1991 WL 208467
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Chancery of Delaware, New Castle County.

Randolph DICKERSON, et al., Plaintiffs,
v.
Michael N. CASTLE, Governor of the State of Delaware, et al., Defendants.

Civ.A. No. 10256. | Submitted: Sept. 24, 1991. | Decided: Oct. 15, 1991.

Attorneys and Law Firms

Neilson C. Himelein, Community Legal Aid Society, Inc., Wilmington, Ben T. Castle, ACLU of Delaware, Wilmington, Elizabeth Alexander, Alvin J. Bronstein, and Mark Lopez, ACLU National Prison Project, Washington, D.C., for plaintiffs.

David A. White, Department of Justice, Wilmington, and Thomas J. Capano, Counsel to the Governor, Wilmington, for defendants.

Opinion

MEMORANDUM OPINION

CHANDLER, Vice Chancellor.

***1** Plaintiffs filed this lawsuit in March 1980 on behalf of two classes of individuals: prisoners convicted of violations of Delaware law incarcerated in the Delaware state prison system and pre-trial detainees. The defendants are the Governor, the State Commissioner of Correction (the "Commissioner") and various other officials of the Delaware Department of Correction (the "Department"). The original complaint alleged that conditions of overcrowding at the Delaware Correctional Center in Smyrna were violative of article I, § 11 of the Delaware Constitution of 1897. That section provides in pertinent part that "in the construction of jails a proper regard shall be had to the health of prisoners."

After several years of discovery and negotiations between the parties, the parties reached a settlement agreement. Later, this Court entered it as an Order. That agreement (the "Order"), 17 pages in length, went far afield from the original complaint, covering conditions at all four major prisons which the Department operates. It addressed problems including overcrowding, medical treatment, legal access and environmental conditions at the facilities. It provided that the defendants give the plaintiffs monthly summaries concerning implementation of the agreement.

Approximately one year after entry of the Order, the plaintiffs filed a motion to show cause why the defendants should not be held in civil contempt based on their alleged violations of the settlement agreement. The parties took discovery with respect to this motion, briefed the issues and later argued them. However, this Court held in abeyance a decision on the motion pending certain negotiations between the parties.

In their motion to show cause, the plaintiffs contended that defendants had failed to abide by the settlement agreement in three areas. First, plaintiffs argued that the defendants violated the requirement to reduce overcrowding, especially at the Multi-Purpose Criminal Justice Facility ("Gander Hill"), the Women's Correctional Institution ("WCI") and the Sussex Correctional Institution ("SCI"). At Gander Hill, the settlement agreement required defendants to eliminate housing inmates in non-housing areas, which consisted of eight classroom areas and two multi-purpose rooms, by November 30, 1988. However, since execution of the settlement agreement, defendants periodically have used day rooms and counselors offices for housing and have double-bunked protective custody inmates, which plaintiffs contend is "inconsistent with the spirit and structure" of the settlement agreement because it conflicts with the agreement's goal of reducing overcrowding. At the WCI, the defendants periodically had exceeded the population limits in the multiple resident rooms and various dorms in the Banton Building during the months before plaintiffs filed their motion. By January 31, 1989, according to the plaintiffs, the defendants also had failed to meet the requirement in the settlement agreement to remove all remaining pre-trial detainees from the receiving areas at SCI.

***2** Second, plaintiffs argued that the settlement agreement required defendants to clean and balance the air ventilation systems at all four prisons by June 30, 1989, and to ensure by that date that the amount of ventilation (fresh air or recirculated air) would be in accordance with the American Correctional Association's ventilation standards. Plaintiffs asserted that this requirement had not been met. Finally, the plaintiffs contended that defendants anticipatorily had breached their obligation under the Order to construct a new 200-bed women's prison by December 31, 1991.

Following oral argument on the motion to show cause, the parties have worked closely together, with this Court's

encouragement, in an effort to resolve some of the points in dispute. The defendants vehemently denied that they were in contempt of the Order at the time the plaintiffs filed their motion to show cause. It is undisputed, however, that significant changes have occurred over the course of the past year and a half, changes that have improved the lot of prisoners and pre-trial detainees in the Delaware prison system.

The improvements made include the complete cleaning and balancing of the ventilation systems in three of the four prisons, as well as improvements in the system in other respects. In addition, a private contractor has completed the cleaning and balancing in the Delaware Correctional Center, with the exception of one or two buildings. The United States Bureau of Prisons will test all of the ventilation systems to ensure that they meet the American Correctional Association's ventilation standards.

