

1993 WL 441728

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United States District Court,
E.D. Pennsylvania.

Martin HARRIS, Jesse Kithcart, Johnny Grant,
Randall Cummings, Evelyn Lingham, Thomas
Cotton, Larry Hines and Michael Mobely

v.

Theodore LEVINE, in his official capacity as
Commissioner of the Department of Human
Services of the City of Philadelphia, Albert F.
Campbell, Rosita Saez-Achilla, Genece E. Brinkley,
Esq., Rev. Paul M. Washington, M. Mark Mendel,
Esq., Hon. Stanley Kubacki, Mamie Faines, each
in his or her official capacity as a member of the
Board of Trustees of the Philadelphia Prison
System, J. Patrick Gallagher, in his official
capacity as Superintendent of the Philadelphia
Prison System, Harry E. Moore, in his official
capacity as Warden of Holmesburg Prison,
Wilhelmina Speach, in her official capacity as
Warden of the Detention Center Press Grooms, in
his official capacity as Warden of the House of
Corrections, Ramond E. Shipman, in his official
capacity as Managing Director of the City of
Philadelphia, Hon. Edward G. Rendell, in his
official capacity as Mayor of the City of
Philadelphia, and the City of Philadelphia.

No. CIV. A. 82-1847. | Oct. 28, 1993.

Opinion

MEMORANDUM AND ORDER

SHAPIRO.

*1 On October 5, 1993, this court ordered that:

1. Defendants shall forthwith pay into the court the entire amount of the fines due and owing, \$584,000, at the time of the submission of plaintiffs' September 3, 1993 demand letter for failure to submit the Facilities Audit and Ten-Year Plan on their respective due dates; and

2. Defendants shall submit the Facilities Audit and Ten-Year Plan within ten (10) days of the date of this Order.

A hearing has been set for Friday, October 29, 1993, to consider imposition of additional accrued fines and/or

whatever other measures of coercive civil contempt are necessary to obtain submission of the Facilities Audit and Ten-Year Plan, including but not limited to dismissal of defendants' Motion to Modify ¶ 17 of the March 11, 1991 Consent Decree.

On January 7, 1992, Edward G. Rendell, in his official capacity as Mayor of the City of Philadelphia, filed a Motion to Modify the provisions of the December 30, 1986 Consent Decree and the March 11, 1991 Consent Decree. The Order requested would provide that,

[A]ny and all provisions of the consent decrees (1) establishing a maximum allowable population for the Philadelphia Prisons, (2) requiring the non-admission of Philadelphia prisoners, and (3) requiring the release of Philadelphia prisoners [be] severed from the remaining provisions of the decrees and [be] vacated. Specifically paragraphs 2 f-g, 3-5 (as amended) of the December 30, 1986 consent decree and paragraphs 17-19 and 30 of the March 11, 1991 consent decree ... [be] vacated. The remaining provisions of these decrees ... remain in effect.

The memorandum in support of the Motion made clear that the City supported the Consent Decree provisions for prison planning and construction:

This administration invites discussions with counsel for the plaintiff class about the substantive issues of this litigation and recognizes that the prisoners and the public have legitimate interests in the enlargement and improvement of Philadelphia's prisons and in sound penological policies. In fact, consistent with the desire of this Court to expedite the construction of sound prisons, on December 11, 1991, *then Mayor-elect Rendell wrote then Managing Director Pingree asking that the prison planning and construction schedule be speeded up*. As Mayor, Mr. Rendell will direct the implementation of this request as urgent City policy (Motion, p.18, n. 14). (Emphasis

supplied)

The City has repeatedly asked this court to postpone the hearing on the Motion to Modify until the City's consultants have completed their compliance audit of the physical conditions. Copies of correspondence in the matter are attached hereto (Exhibit A). The City has used the ongoing audit as a reason to forestall plaintiff's discovery in preparation for the hearing on the Motion. On July 29, 1993, the City requested an *indefinite continuance* with regard to the scheduling of the hearing in the City's Motion to Modify the Consent Decrees until the City submits the Physical Audit and Ten-Year Plan.

