UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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JAMES BENJAMIN, et al.,

Plaintiffs,

- against -

ANTHONY J. SCHEMBRI, et al.,

Defendants,

and related cases.

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75 Civ. 3073
(MEL)

APPEARANCES:

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LASKER, D.J.

In an effort to conclude this long-running litigation by achieving compliance with the consent decrees controlling this case, the parties were ordered to, and did enter into a Disengagement Plan on June 2, 1987, the purpose of which was to bring about the ultimate conclusion of court supervision. The Disengagement Plan requires, as a prerequisite for certification of compliance, the implementation of an effective internal compliance monitoring mechanism. The Disengagement Plan has been supplemented by a 1990 order requiring the parties to prepare "work plans" identifying the tasks to be done to achieve compliance and setting deadlines for accomplishment of those tasks; an order of July 10, 1992 which provides for a system of monetary sanctions for unexcused noncompliance with such deadlines and an order of February 25, 1994, negotiated by the parties with the assistance of the Office of Compliance Consultants (OCC) establishing a Compliance Monitoring Work Plan. The work plan provides for the creation of an internal compliance auditing process within the Department of Correction (DOC) to assess compliance with the requirements of the Decrees.

The monitoring plan provides that the compliance audits were to commence on January 2, 1995, that the parties were to reach agreement on staffing issues by June 28, 1994, which they did; and the City

"take the necessary steps to ensure that certain staff are hired" by December 12, 1994. The staff specified in the monitoring plan consisted of 4 Management Auditors, three Staff Analysts and two Office Aides.

The order of July 10, 1992 provides a schedule of coercive fines, the goal of which was to ensure compliance with work plan deadlines, but the order specifies that "[i]f either party believes that it cannot comply with any deadline within any work plan adopted by the Court ... that party shall ... request an extension of time from the court via OCC as soon as the need for an extension becomes apparent, and in any case no later than one week before the date stated in the work plan."

As indicated above, the Monitoring Work Plan required the City to hire compliance monitoring staff by December 12, 1994. By letter of December 5, 1994, the Department of Correction informed the OCC of its request for a twenty-nine week extension of this hiring requirement. The request was premised on the problems caused by the City-wide severance of employees and the anticipated re-deployment or layoffs of Department Staff.

On December 13, 1994, OCC informed the Department that it did not believe that the anticipated effect of the City-wide severance program was an acceptable basis for extending the December 12 deadline since the City retained complete control of the

deployment and hiring of its own personnel. OCC added that the proposed seven-month extension was "particularly distressing" because execution of the Compliance Monitoring Work Plan was "the linchpin in the Department's efforts to move toward disengagement" and a seven-month extension would be a body blow to the attainment of that goal.

On December 19th, in telephone conference with the parties, the Court denied the Department's application for an extension of the deadline. That conference was not recorded; but the reasons for denial were that it did not appear to have been made "as soon as the need for an extension becomes apparent," as required by the governing order of July 10, 1992, and that, in any event, the request for an extension of seven months to hire 9 employees was unreasonable on its face. On January 10, 1995, a written order was entered, denying the Department's request for an extension of time and ordering the defendants to fill the nine civilian auditing positions forthwith.

On January 24, 1995, plaintiffs moved to hold the defendants in contempt for noncompliance with the Compliance Monitoring Work Plan.

WHAT HAPPENED ?

The facts are not substantially in dispute. As far back as August 12, 1994, Alan Vengersky, Director of Personnel of the Department Of Corrections informed Deputy Commissioner Gary M. Lanigan, that the Management Auditor positions could not be filled by "internal redeployment"; that is, reassignment of DOC staff. Accordingly in late August, Vengersky, on behalf of DOC, submitted to the Office of Management and Budget (OMB) a "Planned Action Report" (a "PAR") requesting approval for the hiring of the requisite Management Auditors and Staff Analysts from the relevant Civil Service lists. Thereafter, the ball bounced back and forth between OMB and DOC. For example, Douglas Apple, Assistant Director of OMB with responsibility for budgetary matters affecting DOC, testified that in both September and November 1994 he told Commissioner Lanigan that the PAR for the civilian compliance auditing staff would not be approved "at that time" and that DOC should consider filling those positions, including Management Auditors, through internal redeployment. Apparently Lanigan concluded that OMB's position was not final because he testified as late as February 1, 1995 that "...The process to continue to try to convince OMB to have hiring done for these positions as well as other critical positions is an ongoing conversation to this date."