Efforts at reducing prison overcrowding and minimizing the use of non-housing areas also have produced significant changes in all four prisons. The State has moved all protective custody inmates from Gander Hill into single cells at SCI, thereby ending double-bunking and opening up additional housing space at Gander Hill. At SCI, the Commissioner has prohibited housing pre-trial detainees in the receiving area, except for certain limited disciplinary cases. Furthermore, the Commissioner has agreed to provide plaintiffs' counsel with weekly or daily logs of the status of inmates in the receiving areas as well as the status of pre-trial detainees housed in other parts of SCI.

As far as overcrowding in the women's facilities, the state has obtained a site for the new 200-bed women's prison, with construction work well under way and expected to be completed within the time mandated by the settlement agreement. Periodic overcrowding at the WCI, a situation that should be eliminated when the new prison opens, has been more difficult to control. However, several measures have been implemented at WCI to reduce overcrowding in certain dorms of the Banton Building and in the beauty parlor area.

Increased emphasis on pre-trial release has resulted from the cooperation of the Department of Corrections, the Attorney General's Office, the Public Defender and various law courts. In addition, with the assistance of the Edna McConnell Clark Foundation, the Department has begun an aggressive parole release program designed to ensure that every inmate eligible for parole has a parole application completed prior to his or her parole eligibility date. This practice will enable the Department to arrange release earlier than under existing practices, thereby saving additional prison bed space.

***3** Another initiative involves an aggressive program for work release. That is, the Department will concentrate its efforts in identifying inmates eligible for work release and assisting them in finding community-based drug and alcohol rehabilitation programs designed to maintain their work release eligibility. As a corollary to the emphasis on work release eligibility, the Department has instituted efforts to reduce the number of inmates who are returned to prison for violation of probation, principally through the development of funding sources for community-based drug and alcohol treatment programs. The Commissioner also has required that all recommendations for revocation of any offender from community placement receive a high level review within the Department to determine whether added conditions or treatment would enable the offender to remain in the community. These various efforts, no doubt caused in part by this litigation, represent institutional changes that should improve, over the long term, the overcrowding at all four Delaware prisons.

Considering the effect of these different measures and the determined efforts by all parties to address the overcrowding issue, I conclude that the defendants are presently in compliance with the terms of the Order. An exception may be that from time-to-time A and C dorms of the Banton Building at WCI exceed the population limits imposed by the Order. Occasionally A dorm is used to house up to five inmates, even though it is limited under the Order to four inmates; on other occasions A dorm's population is only three inmates. In C dorm, the number of women housed occasionally rises to as many as six on a given day, although typically only three are housed there as the Order requires. Because the defendants have instituted a number of measures designed to stay within the population limits at WCI and because the impending opening of the new 200-bed women's prison offers a long-term solution to the overcrowding problem, the occasional violation of the Order in connection with the population in the Banton Building is *de minimis* in nature.

Nevertheless, the plaintiffs now ask me to decide their motion, hold the defendants in contempt, put in place a system of fines for possible prospective violations of the agreement, and provide that the proceeds from the levying of such fines be used to establish a bail fund which would result in the release of some pre-trial detainees. According to the plaintiffs, this Court should impose the proposed bail fund, or something similar, as an automatic population reduction device. Plaintiffs also seek via separate motion to amend the complaint. This is my decision on those motions.

I.

A motion to show cause why the defendants should not be

held in contempt is addressed to the discretion of this Court. *Fatemi v. Fatemi,* Pa.Super., 537 A.2d 840 (1988); *School Committee v. North Providence Federation of Teachers,* R.I.Supr., 468 A.2d 272 (1983); *Persons v. Lehoe,* Vt.Supr., 554 A.2d 681 (1988). This Court must use the contempt power in a manner appropriate to the situation so as to best resolve the conflict at hand. *City of Wilmington v. A.F.S.C.M.E.,* Del.Ch., 307 A.2d 820 (1973).

