UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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RALPH VALVANO, et al., : 70 C 1390

Plaintiffs, :

-against- :

BENJAMIN MALCOLM, et al., :

Defendants. :

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DETAINEES OF THE BROOKLYN HOUSE OF DETENTION, et al., :

Plaintiffs, : 73 C 261

-against- :

BENJAMIN MALCOLM, et al., :

Defendants. : November 15, 1974

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Appearances:

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Assistant Corporation Counsel
of Counsel

J U D D, J.

MEMORANDUM AND ORDER
(Motion for Contempt)

Plaintiffs have moved to find the defendants in contempt for failure to comply with the portions of this court's order entered July 21, 1974, as amended on October 2, 1974, which require that "counting from September 1, 1974 no person shall be confined in a cell with another person for a period longer than thirty days unless on the voluntary written consent of both persons".

Facts

The plaintiffs assert that double celling continues unabated at both Brooklyn House of Detention for Men (BHD) and Queens House of Detention for Men (QHD). Defendants respond that they are in conformity with this court's judgment because they have obtained the voluntary written consent of all inmates who have presently been double celled for more than

thirty days and that no one in either facility has been in a cell with another man for more than thirty days without such written consent.

Plaintiffs reply that the consents to which the defendants point were not really voluntary. They assert in the first place, that the consents were impelled by fear that refusal would simply result in transfer to a more distant institution where they would still be double celled. In the second place, they assert that the manner in which the consents were obtained was inherently coercive.

The form used at BHD in a survey of the detainee population undertaken on October 26, 1974 stated:

> I herewith request permission to live in a double occupancy cell. I fully understand that, under a Federal court decision, I have the right to single cell occupancy while housed in the Brooklyn House of Detention. I wish to forego that right and be permitted to have a cell partner.

It appears that a correction officer would approach a cell in which detainees were housed and if the cell contained two detainees would say words to the effect, "you men are in a double cell, do you want to consent to that?" Thereupon, the officer would hand the form to the detainees

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for their signature. There was no oral explanation of the right to be housed in a single cell and no evidence that the officers had been given detailed knowledge of the court's order or the department's policy with regard to the order, so that they could respond meaningfully to inquiries about it.

The form used at QHD read:

> A judgement has been handed down by Judge Orrin G. Judd wherein you have the option to elect to be confined in single or double cell occupancy.
>
> In accordance with this judgement, you are to indicate by check (√) mark how you wish to be housed:
>
> CHECK ONE: SINGLE OCCUPANCY ( )
> DOUBLE OCCUPANCY ( )

Before the survey at QHD one of the members of the inmates liaison committee inquired whether persons who indicated a preference for single-cell occupancy would be transferred to another institution where they would be double celled. An Assistant Deputy Warden replied in effect:

> We are not ruling out that possibility. It is a possibility that we may have to consider.

When the liaison committee reported to detainees who were double celled, and would prefer single cell confinement, they voiced concern that a choice for a single cell

might result in a transfer to the New York House of Detention for Men at Rikers Island and being housed there in double cells.

The provision in this court's order to permit continued occupancy of standard cells by two men on voluntary consent was not intended to permit easy evasion of this court's factual conclusion that double celling was dehumanizing. The provision simply recognized the professional opinion of certain witnesses that some inmates preferred not to be alone in a cell.

The court recognizes the pressures of numbers at BHD and QHD, especially in light of the Court of Appeals' opinion in Wallace v. Kern, 499 F.2d 1345, holding that a federal court may not put an overall limit on the length of pre-trial confinement. The court also recognizes that some inmates at BHD and QHD may have to be moved to less accessible facilities in order to achieve single-cell housing. A man's desire to be near his family, friends and lawyer may be a reason for consenting for a while to improper housing. The choice should not, however, be between double-celled housing at BHD or QHD and double-celled housing at the place of transfer.

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If the number of requests for single cells exceeds the single cells available elsewhere, the remedy is for the warden to notify the courts that the institutions are at capacity. The courts may then be able to release inmates who face the least serious charges and present the least likelihood of absconding, in order to assure a "tolerable living environment" for those who must be confined.

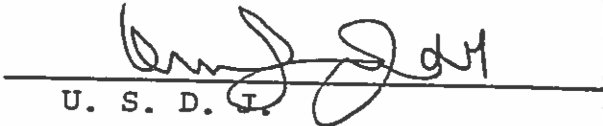
Plaintiffs had not sought the aid of the court in the implementation of the order against double celling before the surveys were made at BHD and QHD, or before the motion for contempt was brought. It was only at the time of the hearing on the contempt motion that any provision was requested for giving the inmates clear notice of the rights afforded them under this court's order. A notice has been submitted and approved with a direction that it be distributed to the inmates and posted, Order of November 6, 1974.

There is no question that the court would have power to hold defendants in contempt, even though they are public officials, and that one sanction for contempt would be money fines. 18 USC § 401; Landman v. Royster, 354 F.Supp. 1292, 1300 (E.D. Va. 1973); Hamilton v. Love 358 F.Supp. 338

(E.D. Ark. 1973); Jones v. Wittenberg, 357 F.Supp. 696 (N.D. Ohio 1973). However, the court does not find that there has been any deliberate violation of its order by the defendants. Any question of coercion in obtaining consents may be obviated by letting inmates reconsider their choices.

Consents heretofore obtained should not be regarded as permanent. A man who has consented to double cell occupancy should have the right after another thirty days to request a transfer to a single cell with the assurance (a) that he will not be penalized in any way for making such a request and (b) that if he is transferred to another institution he will not be placed in a standard cell with another man.

A revision of the form of notice heretofore approved should be made in order to incorporate the provisions set forth above. The plaintiff is directed to settle an order in accordance with this memorandum, with a revised form of notice, on three days' notice to defendants' attorneys.



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