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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Patricia Welsch, et al.,
Plaintiffs,

v.

No. 4-72 Civil 451

Arthur Noot, et al.,
Defendants.

Following a careful review of the entire record in this matter, I herewith adopt in total the Findings, Conclusions and Recommendations submitted on December 7, 1981 by Frank J. Madden, Hearing Officer, regarding the above matter.

Respectfully submitted,

Dated this 7th day
of December, 1981.

Lyle D. Wray
Lyle D. Wray, Ph.D.
Monitor

UNITED STATES DISTRICT COURT
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FOURTH DIVISION

Patricia Welsch, et al.,

Plaintiffs,

FINDINGS, CONCLUSIONS
AND RECOMMENDATIONS

v.

No. 4-72 Civil 451

Arthur E. Noot, et al.,

Defendants.

PART I

A. Procedural Posture of Present Hearing

1.A.1. In response to information provided by plaintiffs' counsel, on July 6, 1981 the Court Monitor issued a Notice of Initial Determination pursuant to paragraph 95(e) of the Consent Decree. (Exhibit 46). In the absence of any response from the defendants, on July 16, 1981, the Court Monitor established dates for a conference with the parties and set a hearing date for August 7, 1981. This schedule was not adhered to because of the AFSCME strike. The conference was held on October 14, 1981. The hearing on these issues was held before Frank Madden, Hearing Officer, and Lyle Wray, Court Monitor, on November 3, 1981.

1.A.2. Luther A. Granquist and Anne L. Henry, Developmental Disabilities Advocacy Project, appeared as counsel on behalf of plaintiffs, and P. Kenneth Kohnstamm, Special Assistant Attorney General appeared on behalf of defendant Commissioner of Public Welfare and the defendant Chief Executive Officer, and Larry D. Starns, Special Assistant Attorney General, appeared on behalf of defendants Acting Commissioner of Finance and Commissioner of Administration.

B. Hearing Proceeding

1.B.1. In lieu of testimony, counsel for the parties

submitted a Stipulation providing for receipt into evidence of the deposition of Dennis Boland taken October 7, 1981, a total of 54 exhibits, and a detailed statement of undisputed facts.

C. Prior Monitor Hearings

1.C.1. Issues similar to those presented before the Court Monitor at this time were presented to Mr. Madden in his capacity as Court Monitor of the previous Cambridge State Hospital Consent Decree on November 25, 1981. Mr. Madden's recommendations were issued on January 30, 1981. A hearing was held before Mr. Madden, as Hearing Examiner, and the 1980 Consent Decree Court Monitor on March 13, 1981 which dealt, in part, with staffing and funding issues. A decision on the issues raised was issued on May 21, 1981. The present issues are considered in the context of this prior consideration of similar issues.

PART II

GENERAL CONCLUSIONS

A. Applicability of Paragraphs 37 and 39

2.A.1. The staffing requirements as stated in paragraphs 37 and 39 of the Consent Decree are applicable only "until such time as each state hospital has positions sufficient to meet all the staffing requirements of paragraphs 46 through 55 of this Decree." At the present time, these staffing requirements are not met at each state hospital. (Fact Statement, ¶59; Exhibits 37-44). The failure to meet these requirements is not, in itself, a violation of the Decree, for those standards are future standards to be met as the population of the institutions declines. The failure to meet those standards simply makes paragraphs 37 and 39 applicable to the issues presented now.

B. Full-Time Equivalent Position

2.B.1. Paragraphs 37 and 39 refer only to full-time equivalent positions. As will be discussed below, one of

the key issues presented in this hearing is whether reductions in funding can constitute reductions in positions. There is clearly a correlation between allocated funding and allocated positions. (See Boland Deposition, page 82). For purposes of this Decree, a full-time equivalent position is a position such as a state complement position or a position comparable in scope to a state complement position for which funding is guaranteed.

C. Showing of Diminution of Care Not Required

2.C.1. In order to establish non-compliance with paragraphs 37 and 39 of this Decree, whether as a result of a reduction in positions or a reduction in funding, the plaintiffs are not required to establish that such reductions have led to a diminution in the care state hospital residents are provided. (See Welsch v. Noot, paragraph 40(e) Monitor Findings of Fact and Recommendations, page 20, ¶3 (January 30, 1981)).

D. Scope of Issues Decided

2.D.1. It is not within the scope of the responsibilities of the Court Monitor to make determinations with regard to the power of the Court to order, if requested, implementation of the corrective actions proposed and the recommendations made in these Findings, Conclusions and Recommendations. The Court Monitor also recognizes that the interpretation of the Consent Decree is ultimately for the Court to decide. However, it is not possible for the question of compliance with the Decree to be considered apart from interpretation of the Decree itself. To that end, the Court Monitor's interpretation is incorporated herein.

PART III

ISSUES RELATING TO THE CLOSING
OF ROCHESTER STATE HOSPITAL

3. Late in the 1981 regular session of the Minnesota legislature the decision was made to close Rochester State Hospital. The surgical unit and the chemical dependency program at that institution were to be closed by July 1, 1981.

