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United States District Court,
E.D. Pennsylvania.

Martin HARRIS, Jesse Kithcart, William Davis, Randall Cummings, Evelyn Lingham, Estrus Fowler, Tyrone Hill and Nathaniel Carter
v.
The CITY of Philadelphia, Joan Reeves, in her 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, Raymond E. Shipman, in his official capacity as Managing Director of the City of Philadelphia, and Hon. Edward G. Rendell, in his official capacity as Mayor of the City of Philadelphia No. 82-1847

No. CIV. A. 82-1847. | Feb. 16, 1994.

Opinion

MEMORANDUM AND ORDER

SHAPIRO.

***1** Before the court is defendants' Motion Requesting that Contempt Fines Not Be Imposed ("Defendants' Motion") and Plaintiffs' Response to City's Motion for Reconsideration ("Plaintiffs' Response"). Defendants are moving for reconsideration of penalties imposed by the court pursuant to the Memorandum and Order of June 14, 1993 and ¶ 7 of the Order of June 16, 1993.

I. BACKGROUND

The Memorandum and Order of June 14, 1993 was issued in response to a motion submitted by the plaintiff class for contempt sanctions against the defendants for failure to comply with ¶ 17 of the March 11, 1991 Consent Order. Paragraph 17 mandates the implementation of an early release mechanism for pretrial detainees whenever the defendants exceed the Maximum Allowable Population for the Prison System, as established in the December 31, 1986 Consent Order. Paragraph 7 of the Order of June 16, 1993 imposed penalties for failure to comply with ¶ 16 of the March 11, 1993 Consent Order and the Order of July 2, 1991. Pursuant to ¶ 16, the defendants agreed to provide a minimum of 250 treatment beds, including alcohol and substance abuse rehabilitation, training and other support services, for those who would otherwise be committed to or retained in the Prison System, and the July 2, 1991 Order required that the defendants maintain not only the 250 beds but 90% occupancy thereof or be subject to a penalty of $500.00 per day.

II. DISCUSSION

The law in this Circuit is clear that a motion for reconsideration must be denied unless it raises new arguments and provides new information. [See plaintiffs' Brief at 2. But c.f. *Smith v. Hartford Ins. Group,* 6 F.3d 131, n. 2 (1993)] The defendants have provided no information not available prior to the issuance of the Orders, but they have raised new arguments and those arguments will be addressed herein.

A.

Paragraph 16 and the Order of July 2, 1991.

The defendants argue that the court cannot hold the City in contempt for violation of Paragraph 16 because the City did contract with GPCCC for 250 treatment beds, and that the court cannot hold the City in contempt for violation of the 90% occupancy requirement in the Order of July 2, 1991, because the Order altered the terms of the Consent Order and the court lacked the authority to do so.

As to the court's power to issue the July 2, 1991 Order, even if correct, the defendants' argument is not timely. It is ludicrous for the defendants to suggest that the March 11, 1991 Consent Order required only that the City provide 250 treatment beds but that they need not be filled. This is a prison overcrowding case and all of the provisions within the Consent Order were directed at either reducing the prison population or providing adequate beds for those incarcerated. To argue that the Consent Order intended only for the City to pay for 250 treatment beds but not necessarily use them strains credulity.

However, even if the July 2, 1991 Order exceeded the court's authority to enforce the terms of the Consent Order, the defendants' argument is not timely. At no

previous time during the more than two years prior to the defendants' instant motion did the City move for reconsideration of the Order; nor did it seek certification of the Order for appeal. The defendants never sought a modification of Paragraph 16 to clarify whether the City's obligation was only to provide the 250 beds, or also to have them occupied.

***2** The defendants have had ample opportunity to seek reconsideration of the Order for this is not the first time that the court has imposed penalties for its violation. On October 10, 1991, in response to plaintiffs' motion for contempt sanctions for the City's failure to maintain 90% occupancy at GPCCC, the court imposed a penalty of $44,000; the City paid this sum into court. The City did not appeal the Order of October 10, 1991 or move for reconsideration of the Order of July 2, 1991. The City is now estopped from moving for its reconsideration.

Even if the court concurred with the argument that merely providing the 250 treatment beds was adequate to comply with the Consent Order, the defendants would be in contempt of the Consent Order. Paragraph 16 expressly provides for 250 treatment beds, providing "alcohol and substance abuse rehabilitation, training and other support services." Based on the defendants' own evidence, the beds provided by GPCCC did not fulfill those requirements.

Exhibit B to the City's Memorandum of Law in Support of City Defendants' Motion Relating to the Imposition of Contempt Fines ("City's Memorandum") contains a report prepared by the City's Department of Public Health. The report describes a facility that is more comparable to a jail than a treatment facility.