***4** While in a criminal contempt proceeding any penalty for contumacious behavior is punitive in nature, this is a proceeding for civil contempt. The only purpose for finding the defendants in contempt and assessing a penalty here would be to coerce them to obey the Order.[1] *Delaware State Bar Ass'n v. Alexander,* Del.Supr., 386 A.2d 652 (1978); *Buckson v. Mancari,* Del.Supr., 223 A.2d 81 (1966); *Department of Services for Children, Youth & Their Families v. Cedars Academy,* Del.Ch., C.A. No. 1399-S, Allen, C. (Oct. 30, 1989) (where the court is acting principally to coerce compliance with its order, the contempt is civil). In order to bring this coercive power to bear on the defendants, this Court must first find by clear and convincing evidence that a violation of the Court Order has taken place. *Feliciano v. Colon,* 697 F.Supp. 26 (D.P.R.1987); *but see City of Wilmington v. A.F.S.C.M.E.,* 307 A.2d at 823 (applying preponderance of evidence standard because of "civil" nature of the proceeding). For a party to be found in contempt for violation of the Court's Order that violation must not be a mere technical one, but must constitute a failure to obey the Court in a "meaningful way." *Palmigiano v. DiPrete,* 700 F.Supp. 1180 (D.R.I.1988); *Ruiz v. McCotter,* 661 F.Supp. 112 (S.D.Tex.1986).[2] Even if a finding of contempt is made, the Court need not impose sanctions for failure to comply with its Order if it perceives that the party is making a good faith effort to remedy the problems which necessitated the action. *Albro v. County of Onondaga, New York,* 681 F.Supp. 991 (N.D.N.Y.1988).

This case procedurally is unusual because plaintiffs seek to have this Court bring to bear its coercive power against defendants who are in current compliance with the Court Order in question and who have implemented a host of institutional changes in a good faith effort to maintain compliance in the the future. The plaintiffs have cited a large number of cases in which courts have used the contempt power to enforce compliance with orders involving the administration of prisons and jails. Only one of the cited cases involved the use of the contempt power against a party in current compliance with a court order, a prior violation of which was the basis for the finding of the contempt. *Toussaint v. McCarthy, supra.* In that case, however, there was a pattern of egregious and unexcused delay in connection with court orders to administer a prison in a constitutionally permissible manner. Therefore, the *Toussaint* court felt constrained to set up a scheme to forestall future noncompliance.[3]

In contrast to the facts in *Toussaint,* where the court had been faced with a long period of noncompliance and evidence that, absent coercion, noncompliance was likely to exist again in the future, the defendants in this case have worked, in my opinion, diligently and in good faith both to comply with the Order and to address the concerns of the Court and the plaintiffs. Whether, as the defendants claim, they were in compliance with the Order at the time the plaintiffs filed their motion or, as the plaintiffs would argue, only belatedly came into compliance with certain aspects of that Order, the history of the last three years of this litigation has been one of sustained progress toward better and better conditions for prisoners and pre-trial detainees in the Delaware prison system.

***5** For these reasons, therefore, I need not decide whether, at the time plaintiffs filed their motion, the defendants were in technical noncompliance with the Order. Such finding would be of no practical value in deciding whether to apply a coercive remedy. Since the defendants are in compliance at present and are making good faith and meaningful efforts to improve overall living conditions in the prison system, coercion currently is not needed.

More importantly, the behavior of the defendants over the past three years convinces me that a finding of contempt and the implementation of a coercive scheme to prevent noncompliance with the Order in the future is not only unnecessary but may in fact be counter-productive. This is because the parties now appear to be working well together, with the defendants providing candid and current information to the plaintiffs, as well as liberal access to inspect prison conditions. The threat of coercive sanctions, in my opinion, might well end this prevailing spirit of cooperation.

Defendants are providing plaintiffs with regular reports on the status of inmates in the receiving areas of SCI and on the population fluctuations at WCI and Gander Hill. Wardens and shift commanders at the various prisons evidently supply information to plaintiffs on request. The relationship between the parties has been characterized by a free flow of information and an easy exchange of ideas and suggestions for addressing concerns about compliance with the Order. The only significant disagreement has been over the need for, and wisdom of, an automatic population reduction device, such as the proposed bail fund.