The remaining units were to be closed by June 30, 1982. (Fact Statement, ¶34). The closing of the chemical dependency unit and the planned closing of the units for mentally ill persons at that institution do not raise issues under the Consent Decree, for paragraph 38 states that nothing in the Decree governs future use of those positions. Issues are raised with regard to the positions at Rochester in the surgical unit, the unit for mentally retarded persons, and the general support and outside hospital care positions.

A. Surgical Unit Positions at Rochester State Hospital

3.A.1. The fiscal year 1981 salary roster filed with the Court pursuant to paragraph 40 of the Consent Decree indicates that 54.7 full-time equivalent positions were allocated to the surgical unit at Rochester State Hospital at the time the Consent Decree was approved. (A copy of this salary roster was received as Exhibit 19 at the Monitor hearing held on November 25, 1980.) These 54.7 positions were included within the 1204.55 positions identified in paragraph 39 of the Consent Decree. (See Appendix A to the Decree).

3.A.2. The surgical unit at Rochester State Hospital was closed as of July 1, 1981. (Fact Statement, ¶41). This action resulted in the termination of these 54.7 full-time equivalent positions. (Exhibit 5).

3.A.3. Paragraph 39 of the Consent Decree requires at this time that upon any reduction in the number of 1204.55 positions covered in that paragraph, 45 percent of the number of positions so reduced must be added to the 2915.93 positions protected by paragraph 37 of the Decree.

3.A.4. In order to comply with paragraph 39 of the Decree, the defendants would have had to transfer on or shortly after July 1, 1981 to the salary rosters which formed the basis for the number of positions identified in paragraph 37 a total of 24.615 full-time equivalent positions and to transfer at that time to the salary accounts for those salary rosters an amount of money equal to 45 percent of the total cost of the surgical unit positions or an amount of money equal to the

average per position cost of \$18,500 presently used by the Department (see Exhibit 5, Fact Statement, ¶¶25 and 46) times 24.615 or \$455,377. (Fact Statement, ¶38, Exhibit 7).

3.A.5. Neither action has been taken. The defendants have no present plans to take either action. (Fact Statement, ¶42).

3.A.6. The action necessary to achieve compliance with paragraph 39 of the Decree has been recognized by DPW officials. (Fact Statement, ¶¶36-40; Exhibits 4, 5, 7 and 9). The hospital administrator at Rochester State Hospital stated in response to a request to transfer such positions that "since there are no positions or funds available for the surgical program I cannot comply with your request." (Fact Statement, ¶37; Exhibit 5).

3.A.7. Corrective Action Required. In order to come into compliance with paragraph 39 of the Consent Decree, the defendants must increase by 24.615 (54.7 positions times 45%) full-time equivalent positions the total number of positions assigned to the salary rosters included in the fiscal year 1981 salary roster filed with the Court pursuant to paragraph 40 which form the basis for the 2915.93 positions identified in paragraph 37 of the Decree and increase the salary account for each salary roster to which these positions are added by an amount not less than \$18,500 times the number of full-time equivalent positions added to the salary roster. (\$18,500 is an average per position. See Fact Statement, ¶¶11, 25 and 46, and Exhibit 5, page 3).

B. MR Positions at Rochester State Hospital

3.B.1. The fiscal year 1981 salary roster filed with the Court pursuant to paragraph 40 of the Consent Decree indicates that 125.0 full-time equivalent positions were allocated to the MR salary roster at Rochester State Hospital at the time the Consent Decree was approved. These 125.0 positions were included within the 2915.93 positions identified in paragraph 37 of the Consent Decree. (See Appendix A to the Decree).

3.B.2. The MR unit at Rochester State Hospital known as

the Rochester Social Adaptation Center (RSAC) will be closed as of December 1, 1981. Present plans provide that there will be a reduction in the number of RSAC positions filled as units are closed so that only 10 positions will remain filled on December 1, 1981 and none as of January 1, 1982. (Fact Statement, ¶¶43,44 and 46; Exhibit 5).

3.B.3. As of September 30, 1981, the number of filled positions on the MR salary roster had been reduced by 29 to 96 full-time equivalent positions. (Fact Statement, ¶47; Exhibit 29).

3.B.4. Paragraph 37 of the Consent Decree provides that there may be no reduction at this time in the total number of 2915.93 positions covered by that paragraph.

3.B.5. In order to comply with paragraph 37 of the Decree, at the time a position or positions are vacated at RSAC the defendants would have had to transfer to the other salary rosters which formed the basis for the number of positions identified in paragraph 37 a number of positions equal to the number of positions vacated and to transfer to the salary accounts for those salary rosters an amount of money equal to the cost of those positions for the remainder of the fiscal year or an amount of money equal to the average per position cost of \$18,500 presently used by the Department (see Exhibit 5 and Fact Statement ¶¶25 and 46) times the number of positions vacated prorated to the end of the fiscal year. For the 29 positions which had been vacated by September 30, 1981, the sum involved would be at least \$402,462. (Fact Statement, ¶47). That sum would be increased if those positions had been vacated prior to September 30, 1981.