In ordinary parlance, this action-reaction-counteraction syndrome might be called passing the buck. Whatever the proper term, the Apple-Lanigan episode is typical of exchanges which occurred between Apple and Vengersky (i.e., OMB and DOC), as well as within DOC between Vengersky, Chief Sullivan and others, with the result that, by the time DOC was convinced that OMB was dead set against hiring from the Civil Service lists at a time when the City was involved in massive severance of employees to reduce the budget, the jig was up and the Court ordered dated was staring DOC in the face.

WHAT TO DO ABOUT IT ?

The plaintiffs contend that the defendants have violated the Compliance Monitoring Work Plan by not meeting the Court directed date for hiring of monitoring personnel (in fact the positions were not filled until February 3, 1995) and that the defendants are not absolved by having applied for an extension on December 5, 1994 because that date was not "as soon as the need for an extension becomes apparent" as specified in the order of July 10, 1992. The plaintiffs further argue that the defendants' conduct constitutes a contempt because, according to the plaintiffs, the defendants were not "reasonably diligent or energetic in complying with what was ordered." New York State National Organization for Women v. Terry, 886 F.2d 1339, 1351 (2d Cir. 1989),

cert. denied, 495 U.S. 947, 110 S.Ct. 2206 109 L.Ed. 2d 532 (1990). The plaintiffs ask that the penalties provided for by the order of July 10, 1992 be imposed, and that a fine of $500,000 be levied on account of the contempt.

The defendants argue strongly that their efforts to comply with the Court ordered hiring schedule were "reasonably diligent" and "energetic", their failure to meet the deadline has caused no immediate injury, there has been substantial compliance with the order, and the financial crunch of 1994 caused problems, which, in spite of previous financial crises, were unforeseeable and which justified the City's efforts to meet its Court ordered obligations by redeployment of severed personnel rather than by hiring off Civil Service lists.

There is no doubt that the defendants have violated the hiring schedule of the Compliance Monitoring Work Plan and that the City failed to inform the Court of its probable inability to meet the schedule "as soon as the need for an extension bec[ame] apparent." Although DOC may originally have given itself plenty of lead time in putting a hiring proposal to OMB in August, 1994, it was clear early on from Apple's strongly negative statements that DOC would probably not be able to put the ball across the line before the whistle blew. The City's failure to keep the Court and other parties informed on

a timely basis of the at least considerable likelihood that the ordered date could not be met, and its failure to meet the date itself constitute a blow to the Disengagement process sufficient to justify the imposition of the financial penalty imposed by paragraph 5 of the order of July 10, 1992. If OMB wishes to carry out its mission of saving the City money, this is not the way to do it.

While there is no doubt that the defendants violated the Compliance Monitoring Order, there is serious doubt whether their conduct constituted a contempt. It is clear from the record that DOC personnel in particular, and OMB personnel to a lesser extent, spent considerable energy trying to comply with the order while faced with a serious fiscal crisis. There was much smoke, flapping of wings and a substantial exchange of phone calls and memoranda. The problem is not that nobody tried to do the right thing. The problem is that the matter was not given the priority that this Court ordered requirement, the result of years of litigation, and the purpose of which is to terminate the litigation, merited.

In two earlier instances, the defendants have been held in contempt and have been sanctioned. The episode at hand differs, however, not only in that in the earlier situations the defendants recklessly, if not

deliberately, disobeyed the orders in question, but that the disobedience involved -- i.e., failure to supply an inmate a bed on a timely basis and unilaterally reneging on a commitment to provide inmates with cook-chilled food from a facility ready to go -- had a directly adverse impact on the detainee members of the plaintiff class. Fortunately, no comparable impact has been imposed on the plaintiffs as a result of the current violation. Accordingly, the motion to hold the defendants in contempt is denied, but the defendants -- including OMB and all relevant City agencies and actors -- are on notice that in matters of this kind the cumulative record may be controlling and that, in light of the history to date, a further lapse might certainly constitute a contempt. Take us seriously.

Submit order on notice.

Dated: Boston, Massachusetts
March 1, 1995

U.S.D.J.