Accordingly, I decline to enter a finding of contempt or to order sanctions against the defendants at this time. Of course, the Order calls for ongoing monitoring of the situation by the plaintiffs. Should, in the plaintiffs' opinion, the defendants fail to comply with the Order in a meaningful way,[4] the plaintiffs are free to renew this

motion.[5]

While I need not say more about plaintiffs' motion for an order to show cause, I think it is appropriate to comment on the particular remedy sought by the plaintiffs in this situation. The plaintiffs suggest a $3,000 per day fine which would accumulate for each day defendants violate the Court Order. This in itself is not unusual. However, the plaintiffs go further and contend that this Court should levy these fines to form a fund from which some pretrial detainees' bail could be made. This would have the effect of reducing the prison population, which the plaintiffs claim is fitting in that it is the defendants' failure to reduce that population which has resulted in, plaintiffs argue, a part of the defendants' noncompliance with the Order. It appears to me that it is this specific method of prison population reduction, and not specific compliance with the Order (which, after all, has been achieved), that motivates the plaintiffs.

It would be only under egregious circumstances and with grave misgivings, however, that I would contemplate such a sanction for contempt. Of course, all cases of this nature, in which the courts seek to enforce an order against the Executive Branch of government, raise separation of powers concerns. But the particular remedy urged upon me by the plaintiffs, in my opinion, raises separation of powers problems to an exceptional degree. Not only does it involve prescribing a method whereby the Executive Branch must conduct its affairs in order to comply with the Court Order, it also impinges on the power of the Legislative Branch, which has established certain parameters for bail to be posted in categories of cases-parameters that payments from the proposed bail fund effectively would change. In addition, it would alter fundamentally the power of the law courts of this state to determine bail in certain criminal cases.

***6** I understand that certain courts exercising the contempt power in cases involving the administration of prisons have fashioned similar remedies. *See, e.g., Mobile Co. Jail Inmates v. Purvis,* 581 F.Supp. 222 (S.D.AL.1984). Such a remedy may be within this Court's power. However, because institutional concerns underlying the doctrine of separation of powers make appropriate extreme caution when this Court is asked to become involved in the *administration* of the prisons by the Executive Branch,[6] and because of the other separation of powers concerns that I have expressed above, such an intrusive sanction is one to reserve as a last resort, rather than as a point of departure, to ensure future compliance with this Court's Order.[7]

There remains one issue to be dealt with in connection with plaintiffs' motion for an order to show cause. The plaintiffs have requested attorneys' fees in connection with this motion. Chancery Court Rule 88 provides for attorneys' fees to be shifted under certain circumstances. Where a suit by one member of a class results in a benefit to all members of the class, an exception may be made, at the Court's discretion, to the general rule that litigants must pay their own expenses, and the Court may award attorneys' fees to the plaintiffs. *TriState Mall Assoc. v. A.A.R. Realty Corp.,* Del.Ch., 298 A.2d 368 (1972).

In this case, there were reasonable grounds for the filing of plaintiffs' motion. At the time plaintiffs filed their motion, defendants admitted, for example, that the population limits for certain dorms at WCI had been periodically exceeded. Since that time, substantial benefits have inured to the classes represented in this suit, prisoners and pre-trial detainees. These include the improved ventilation systems, removal of protective custody inmates from double-bunking at Gander Hill, numerous initiatives (*e.g.* accelerated parole, pre-trial release, and work release programs, etc.) to speed up release of nonviolent offenders and to expand community-based treatment programs, and ensuring separate housing areas for pre-trial detentioners at SCI. Defendants also have taken steps to ensure timely completion of the new 200 bed women's facility. I find a substantial likelihood that at least some of these benefits, gained for both classes, were the direct result of the plaintiffs' motion and resulting litigation.

Considering the benefits obtained for the class and the causal connection of those benefits to this litigation, I conclude that reasonable attorneys' fees are appropriate. *See Chrysler Corp. v. Dann,* Del.Supr., 223 A.2d 384 (1966); *TriState Mall Assoc., supra.* The plaintiffs shall submit an affidavit, with a form of Order, stating the amount of attorneys' fees incurred, pursuant to Chancery Court Rule 88. Defendants may, of course, respond regarding the reasonableness of such fees.

II.

I turn now to the other matter before me, plaintiffs' motion for leave to amend the complaint. Plaintiffs request the following amendment:

***7** 1. The federal constitutional claims raised in this litigation are based on 42 U.S.C. § 1983.

The prayer for relief in the Complaint is hereby amended by revising subsection (e) to read as follows:

(e) that attorneys' fees be awarded to plaintiffs pursuant to 42 U.S.C. § 1988.

Pursuant to Chancery Rule 15, this Court shall grant leave to amend the pleadings freely when justice so requires. It seems to me beyond dispute that the plaintiffs may assert

prospective violations of the United States Constitution, and that they may bring those claims pursuant to 42 U.S.C. § 1983.[8] Title 42 of the United States Code provides for attorneys fees via § 1988.