3.B.6. While persons filling those positions may have accepted employment at other institutions, none of the RSAC positions have been transferred to any other institutions nor have any of the funds allocated to the MR salary account at Rochester State Hospital been transferred to any other MR salary account. The Department projects that such transfers might be made in March or April, 1982. (Fact Statement, ¶47).

3.B.7. The action necessary to achieve compliance with paragraph 37 has been recognized by DPW officials. (Fact Statement, ¶46).

3.B.8. Corrective Action Required. In order to come into compliance with paragraph 37 of the Consent Decree, the defendants must reallocate within the salary rosters which formed the basis for calculation of the 2915.93 positions covered by paragraph 37 all positions vacated on the MR salary roster at Rochester State Hospital since July 1, 1981 and must transfer from the MR salary account at Rochester State Hospital to the salary account for each salary roster to which these positions are added an amount no less than the total cost for each position (including salary and fringe benefits) from the date it was vacated to the end of the fiscal year or an amount not less than \$18,500 annually for each position prorated from the date the position was vacated to the end of the fiscal year.

C. GS and Outside Hospital Care Positions at Rochester State Hospital

3.C.1. The fiscal year 1981 salary roster filed with Court pursuant to paragraph 40 of the Consent Decree indicates that 187.3 full-time equivalent positions were allocated to the GS salary roster at Rochester State Hospital and 2.0 full-time equivalent positions were allocated to the Outside Hospital Care salary roster at that institution at the time the Consent Decree was approved. These positions were included within the 1204.55 positions identified in paragraph 39 of the Decree. (See Appendix A to the Decree; Fact Statement, ¶¶ 49 and 52).

3.C.2. All resident units at Rochester State Hospital are scheduled to be closed by May 1, 1982. (Fact Statement, ¶43). Present plans provide for a reduction in the number of GS positions filled at Rochester State Hospital as units are closed at that institution. (Exhibit 5).

3.C.3. A total of 179.25 positions were budgeted on the GS salary roster at the beginning of fiscal year 1982. (Fact Statement, ¶49). This reduced number of positions was not a

result of reallocation of GS positions among the several institutions according to the Rochester GS fiscal year 1982 salary roster (Exhibit 52) and the status report on complement positions as of July 4, 1981 (Exhibit 24). It follows that as of the beginning of fiscal year 1982 at least 8.05 full-time equivalent positions (187.3 minus 179.25) had been eliminated from the GS salary roster positions at Rochester State Hospital. An additional 18.05 positions at Rochester State Hospital had been vacated by September 30, 1981.

3.C.4. One of the two positions on the Outside Hospital Care salary roster at Rochester State Hospital had been vacated at the beginning of fiscal year 1982. (Exhibit 5). The second position was vacated by September 30, 1981. (Fact Statement, ¶52).

3.C.5. Paragraph 39 of the Consent Decree requires at this time that upon any reduction in the number of 1204.55 positions covered in that paragraph, 45 percent of the number of positions so reduced must be added to the 2915.93 positions covered by paragraph 37 of the Decree.

3.C.6. In order to comply with paragraph 39 of the Decree with regard to those positions vacated before the start of fiscal year 1982 on those two salary rosters, the defendants would have had to transfer no later than July 1, 1981 to the salary rosters which formed the basis for the number of positions identified in paragraph 37 a total of 4.07 full-time equivalent positions (45% of 9.05 positions) and to transfer at that time to the salary accounts for those salary rosters an amount of money equal to 45% of the total cost of those positions or an amount of money equal to the average per position cost (\$18,500) for those positions for the fiscal year (\$75,295).

3.C.7. In order to comply with paragraph 39 of the Decree with regard to those positions at Rochester State Hospital included within the positions identified in paragraph 39 which have been vacated since July 1, 1981, the defendants would have had to transfer at the time a position or positions

were vacated a total of 45% of those positions to the salary rosters which formed the basis for the number of positions identified in paragraph 37 of the Decree and to transfer at that time to the salary accounts for those salary rosters an amount of money equal to 45% of the total cost for those positions to the end of the fiscal year or an amount of money equal to 45% of the average per position cost of \$18,500 times the number of positions vacated prorated to the end of the fiscal year.

3.C.8. None of these actions required by the Consent Decree have been taken. There are no present plans to take these actions. (Fact Statement, ¶¶51 and 52).

3.C.9. The actions necessary to achieve compliance with the Decree with regard to these positions have been recognized by DPW officials. (Fact Statement, ¶¶48 and 52; Exhibit 5).

3.C.10. Corrective Action Required. In order to come into compliance with paragraph 39 of the Consent Decree, the defendants must increase the total number of positions assigned to the salary rosters which form the basis for the 2915.93 positions identified in paragraph 37 of the Decree by a number equal to 45% of the GS and Outside Hospital Care positions vacated at Rochester State Hospital and increase the salary account to which those positions are assigned by an amount of money equal to the total costs for fiscal year 1982 for each position from the time it was vacated to the end of the fiscal year or an amount of money equal to 45% of the average annual per position cost of \$18,500 for each position prorated from the date the position was vacated to the end of the fiscal year.