*2 Under the terms of ¶ C.2 of the Prison Planning Process appended to the March 11, 1991 Consent Order, defendants are required to conduct an analysis of existing prison facilities (the "Facilities Audit") and develop a plan for necessary physical improvements to existing facilities. Under the terms of the Stipulation and Agreement Amending Due Dates for Plans Comprising the Prison Planning Process ("the Stipulation and Agreement"), the Facilities Audit was to be completed by August 31, 1992.

Under the terms of ¶ C.3 of the Prison Planning Process, defendants are required to develop a phased plan for the development of such new correctional capacity as may be necessary to house the projected prison population that cannot be housed in existing facilities (the "Ten-Year Plan"). Under the terms of the Stipulation and Agreement, the Ten-Year Plan was to be completed by December 31, 1992.

On January 7, 1992, defendants filed the Motion to Modify the December 30, 1986 Consent Order and the March 11, 1991 Consent Order (the "Motion") but no hearing date was requested. By Order of September 14, 1992, the court set a hearing date on the Motion for November 9, 1992; by Order of November 6, 1992, at the request of defendants by letter of September 23, 1992, and after the submission of a proposed revised hearing schedule by the parties, the hearing was postponed to January 25, 1993.

By Order of January 11, 1993, because of defendants' failure to submit the Facilities Audit, on which they had relied in their Proposed Findings of Fact and Conclusions of Law, submitted November 30, 1992, the court further postponed the hearing on the Motion. On March 24, 1993, defendants represented that the Physical Audit and Ten-Year Plan would be submitted on or before June 1, 1993, and plaintiffs responded on April 21, 1993 with a proposed hearing date of November 3, 1993.

On May 10, 1993, defendants revised their estimate of when the Physical Audit and Ten-Year Plan would be

submitted to "the end of June 1993." In reliance on defendants' representation, the court issued an Amended Order on June 10, 1993, scheduling the hearing for December 20, 1993. On June 29, 1993, defendants requested a "further extension" of time to July 30, 1993, to submit the Facilities Audit and Ten-Year Plan in order to allow review of the draft by the Chief of Staff and Finance Director, and plaintiffs responded on July 1, 1993 that defendants had never been granted an extension and remained in default of the respective due dates.

On July 29, 1993, defendants informed the court that review of the drafts of the Facilities Audit and Ten-Year Plan would not be completed "before the end of August," and defendants proposed that, when the plans are submitted, the parties would propose an appropriate hearing schedule. On August 27, 1993, the Special Master wrote to defendants inquiring when they estimated that the Facilities Audit and Ten-Year Plan would be submitted, and no response had been received when the court ordered the defendants to submit the Facilities Audit and Ten-Year Plan within ten days.

*3 Defendants now move for an extension of time for submission of the Facilities Audit and Ten-Year Plan until January 15, 1994. The Motion for Extension of Time avers that the present City Administration learned for the first time just prior to the August 31, 1992 due date for the Facilities Audit that it had failed to perform or cause to be performed the work necessary for preparation of the Facilities Audit or the Ten-Year Plan. It further avers:

The essential preparatory research needed for the Facilities Audit and Ten-Year Plan was further delayed because of the need to first obtain this Court's approval of the contract engaging the Correctional (sic) Justice Institute ("CJI") to serve as the consultant for the Defendants in preparing the Audit and Plan, which approval was not granted until the end of 1992. Substantial work could not begin on these projects until after that point in time (Par. 5.).

At the City's request, the court has approved expenditure of bond funds to prepare the Facilities Audit and the Ten-Year Plan; it is admitted that drafts of same are presently available and under review by Chief of Staff, David L. Cohen, and Finance Director, Stephen P. Mullin, per letters of June 29, 1993 and July 29, 1993. However, the defendants aver in their Motion for Extension of Time that:

The basic data required for the final

stage of preparing the Audit and Ten-Year Plan has recently been obtained from CJI. Final analysis of this data and integration of the data into a comprehensive Audit Report and Ten-Year Plan will require until January 15, 1994 (Par. 7).

