nature of a Response to Parties' Positions on Contempt Sanctions, the Stipulated Facts, after a hearing, and for the reasons stated in the accompanying Memorandum, it is ORDERED that:

1. Said Motion is GRANTED.

2. The City of Philadelphia is adjudged IN CONTEMPT of this court's Order of March 11, 1991.

3. A FINE in the amount of $106,000 is ASSESSED against the City as compensation to the plaintiff class for past disobedience to said Order and to compel future compliance.

4. The City shall pay $55,000 forthwith.

5. The City may submit to the Special Master, on or before *July 30, 1993,* an alternative Plan in accordance

with ¶ 30 of the Stipulation and Agreement, and a proposal to ensure that mentally ill persons are not housed in the general population of Philadelphia prisons. Prior to submitting any such plans, drafts shall be submitted to the Special Master and provided to counsel for the plaintiff class, for review and comment Thereafter, the Special Master shall forward same to the court with recommendations.

6. If the City does not submit plans by July 30, 1993, the balance of the fine shall be paid by that date. If the City does submit plans, the court will determine by August 6, 1993, whether the plans warrant discharge of the balance of the fine.

7. Class counsel may submit a proposal for the use of the fine and a petition for counsel fees in connection with these contempt proceedings, or counsel may defer their request for funds until after August 6, 1993, when the total amount of the sum due will have been finally determined.

Mr. Jordan: “Yes, your Honor.”

Footnotes

1 The District Attorney has twice moved to intervene in this case; both motions were denied by this court, and those denials were affirmed on appeal. *See Harris v. Pernsley,* 113 F.R.D. 615 (E.D.Pa.1986) (denying motion for intervenor status), *aff'd* 820 F.2d 592 (3d Cir.1987), *cert. denied,* 484 U.S. 947 (1987); *Harris v. Reeves,* Order of January 14, 1991 (denying renewed motion for intervenor status), *aff'd,* 946 F.2d 214 (3d Cir.1991), *cert. denied sub nom., Abraham v. Harris,* 112 S.Ct. 1516 (1992). While the District Attorney is not a party to this case, the court has granted objector status to the District Attorney with regard to the release orders at issue here. *See Harris v. Pernsley,* 113 F.R.D. at 625. The conduct of the District Attorney is peculiarly relevant to the contempt determination, and “those who have knowledge of a valid court order and abet others in violating it are subject to the court's contempt powers.” *Roe v. Operation Rescue,* 919 F.2d 857, 871 (3d Cir.1990). As the City defendants acknowledge responsibility for the conduct alleged to be in contempt of this court's Order, and the plaintiff class has not moved for sanctions against the District Attorney, we do not address that question. (*See* Tr. 12/18/93, at 135 40).

2 The history of this case, and the provisions of the 1991 Stipulation and Agreement, are fully discussed in *Harris v. Reeves,* 761 F.Supp. 382.

3 The District Attorney, objecting to the Early Release Mechanism, filed an appeal of this court's Order of March 11, 1991. Because the Court of Appeals affirmed this court's earlier Order denying intervenor status to the District Attorney, the District Attorney's appeal was dismissed. *Harris v. Reeves,* 946 F.2d at 224. Pending that determination the Court of Appeals temporarily stayed the Early Release Mechanism. Therefore, it was not actually implemented until November, 1991.

4 The City was in compliance with the MAP on 53 days between June and September, 1988. “The release mechanism to which the District Attorney has expressed such vehement opposition has been made necessary by the City's inability to reduce the prison population below the MAP.” *Harris v. Reeves,* 761 F.Supp. at 396.

5 Paragraphs 3A and B list the so-called “enumerated offenses,” which are: murder, attempted murder, forcible rape, attempted rape, involuntary deviate sexual intercourse, corrupting the morals of a minor, arson, kidnapping, aggravated assault, a crime of violence committed or attempted with a firearm, knife or explosive, escape from custody, and certain domestic violence and abuse offenses set forth at 18 Pa. Cons. Stat. Ann. §§ 2711, 4952, 4955; 35 Pa. Cons. Stat. Ann. § 10190.

6 Plaintiff class suggests that if this court finds defendants in contempt, fines should be imposed for the period from July 6, 1992, through the date of this Order. For reasons subsequently stated, any monetary sanctions will be imposed only for the period from the week of July 6, 1992, until the week of November 30, 1992.

7 A court finding contempt by a wilful violation of a court order may order the offending party to pay the attorney's fees necessitated by the movant's efforts to enforce the Order. *See Ranco Ind. Products v. Dunlap,* 776 F.2d 1135, 1139 (3d Cir.1985).

8 Mr. Jordan is the Chair, Litigation Group, Office of the City Solicitor. “[A]s a practical matter, [Mr. Jordan is] the City Solicitor in this case.” (Statement of Mr. Jordan, Tr. 12/18/93, at 136).