PART IV

ISSUES RELATED TO REDUCTIONS IN SALARY SPENDING PLANS FOR THE INSTITUTION SALARY ACCOUNTS AFFECTED BY THE CONSENT DECREE

A. Introduction

4.A.1. On June 4, 1981 Commissioner Noot, in a memorandum to the DPW Cabinet, summarized certain reductions to be

made in the Annual Spending Plan for fiscal year 1982. His memorandum made specific reference to a reduction of a total of 241 state institution positions. In that memorandum he equated these positions to total dollar reductions in the spending plan of \$4,459,000. (Exhibit 17). While these proposed reductions would include reductions at the state nursing homes and in other institution salary accounts not affected by the Consent Decree, it is not disputed that significant reductions have been made in the salary accounts for the salary rosters and the positions governed by paragraphs 37 and 39 of the Decree. (Fact Statement, ¶¶26-28; Tables I-III). The fundamental issue is whether these reductions constitute non-compliance with the Decree.

4.A.2. The statement of Undisputed Facts submitted to the Court Monitor discusses in detail the circumstances which led to these reductions. It is not necessary to set forth in such detail again the legislative action taken, the internal action taken by DPW both in the central office and at the several institutions, or the overall Minnesota state budget situation.

4.A.3. It is evident that any discussion of these issues is complicated by the closing of Rochester State Hospital. Issues arising out of that action have been discussed in Part III, above. The focus here will be on budget reductions imposed in the other seven (7) institutions.

4.A.4. The issues presented in these other institutions are further complicated by the fact that no particular positions in those institutions have yet been eliminated. (Fact Statement, ¶25; Exhibits 24 and 36). Indeed, DPW documents still account for 5,677 positions, although it is not disputed that the Rochester State Hospital surgical unit and chemical dependency unit positions have been eliminated. (Exhibits 5, 24 and 36; Boland Deposition, pages 89-90).

4.A.5. In this overall context, the issues posed here are:

- a. whether reductions in the salary accounts for the salary rosters which formed the basis for the 2,915.93

positions identified in paragraph 37 of the Decree are tantamount to a reduction in the number of those positions and thus a violation of the Decree; and

- b. whether reductions in the salary accounts for the salary rosters which formed the basis for the 1,204.55 positions identified in paragraph 39 of the Decree are tantamount to a reduction in the number of those positions and thus, in the absence of re-allocation of 45 percent of those positions (and the money to fund them) to the protected class of positions under paragraph 37, a violation of the Decree. (It is not disputed that no such reallocation has taken place.)

B. The Reduction Process

4.B.1. The parties point out that any discussion of funding reductions presumes a starting point. Some of the apparently inconsistent reduction figures in the various exhibits arise because different starting points were used. (Fact Statement, ¶¶12 and 29).

4.B.2. For the purposes of determining compliance with paragraphs 37 and 39 of the Decree, the appropriate starting point is the Total Salary Spending Plan figures presented in column 6 of the Salary Spending Plan in Exhibit 19. This figure includes the costs of salaries and fringe benefits for each position on the relevant salary rosters. (Fact Statement, ¶¶17 and 18). If full funding for salaries and fringe benefits for all positions on the respective MR salary rosters were provided, no question of compliance with paragraph 37 would arise in terms of a budget reduction causing non-compliance. It would be established then that the several state institutions had both the authority to hire and the funds available to pay for persons employed in these positions. Similarly, full funding of salary and fringe benefits for the 1,204.55 positions covered by paragraph 39 would constitute compliance with that paragraph insofar as availability of funds is concerned. To the extent that the cost of a particular position would increase because of an increase in salary levels or fringe benefits, additional funds would have to be allocated to the salary account in order to maintain compliance. With that qualification, however, it is concluded that if the relevant salary accounts had been funded in an amount which provided

for full allocation of the costs for the Total Salary Spending Plan (Exhibit 19, Salary Spending Plan, Column 6) the defendants would have complied with paragraphs 37 and 39 of the Decree.

4.B.3. The Total Salary Spending Plan was reduced by the amounts shown in column 7 ("Salary Adjustments") of the Salary Spending Plan in Exhibit 19. These salary adjustments are itemized in the Salary Adjustment Schedule in Exhibit 19. They are described in paragraph 20 of the Fact Statement.

4.B.4. Each salary account at the seven institutions discussed in this part was reduced by an amount of approximately 2.3 percent in what has been termed the "Commissioner's reduction." This reduction was required in order to bring the state hospital salary spending plan within the amount appropriated. Unlike the "two percent set aside" discussed below, this amount will not subsequently be available for expenditure. The impact of the "Commissioner's reduction" was offset at some institutions, as is discussed below, by transfers from one salary account to another, but for each institution the total of the Total Salary Spending Plans for all salary accounts was reduced by approximately 2.3 percent. (Exhibit 19; Fact Statement, ¶20).

4.B.5. A second type of "salary adjustment" was made internally at each of the seven (7) institutions and involved transfers into or out of the Total Salary Spending Plan (column 6) for a particular salary account. Some transfers were made from the Total Spending Plan for one salary account to the Total Salary Spending Plan for another salary account. These types of transfers are shown in column 3 of the Salary Adjustment Schedule in Exhibit 19. These transfers at the seven (7) institutions made no difference in the total of the salary monies available for all of the salary accounts at an institution. (The subtotal amount for this type of transfer is zero for each of the seven institutions. See Salary Adjustment Schedule, column 3, Exhibit 19.) However, one salary account might increase (such as an increase in the GS salary account

at Faribault), while another would decrease (an equal reduction was made in the MR salary account at Faribault).