> ... the actual treatment program ... seems ... to be hard pressed to effectively assist the clients in achieving the program's stated goals.
>
> There was not enough clinical staff available to adequately treat the clients and screen clients at the prisons ....the counseling staff does not have regular meetings with the supervisor or with the case managers ....the major flaw of the therapeutic aspect of the program was the low level of actual group and individual counseling ....this level of therapeutic intervention is absolutely inadequate and inappropriate for a residential treatment facility, and calls into question the staff's real understanding of the needs of the population.

City's Memorandum, Exhibit B at 8.

> ... many clients seemed to be milling in the day room ..., with no apparent purpose.

Id. at 9.

> Given the low level of client contact, it is unclear how significant underlying psychological and emotional problems of clients can be assessed and addressed in six months.
>
> The articulated philosophy and methodology did not address the dual problems of addiction and criminal behavior.
>
> ... clinical services seem to be scant and insufficient for the target population ...

Id. at 11.

The report concludes that "the John Czmar Treatment Center functions as a pre-release criminal justice shelter, not a drug rehabilitation program." *Id.* Under these circumstances, it simply is not possible for the defendants to establish compliance with the terms of Paragraph 16 of the Consent Order.

Finally, the defendants argue an impossibility defense because the contractor did not provide an adequate facility and the state court judges did not grant early parole to the program. However, the defendants did not employ "all reasonable efforts to comply" with the court's Orders. *Citronelle-Mobile Gathering, Inc. v. Watkins,* 943 F.2d 1297, 1301 (11th Cir.1991) (Citation omitted).

***3** Judge Legrome Davis testified that he would no longer grant early paroles to GPCCC because of concerns about the program. However, it was up to the City to provide a program that would gain the confidence of the state court judges, and the City failed to do so. GPCCC officials testified that the program's severe underfunding rendered them incapable of providing the services required. Furthermore, the City did nothing to monitor GPCCC's performance pursuant to its contract. The court's expert, Donald Stoughton, reported:

> There is virtually no contract monitoring requirement or process in place. It is essential to develop and maintain a performance monitoring process to assure that the City is getting what it is paying for.

City's Memorandum, Exhibit C at 3.

There is no showing that the City employed "all reasonable efforts to comply." On the contrary, the evidence indicates little or no efforts by the City to help correct the problems with the program.

B.

Paragraph 17.
Defendants were found in contempt for failure to comply with ¶ 17 with respect to three categories of inmates—those with other holds, those from other jurisdictions and those deemed a danger to themselves or the community.

1. Those With Other Holds
¶ 17 requires that the defendants "designate and submit to the Special Master the names of inmates who meet the criteria of Paragraph 4.E.(i)-(iii) of the September 21, 1990 Order." The City argues that inmates with other holds (e.g., enumerated charges, sentences or detainers) are not included. Defendants rely on ¶ 4.E.(3) providing that a person charged with an enumerated offense "shall not be released."

However, as plaintiffs correctly point out, ¶ 4.E.(2) provides for the designation of "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." It does not forbid designation of inmates with other holds, nor does it require their release. It requires only that all prisoners held in default of bail be considered for designation.

Designating inmates with other holds helps reduce the prison population. For many inmates in this category, reducing their bails to zero on the non-enumerated charges will have no impact on their ultimate release dates. However, for many others, it will mean earlier release dates with an immediate impact on the prison population. For example, an inmate with both a non-enumerated charge and an enumerated charge whose latter charge is dismissed will be released immediately on the non-enumerated charge if bail has been reduced to zero. If bail has not already been reduced at the time that the enumerated offense is dismissed, the inmate's release will be delayed three to four weeks until his/her petition is processed through the *Harris* release mechanism. Such a delay serves no purpose.

Even if listing inmates with other holds were not within a strict interpretation of the terms of the Consent Order, the City would be estopped from raising it at this time. In its March 26, 1991 Memorandum Opinion approving the Stipulation and Agreement, more than one year prior to the City's refusal to list inmates with other holds, the court wrote that:

> ***4** [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. 382, 398 (E.D.Pa.1991)

(Emphasis supplied.)

Defendants did not appeal the court's decisions. Nor did they move for reconsideration, modification or clarification. In fact, defendants continued to list inmates with other holds until Mr. Jordan's memorandum of August 5, 1992 to the Population Management Unit, more than sixteen months after the court's Memorandum Opinion.

Furthermore, by memorandum of December 6, 1991 to the plaintiff class, the Special Master reiterated the court's interpretation of the Consent Order. Again, defendants raised no objection. Thus, it is clear that: defendants had adequate notice of the court's interpretation of ¶ 17; it complied with that interpretation for a period of sixteen months; that it never contested that interpretation; and it then unilaterally attempted to amend the court's interpretation of ¶ 17.