The defendants oppose the plaintiffs' motion, contending that it may operate retrospectively to provide a basis for attorneys' fees in connection with litigation concerning plaintiffs' contempt motion, which I have dealt with above. This, claim defendants, will cause them prejudice, presumably because they were not on notice of such a claim and would have acted or litigated differently in light of it. The plaintiffs also believe that the amendment will operate to state a retroactive claim for attorneys' fees in connection with the litigation of their contempt motion. Indeed, this seems to be the motivation for seeking the amendment at this time.

Without deciding whether the prejudice which defendants claim would result from the amendment would have been sufficient to deny the motion, I note that 42 U.S.C. § 1988 (1988) simply provides for reasonable attorneys' fees which would appear to be coextensive with the fees that I have already found appropriate under this Court's inherent equity power. Thus, the sole reason which the defendants have advanced for denying this motion is moot. The plaintiffs' motion to amend is granted. An amended complaint, reflecting the proposed amendment, should be filed within twenty days, together with a form of order.

IT IS SO ORDERED.

[1] The other permissible purpose for assessing the penalty after a finding of civil contempt is to recompense the other party for losses caused by failure to comply with a court order. *Delaware State Bar Ass'n v. Alexander,* Del.Supr., 386 A.2d 652 (1978). However, this remedial function of the contempt power is rarely used. I have not considered it here for at least two reasons. First, the plaintiffs have not sought a remedial award. *See Toussaint v. McCarthy,* 597 F.Supp. 1427 (N.D.Cal.1984) (focus of contempt analysis should be on coercion where plaintiffs do not seek compensatory contempt award). Second, the plaintiffs have presented no evidence of any individual losses to prisoners or pretrial detainees (or, for that matter, any particularized loss to the class as a whole) as a result of the defendants' alleged failure to comply with the Order.

[2] "The purpose of judicial intervention in a case such as this is not simply to prevent isolated instances of misconduct. The Court's duty is to remove a threat to constitutional values posed by the manner of operation of the institution." *Palmigiano v. DiPrete,* 700 F.Supp. 1180, 1183 (D.R.I.1988).

[3] The other cases cited by the plaintiffs all involved use of the contempt power against parties in current or chronic noncompliance with an order of a court. *See Inmates of Allegheny County Jail v. Wecht,* 874 F.2d 147 (3rd Cir.1989); *Twelve John Does v. District of Columbia,* 855 F.2d 874 (D.C.Cir.1988); *Badgley v. Santacroce,* 800 F.2d 33 (2d Cir.1986); *Albro v. County of Onondaga, supra; Palmigiano v. DiPrete, supra; Tate v. Frey,* 673 F.Supp. 880 (W.D.Ky.1987); *United States v. State of Michigan,* 680 F.Supp. 928 (W.D.Mich.1987); *Feliciano v. Colon,* 697 F.Supp. 26 (D.P.R.1987); *Ruiz v. McCotter, supra; Jackson v. Whitman,* 642 F.Supp. 816 (W.D.La.1986); *Mobile County Jail Inmates v. Purvis,* 581 F.Supp. 222 (S.D.Ala.1984); *Miller v. Carson,* 550 F.Supp. 543 (M.D.Fla.1982).

[4] It is one thing for periodic fluctuations in population to occur (causing an excess of inmates to be housed in a particular area of the prison system at a given moment in time) and an altogether different thing when evidence clearly shows that the defendants are not making serious and good faith efforts to cooperate with plaintiffs and to assure future compliance.

[5] Although at some point, in my view, even institutional reform litigation must have an end.

[6] As opposed to directing compliance with the Order, with the method to be supplied by the Executive Branch.

[7] Even absent the considerations expressed above, I would be reluctant to order such a scheme implemented since it seems to me that the accused in such a situation, his bail paid from a state fund, would experience none of the compulsion to appear for trial that the bail system is designed to ensure.

[8] I note that the classes set forth in the complaint include "all persons who are presently *or who may in the future* be housed at the Delaware Correctional Center awaiting trial for alleged violations of Delaware criminal law because of an inability to make the required bail." And "all persons presently incarcerated *or who may in the future be incarcerated* at Delaware Correctional Center after conviction of violations of Delaware criminal laws." (Emphasis added).