4.B.6. Other types of transfers were made as a part of the second type of "salary adjustments" made internally at the seven (7) institutions. These transfers were made out of the Total Salary Spending Plan funds (column 6) to cover costs for workers' compensation and unemployment compensation (column 4 of the Salary Adjustment Schedule in Exhibit 19) or to pay for consultants (column 5 of the Salary Adjustment Schedule in Exhibit 19).

4.B.7. The second type of "salary adjustment" did not have the effect of reducing the total amount allocated to any institution for all the costs included within the Salary Spending Plan, however, the total amount of money allocated for salary and fringe benefits for any one salary account could be either increased or decreased.

4.B.8. The third type of "salary adjustment" made to the Total Salary Spending Plan (column 6 in Exhibit 19) is termed the "two percent set aside." (Fact Statement, ¶¶7c and 20). This reduction of two percent in each salary account differs from the "Commissioner's reduction" in that it was not made to reduce expenditures to an amount within the sums appropriated. The sum which makes up the total amount of the "two percent set aside" for the state hospitals is money which has been appropriated but not yet allocated to the hospital salary accounts in order to cover potential costs of collective bargaining agreements. The "two percent set aside" is discussed in greater detail below.

C. The Effect of These Reductions

4.C.1. The effect of these reductions on the Total Salary Spending Plans (column 6 of Exhibit 19) which were used as a starting point in this discussion on the salary accounts for the salary rosters governed by paragraphs 37 and 39 is indicated by Tables I through III attached to the Fact Statement. The salary rosters for MR salary accounts and for the Minnesota Learning Center salary account at Brainerd State

Hospital were all used as the basis for determining the number of positions governed by paragraph 37. These salary accounts (Rochester State Hospital is not included here) were reduced by a total of \$2,183,542 as a result of the "salary adjustments" made. (Fact Statement, Table I). On the basis of an average per position cost of \$18,500 (Fact Statement, 146), that total reduction would amount to 118.03 ($2,183,542 \div 18,500$) full-time equivalent positions. This reduction is not the full reduction for positions covered by paragraph 37, for most of the GS salary roster positions at Faribault and Cambridge State Hospitals are included within the paragraph 37 positions. (Consent Decree, Appendix A).

4.C.2. The total "salary adjustments" made in the GS and regional laundry salary accounts at the seven institutions (excluding Rochester State Hospital) amounted to \$1,042,253. (Fact Statement, Tables II and III [$\$960,615 + \$81,638$]). All of the salary rosters for these salary accounts served as a basis for the 1,204.55 number in paragraph 37, with the exception noted above regarding Cambridge and Faribault State Hospitals. Based on the \$18,500 average cost per position, this reduction would amount to 56.34 positions.

D. Conclusions With Regard to Compliance With Paragraphs 37 and 39

4.D.1. Given the assumption that full funding for salary and fringe benefits for all positions on a salary roster covered by either paragraph 37 or paragraph 39 of the Decree would constitute compliance with those paragraphs, any reduction in such funding raises questions regarding compliance. Although it must be recognized that some positions will necessarily be vacant when turnover occurs, and that funding in an amount less than full funding for every day of the year for all positions could still be sufficient considering such turnover, the amounts at issue here are sufficiently large to constitute non-compliance with paragraph 37 and, since no transfer has been made of 45% of positions or funds from the salary rosters and salary accounts covered by paragraph 39, a viola-

tion of that section as well. The fact cannot be overlooked that the process of establishing the final salary plan started with a need to reduce positions. (Exhibit 17; Fact Statement, ¶25). While the Department chose not to identify specific positions for elimination, the dollar reductions have had the same effect.

4.D.2. The possibility of using the "two percent set aside" funds does not alter this conclusion. That money was set aside to meet anticipated additional costs for labor contracts. Additional costs for labor contracts would increase the cost of the Total Salary Spending Plan listed in column 6 of Exhibit 19. (Fact Statement, ¶19). The salary supplement funds to be allocated later in the fiscal year will meet only additional expenses which were not included in the figures in Exhibit 19 after an offset for savings in the Department of Public Welfare as a result of the AFSCME strike. (Fact Statement, ¶31). The "two percent set aside" was established because the amount of the salary supplement might not meet total additional costs. (Fact Statement, ¶7d). If the salary supplement plus the "two percent set aside" does not meet the increased costs of labor contracts, further reductions in the salary spending plan would be required. (Fact Statement, ¶31). It is speculative, therefore, to assume that all or even a portion of the "two percent set aside" will be available to offset the reductions noted above.