2. Those From Other Jurisdictions
This category of inmates includes: (a) those with enumerated offenses who also have detainers from other jurisdictions; (b) those brought to Philadelphia "on writ" for court appearances[1] who have not been returned despite the fact that the court dates have passed. The defendants again argue on reconsideration that these inmates do not fall within a strict interpretation of the Consent Order.

Of the several categories of inmates that the defendants discontinued listing, this is the most puzzling to the court. Not only did the City initially agree to listing inmates from other jurisdictions and then unilaterally withdraw from its prior agreement, but, in terms of public policy, this category of inmates does not raise the possible risks associated with the other categories. These inmates are not to be released to the streets, but to lawful incarceration in other jurisdictions.

This is especially true with respect to those inmates returned to Philadelphia on writs where hearing dates already have passed. There is nothing else holding these inmates in Philadelphia, and, by the terms of Paragraph 2.h of the 1986 Consent Order, they must be returned to the sending jurisdictions.[2] For those inmates to remain in the Philadelphia Prisons is a violation of the 1986 Consent Order.

With respect to those with detainers from other jurisdictions, the defendants not only had notice of the court's interpretation of the Consent Order, but had

expressly agreed that those inmates should be listed (Letter from First Deputy City Solicitor T. Michael Mather to the Special Master, January 17, 1992, Stipulation Ex.D.). As for those returned to Philadelphia "on writ," the Special Master was informed on May 20, 1992, that the defendants did not object to the transfer of these inmates. Defendants may not unilaterally alter the terms of the Consent Order as interpreted by the court and implemented by the parties.

3. Those Deemed a Danger to Themselves or the Community

***5** The defendants argue that ¶ 4 of the 1986 Consent Order permits them to omit from the release lists those inmates deemed by the City to be a danger to themselves or the community. Paragraph 4 of the 1986 Consent Order required that the City seek the release of certain inmates "through the mechanism of the Bail Master appointed by the *Jackson* court or otherwise" when the prison population exceeded the MAP.

While it is true that Paragraph 4 of the 1986 Consent Order allowed the City not to seek the release of those inmates "whose release would constitute an imminent threat to public safety or to the inmates' own health, safety or welfare, that provision was superseded by the 1991 Consent Order. Because of the ineffectiveness of ¶ 4 of the 1986 Consent Order in keeping the prison population within the MAP, ¶ 4 of the Order of September 21, 1990 further defined the implementation of the 1986 Consent Order.

¶ 17 of the 1991 Consent Order represents a recognition by the parties that ¶ 4 of the 1986 Consent Order, as implemented through ¶ 4 of the Order of September 21, 1990, was ineffective in maintaining the MAP. ¶ 17 of the 1991 Consent Order, establishing a new, more specific release mechanism, replaced the general requirement of ¶ 4 of the 1986 Consent Order and many of the procedures established in ¶ 4 of the Order of September 21, 1990.

Furthermore, as pointed out by the plaintiff class, the 1991 Consent Order, while not explicitly superseding ¶ 4 of the 1986 Consent Order, does so by implication. First, ¶ 18 of the 1991 Consent Order setting forth those provisions of the 1986 Consent Order which are preserved,[3]does not include ¶ 4. Second, the parties' creation of a new release mechanism pursuant to ¶ 17 of the 1991 Consent Order strongly implies their intent to replace the former system, except insofar as the former mechanism was expressly preserved. Finally, subparagraphs ¶ 17 d. and e. of the 1991 Consent Order establishes a new mechanism for addressing the "public safety" concern. Rather than giving defendants the discretion to omit names of those inmates they deem a danger to themselves or the community, ¶ 17 places the burden on the District Attorney to object to a listed inmate believed to be a special risk to the public safety on the list. That name must be withdrawn if the District Attorney substitutes another inmate eligible for release. For these reasons, the court holds that the discretionary right simply to refuse to designate the names of inmates on grounds of public safety was not reserved to the City by the 1991 Consent Order.

Footnotes

1 Several were brought to Philadelphia to attend funerals but had not been returned to the sending jurisdictions.

2 Paragraph 18 of the 1991 Consent Order expressly preserved Paragraph 2.h of the 1986 Consent Order, which provides:

> [n]o federal or state prisoners, other than inmates detained for *immediate court appearances,* shall be housed within the Philadelphia Prison System, except for those federal prisoners in the custody of the United States Marshal. Said federal prisoners may be housed pursuant to the contract between the City of Philadelphia and the United States Marshal. (Emphasis supplied.)

3 Paragraph 18 provides that ¶ s 1 and 2. a-c and h-i of the 1986 Consent Order survive, as well as the September 21, 1990 Order, except ¶ s 4. A.-C.