9 At that time Ms. Bonney was Director of the Prison Population Management Unit (“PMU”), an operation of The People's Bail Fund under contract to the City of Philadelphia to provide support services related to control of the prison population. Among its several tasks, PMU listed pretrial detainees for release pursuant to ¶ 17 of the Stipulation and Agreement. (Dep. Jeanne Bonney, at 22; Stipulation Nos. 8, 9). Since the beginning of 1993, tasks formerly performed for the City by the People's Bail Fund have been performed by the City's Pretrial Services Office.

10 The Stipulation and Agreement was entered into on behalf of the City of Philadelphia—a corporate entity—by the former mayoral administration; the City remains bound by the Stipulation and Agreement even though a new Mayor has subsequently been elected.

11 *See also* Stipulations Ex. J. (memorandum, with population impact assessment, from Jean Bonney to J. Patrick Gallagher, Ph.D., Philadelphia Prisons Commissioner), estimating that a detainee whose "other holds" are disposed of by bail or otherwise spends 15 additional days in prison because *HvL*–SOB bail was not already entered on the non-enumerated charges.

12 The Special Master states that the "genesis" of the policy of listing detainees with "other holds" was a suggestion by Assistant District Attorney Sarah Vandenbrk. At the meeting where she made this suggestion, the City agreed in principal, and argued that the Bail Commissioners should give only *HvR*–SOB bail on non-enumerated charges.

13 The Court: "From September 18th on, assuming your memorandum is followed, the problem will not exist for persons admitted to the prisons from then on, but it does exist for that population that has been admitted prior to September—"

14 Under this procedure, detainees are sent to the jurisdictions in which they were sentenced on the offense for which they are on probation or parole, where they may be sentenced for the violation, and returned to Philadelphia as necessary for hearings and trials on the offense for which they were arrested. "It's an economy of time ... because if they are serving their sentence over there and waiting for our hearing, they are actually accomplishing more with their time because they won't be getting credit for their [parole or probation violation] sentence while they are here." (Bonney Dep., at 56 57).

15 The admission moratorium was originally established by ¶ 5 of the 1986 Consent Decree, and is part-and-parcel of the Early Release Mechanism. *See* Stipulation and Agreement ¶ 17(a), 18. The moratorium was amended most recently by Order of October 7, 1991.

16 This category of detainee is apparently limited to persons charged with robbery and PIC where PMU claims it was unable to determine if the instrument of crime was a gun, knife, or explosive, or some other instrument. (*see* Bonney Dep., at 60).

17 Attached to the Letter was an intra-office memorandum concerning the District Attorney's objections to inclusion in Lists No. 396, 398, and 399 of eleven detainee who were alleged drug crime conspirators. The memorandum did not propose other detainees for listing in lieu of those proposed for withdrawal.

18 The City's decision simply to delete certain drug defendants and other "dangerous" detainees from release lists (*see, e.g.,,* Stipulation Nos. 32, 33, 64) is particularly disturbing to this court in light of the court's clear instruction that "[t]he District Attorney may use this process [¶ 17(e)] to prevent the release of inmates charged with non-excepted drug offenses if he believes they present a particular threat to public safety." *Harris v. Reeves,* 761 F.Supp. at 398.

19 *See also* Stipulation No. 40: "The March 11, 1991, Order contains no such exception to the release mechanism."

20 Ms. Bonney testified the PMU might have been able to identify others for inclusion in the "A" lists, but for the additional resources the PMU was expending to comply with the August 5, 1992, memorandum. (Bonney Dep., at 43 44).

21 Paragraph 19 of the Stipulation and Agreement does not mean that no fine can be imposed for weeks when 175 eligible names were not available, if the City submitted fewer names than were actually available. Where more than 175 inmates were eligible in a week, the City was not required to list more than 175. Where less than 175 names were eligible, the City was required to list them all. In reaching the 2,020 figure, the court did not count any amount on a given "A" list in excess of 175.

22 Stipulated maximum submissions (2,020
965 = 2,985) less actual submissions (1,059
866 = 1,925) equals 1,060. At the hearing, counsel for the plaintiff class stated the shortfall reflected on the "A" lists was 1,069. The court's figure covers an additional five weeks, but does not include for any week the amount by which an "A" list exceeded 175 names. (Lebowitz, Tr. 12/18/92, at 121). *See* Stipulation and Agreement ¶ 19(c) ("Defendants shall not incur fines ... if they submit to theSpecial Master at least thirty-five names per day ... even if a greater number of inmates meets the criteria....").

23 Presently pending before the court is the defendant's Motion to Modify the Consent Decree. Because of the City's actions in derogation of the schedule established by the court's Order of January 6, 1992, a decision on that Motion has been delayed. *See* Order of January 11, 1993. *Cf. Rufo v. Inmates of Suffolk County Jail, et al.,* 112 S.Ct. 748 (1992). A hearing on that motion is now set for December 20, 1993 (Order of June 11, 1993).