4.D.3. The vacancy rate discussed in Fact Statement, ¶64 does not indicate that compliance with paragraphs 37 and 39 has been achieved despite the reductions made. The vacancy rate calculated on the basis of those figures assumes that positions used by service workers are filled positions. (Exhibit 36). To that extent, the figure is inflated, for these positions are not counted in meeting Consent Decree requirements. (Fact Statement, ¶64). Furthermore, the vacancy rate as of any specific date does not demonstrate that funds are available to the end of the fiscal year to continue employment at the present rate. In addition, those figures, in and

of themselves, do not demonstrate the vacancy rate which could be achieved had no reductions been imposed.

4.D.4. In the Monitor's report of May 21, 1981 arising out of the hearing held on March 13, 1981, the Hearing Officer and the Court Monitor requested that criteria be developed for determining at what point a reduction in funding is tantamount to a reduction in positions. (Welsch v. Noot, Paragraph 96(g) Hearing, Findings of Fact and Recommendations, page 14, ¶3). The Department has not acted on this recommendation. (Fact Statement, ¶6).

4.D.5. In the absence of any demonstration that sufficient funding has been made available for all of the 2,915.93 positions protected by paragraph 37, the action taken in making the reductions noted above is a violation of paragraph 37. Similarly, in the absence of either a demonstration that sufficient funding has been made available for the 1,204.55 positions covered by paragraph 39 or the transfer to the protected class of paragraph 37 positions of 45 percent of reductions made in the paragraph 39 positions, a violation of the Consent Decree has been established.

4.D.6. It is appropriate to look at the issue presented here in the context of the Consent Decree as a whole. It is apparent that substantial flexibility has been allowed each state hospital in allocation of staff. The major portion of both residential and day program staffing requirements are stated in overall ratios. (Consent Decree, ¶¶52-55). These staff need not be deployed uniformly. (Consent Decree, ¶56). Yet flexibility cannot be achieved if uncertainty exists as to the actual number of persons available. Flexibility is not possible when positions are held open for salary savings or transfer. (Exhibit 31; Fact Statement, ¶63).^{1/} Even less flexible management is possible when contingency plans are

^{1/} Defendants submit in their post-hearing brief (brief page 1) that it is well known in the hospital system that a reallocation of positions (from Brainerd to Fergus Falls) has been contemplated for some time to correct an unfair distribution of resources within the system and that Brainerd's planning for this does not constitute evidence of a lack of flexi-

being developed for further cuts. (Fact Statement, ¶77). In such a context it would be difficult to establish the intensive behavior management programs referred to in paragraph 67o(2) (b) of the Decree. In that context, it would be difficult to plan for special programs to be undertaken when public school programs are not in session. Special units which meet the needs of residents cannot effectively be established when uncertainty as to funding exists. Indeed, the sound planning necessary for implementation of the overall habilitation programs required by paragraph 63 is jeopardized when no certainty exists with regard to the staff complement which will be available.

E. Corrective Action Required

4.E.1. In order to attain compliance with paragraph 37 of the Consent Decree, the defendants must allocate sufficient funds to the salary accounts which fund the salary rosters used as the basis for the 2,915.93 positions identified in paragraph 37 to pay for each position on those salary rosters unless a demonstration can be made that a lesser sum will still provide the capability to fund those number of positions taking into consideration the fact that vacancies will occur with normal turnover, taking into consideration the practice of "filling in" behind positions described in Fact Statement, ¶64, and taking into consideration that positions may not be held open to avoid expenditure of salary dollars.

4.E.2. In order to attain compliance with paragraph 39 of the Consent Decree, the defendants must either:

a. allocate sufficient funds to the salary accounts which fund the salary rosters used as a basis for the paragraph 39 positions to pay for the total salary and fringe benefits for each position on those salary rosters or demonstrate in a manner consistent with the standard specified in paragraph 4.E.1. that allocation of a lesser sum will still provide for the

bility. However, under the present circumstances and undisputed facts it is clear that Brainerd State Hospital currently lacks the flexibility to fill positions it will lose and that Fergus Falls State Hospital lacks the flexibility to fill positions it does not yet have.

capability to fund that number of positions; or

b. if sufficient sums are not allocated to those salary accounts to guarantee, in accordance with the standards specified in paragraph 4.E.1., the capability of filling 1,204.55 positions, to transfer to the protected class of positions under paragraph 37 at least 45 percent of the positions which cannot be funded from those salary accounts and thereby increase the number of positions protected under paragraph 37.

4.E.3. The action required as described in paragraphs 4.E.1. and 4.E.2. must be taken apart from any consideration of funding necessary for such expenses as workers' compensation, unemployment compensation, patient pay, and consultants. While such expenses are included in the Salary Spending Plan as a whole, (Exhibit 19), the Consent Decree requires funds to be made available for salaries and fringe benefits as set forth in paragraphs 4.E.1. and 4.E.2.

PART V

ISSUES RELATING TO EMPLOYMENT OF DPW CENTRAL OFFICE PERSONNEL IN POSITIONS COVERED BY PARAGRAPHS 37 OR 39 OF THE DECREE

5. Five DPW central office staff persons who work at the DPW central office in St. Paul are employed in positions allocated to GS salary rosters at state hospitals and paid out of GS salary accounts for those institutions.