The defendants have decided to have the Audit and Ten-Year Plan done simultaneously to expedite completion of the Facilities Audit and the Ten-Year Plan. They assert:

It is the belief of the Defendants that this decision has shortened the total amount of time needed for completion of the Audit and Ten-Year Plan, but it has meant that they will be completed and submitted together rather than allowing earlier submission of the Facilities Audit as was originally envisioned (Par. 6).

This “decision” was made without the agreement of the plaintiff class or the court and suggests the defendants believe they may unilaterally modify a Consent Decree to comport with changing notions of what is “envisioned.” This erroneous concept of the obligation to comply with a court order entered by consent of the parties is very troubling.

Moreover, the reasons asserted to justify the continuance are factually in error. The Motion for Extension of Time asserts ignorance of the requirements of the Consent Decree and efforts required to effect compliance for the first eight months of its administration. That assertion is totally inconsistent with efforts by this court to educate the new administration, including numerous informal meetings of the Special Master, William G. Babcock, Esq., and his consultant, Donald M. Stoughton, not only with counsel but with staff responsible for compliance and meetings on the record between the court and the parties on more than one occasion. Such an assertion belies the competence of counsel and the history of this case.

*4 The motion incorrectly attributes lack of funds to perform the Facilities Audit and Ten-Year Plan to inaction of this court. However, it was not originally contemplated that financial support for this work would come from bond funds and requests of the prior administration for same had been refused. In an effort to expedite the preparation of the Financial Audit and Ten-Year Plan, a request for a contract extension for the Criminal Justice Institute in the amount of \$190,390, submitted June 23, 1992, was approved by this court on

July 7, 1992. The scope of service included work on the Facilities Audit, *beginning in April, 1992*. The second contract extension was submitted in December, 1992 because the original request proved inadequate; after investigation by the court, the second contract extension in the amount of \$50,328, including work on both the Facilities Audit and the Ten-Year Plan, was approved January 22, 1993.

The reasons asserted to justify the continuances are so specious, they can only be characterized, charitably, as pretextual. Therefore, the Motion for an extension of time to produce the Facilities Audit will be denied. It is available, at least in draft form, and its production is essential to the planning process contemplated by the Consent Decree and unqualifiedly affirmed by the present City administration. Its production also helps to fulfill the discovery requirements of plaintiff so that a hearing on the defendants’ Motion can eventually be scheduled. The court has countenanced the City’s delay when it appeared conducive to expediting the planning process, but there is no apparent reason why the Facilities Audit cannot be produced at this time. Defendants aver that by delaying the submission of the Facilities Audit until the Ten-Year Plan is submitted, it will shorten the amount of time needed to complete the Ten-Year Plan. No explanation is given for why that would be; the court is unable to imagine a logical explanation. No continuance to produce the Facilities Audit will be granted.

However, the Ten-Year Plan presents a somewhat different situation. Its production is required by the Consent Decree and failure to produce it results in fines to be paid by the City. However, the Consent Decree never required the Facilities Audit and Ten-Year Plan to be submitted simultaneously. The City’s unilateral decision to do so was never approved by the court. The need for the Ten-Year Plan is not as acute as the need for the Facilities Audit because its production is not a necessary predicate to a hearing on the City’s Motion. The plaintiff class will not be prejudiced by this continuance because the fines provided for by the Consent Decree will continue to run. Plaintiff’s counsel will have the Facilities Audit to study in the interim and be better prepared to evaluate the Ten-Year Plan when it is submitted. Therefore, the court will grant the City’s Motion for a continuance to produce the Ten-Year Plan until January 15, 1994.

ORDER

*5 AND NOW, this—th day of October, 1993, upon consideration of defendants’ Motion for a Continuance to January 15, 1994, it is ORDERED that:

Harris v. Levine, Not Reported in F.Supp. (1993)

1) Defendants' Motion is granted in part and denied in part:

a) As to the Facilities Audit, the Motion for Continuance is DENIED. It shall be provided forthwith in whatever form it presently exists, whether as a preliminary outline, draft, text subject to review, etc.

b) As to the Ten-Year Plan, the requested continuance until January 15, 1994, is GRANTED.