A. Positions at Cambridge State Hospital Filled by DPW Central Office Personnel

5.A.1. Four positions allocated to the general support salary roster at Cambridge State Hospital are assigned for use by personnel who actually work out of the central office of the Department of Public Welfare. Three of those positions are used by the technical assistance (TAP) staff required by paragraph 28 of the Decree; one of those positions is filled by Al Beck who is on the staff of the central office Residential Facilities Division. (Fact Statement, ¶¶ 57-58; Exhibits 59 and 50).

5.A.2. Although the practice of paying Mr. Beck out of

Cambridge State Hospital salary accounts has gone on for a number of years and the practice of using Cambridge State Hospital positions for the TAP personnel was established when those positions were created during fiscal year 1981, those four positions as presently utilized cannot be considered positions available to meet the staffing level of 2,915.93 positions required by paragraph 37 of the Decree. (As Appendix A to the Decree indicates, all but 21.6 of the Cambridge State Hospital general support positions are included in the 2,915.93 positions required by paragraph 37.) The requirement to employ three TAP persons is set forth in paragraph 28 of the Decree. This requirement of the Decree is independent of the provision of paragraph 37 to retain 2,915.93 positions serving mentally retarded persons in the institutions. The historical accident that Mr. Beck has been paid out of Cambridge State Hospital salary accounts does not thereby transform his position into one serving the mentally retarded residents at Cambridge as required by paragraph 37 of the Decree. (Compare Welsch v. Noot, Paragraph 40(e), Monitor Findings of Fact and Recommendations, page 21, ¶5-6 (January 30, 1981)).

5.A.3. Paragraph 59 of the Consent Decree provides that the positions assigned to Cambridge State Hospital (a total of 743.3 are noted in Appendix A) may not be transferred to any other state hospital unless Cambridge State Hospital retains a staff allocation sufficient to meet all the terms of the Decree. Cambridge State Hospital does not now meet all the terms of the Decree. (Fact Statement, ¶59).

5.A.4. To assure compliance with paragraphs 37 and 59 of the Consent Decree, the defendants must allocate at least 743.4 positions to Cambridge State Hospital and guarantee sufficient funding for all those positions. While the four central office positions may not be counted against this requirement at Cambridge State Hospital of 743.4 positions, there is nothing in the Consent Decree which explicitly prevents hiring of the four central office staff on positions allocated to Cambridge State Hospital and nothing in the Decree which

explicitly prevents payment of persons filling those positions out of Cambridge State Hospital salary accounts. The action taken with respect to those positions is not, therefore, in and of itself a violation of either paragraph 37 or paragraph 59 of the Decree.

5.A.5. It is apparent, nonetheless, that payment for these four positions out of the Cambridge State Hospital salary accounts reduces the funds available for Cambridge State Hospital to fill the 743.4 positions which are required.

5.A.6. In order to comply with the Consent Decree, when, for whatever reason, the decision is made to pay these persons out of Cambridge State Hospital accounts, sufficient funding must be made available by the defendants to assure that the obligations of paragraphs 37 and 59 of the Decree may be met at Cambridge State Hospital.

5.A.7. No additional positions or funds were allocated to Cambridge State Hospital to provide for authority to hire or to fund the positions filled by technical assistance personnel and by Mr. Beck. (Fact Statement, ¶60).

5.A.8. A similar question was before the Monitor appointed for the Cambridge State Hospital Consent Decree at the hearing held November 25, 1980. After that hearing, he recommended that the defendants provide written evidence that funding was established in sufficient amount to assure that the positions then required at Cambridge State Hospital could be filled in addition to payment for, inter alia, the four central office staff. (Welsch v. Noot, Paragraph 40(e), Monitor Findings of Fact and Recommendations, pages 22-23 (January 30, 1981)).

5.A.9. No such documentation was submitted to the Cambridge Monitor (who has served as Hearing Officer at this hearing) or to the 1980 Consent Decree Monitor.

5.A.10. Corrective Action Required. The defendants must increase the salary accounts at Cambridge State Hospital by an amount equal to the total annual cost of four positions (the average per position cost of \$18,500 may be used) unless they demonstrate that sufficient funds have been made available

to Cambridge State Hospital to guarantee the funding needed to maintain 743.4 full-time equivalent positions (apart from the four central office positions for fiscal year 1982). In making this demonstration, the defendants may take into consideration the possibility that salary account dollars may go unexpended when turnover occurs and a replacement is not immediately available. The defendants may also take into consideration the fact that one TAP position was vacant for a portion of fiscal year 1982, but only to the extent that Cambridge State Hospital was allowed use of unexpended salary dollars for that position. The defendants, in making the required demonstration, may not consider any salary dollars unexpended as a result of failure to fill a position in compliance with directives or executive orders which limit hiring. The defendants must also consider the likelihood of increased expenditures during the remaining months of the fiscal year.

B. The Position at Fergus Falls State Hospital Filled by a Central Office Employee

5.B.1. During fiscal year 1982 and for a number of years previously, one position on the GS salary roster at Fergus Falls State Hospital has been filled by a person employed at the DPW central office. That person is paid out of the GS salary account for Fergus Falls State Hospital. (Fact Statement, ¶61).

5.B.2. For reasons similar to those discussed with regard to Mr. Beck's position at Cambridge State Hospital, this position cannot be considered within the 1,204.55 positions referred to in paragraph 39 of the Consent Decree. Thus, it could be argued that there has been a reduction in that number of those positions necessitating a transfer to one of the salary rosters used as the basis for the 2,915.93 positions of paragraph 37 of .45 full-time equivalent position and the equivalent amount of money. Such action has not been taken. (Fact Statement, ¶61). However, as noted in the discussion of the Cambridge positions, the Consent Decree does not explicitly prohibit this payment procedure. There is, however,

no indication that the Fergus Falls State Hospital GS salary account has been increased to allow for the expense related to this position. (Boland Deposition, page 22).

5.B.3. Corrective Action Required. The defendants must transfer .45 full-time equivalent positions to one of the salary rosters which serves as a basis for the positions identified in paragraph 37 together with the funding for that position unless a demonstration is made similar to that noted with regard to the Cambridge positions that this employee can be paid out of the GS salary account at Fergus Falls State Hospital at the same time that sufficient funding is guaranteed for that portion of the GS positions included within paragraph 39 allocated to Fergus Falls State Hospital.

PART VI

MORATORIUM ON HIRING

A. Action Taken

6.A.1. By memorandum dated September 30, 1981, Commissioner Noot imposed a moratorium on hiring within the Department of Public Welfare, including the state hospitals. Excluded from this moratorium were direct patient care positions at the institutions. (Exhibit 23; ¶6.A.2.). Mr. Boland issued a more detailed memorandum on this moratorium on October 12, 1981. In that memorandum he indicated that the hiring freeze did not apply if a "general support (or indirect care) position is directly involved with an MR program and comes under the Welsch v. Noot agreement...." (Exhibit 30).

6.A.2. In accordance with Mr. Boland's memorandum, it appears that general support positions may be held open if they are not related to the MR program. Nothing in the Consent Decree prevents such action. However, if this action is tantamount to a reduction in the number of GS positions included within paragraph 39, a transfer must be made to the positions protected by paragraph 37 of .45 of each such position and the money to fund it. There is no indication of intent to take such action in either the Commissioner's or Mr.

Boland's memorandums. Furthermore, since most GS positions at Faribault State Hospital (see Consent Decree, Appendix A) and, by virtue of paragraph 59, all positions at Cambridge State Hospital, are protected positions under paragraph 37, no reduction can be made in those positions.

B. Corrective Action Required

6.B.1. The Commissioner should issue an explanatory directive consistent with paragraph 6.A.1. limiting the effect of the moratorium on those positions at Faribault covered by paragraph 37 and on all positions at Cambridge.

6.B.2. The Commissioner should reallocate to the protected class of positions under paragraph 37 forty-five percent (45%) of all positions covered by paragraph 39 which are reduced pursuant to his moratorium memorandum unless a demonstration can be made that all the required positions can nonetheless be filled in a manner consistent with paragraph 4.E.2. of these Findings, Conclusions and Recommendations.

PART VII

**FURTHER ORDERS REQUIRED TO ASSURE
COMPLIANCE WITH PARAGRAPHS
37 AND 39**

A. The Delay Caused in Achieving Compliance

7.A.1. A review of the issues presented to the Cambridge Monitor in November, 1981, the issues presented to the 1980 Consent Decree Monitor in March, 1981, the recommendations made after both hearings with regard to establishing criteria for determining when budget reductions are tantamount to reductions in positions, and the failure of the Department to respond to those recommendations leads to the conclusion that on-going non-compliance with the requirements of paragraphs 37 and 39 has occurred. There has been no effort made at any point by the Department to establish any criteria, which would provide an effective guideline to use in determining when positions have actually been reduced as a result of funding reductions. The present enforcement mechanism under paragraph 95 leads to the situation where potential or actual non-compli-

ance can continue for months while the issue is presented to the Court Monitor. The final result of the March, 1981 hearing was a recommendation made in May, 1981 less than two months before the end of the fiscal year at issue. The issues in this hearing were raised in the first week of the fiscal year and are as yet unresolved.

B. Corrective Action Recommended

7.B.1. The Court Monitor recommends that the Court, in order effectively to provide for enforcement of paragraphs 37 and 39, issue a further Order requiring the defendants, including the Commissioner of Finance, to assure that each salary account for the salary rosters included in paragraph 37 has an amount of money equal to not less than the sum required for total funding for salaries and fringe benefits for all positions. This assurance should be made at once for fiscal year 1982 and, in the future, at the beginning of each fiscal year, preferably in the form of an allocation. Increases in this allocation should be made as necessary to meet the cost of labor contracts. Reductions should be allowed only after a demonstration consistent with paragraph 4.B.1. has been made, and approved by Stipulation or by Order of the Court, or if the Court so orders, initially by the Court Monitor.

7.B.2. Similar action should be required with regard to positions covered by paragraph 39, taking into consideration the fact that the number of such positions may be reduced.

7.B.3. This recommendation is made on the basis that it is necessary to effective implementation of the Decree. The Court Monitor reiterates the initial statement that issues relating to the power of the Court to make such an order have not been considered.

Respectfully submitted,



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Dated this 7th day
of December, 1981.