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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RECEIVED
MAY 30 1997
JUDGE CHARLES R. NORGLE
UNITED STATES DISTRICT COURT

FRANK BOGARD, et al;)
)
Plaintiffs,)
)
v.)
)
ROBERT WRIGHT, Director of)
Illinois Department of Public)
Aid, et al,)
)
Defendants.)

No. 88 C 2414
JUDGE CHARLES R., NORGLE
Magistrate Rebecca R. Palmeyer

**Plaintiffs' Reply To Defendants' Response To Motion For Extension of Monitor's
Appointment for Three Years and For Other Relief**

I. Introduction: Plaintiffs' Motion, The April 18 Hearing And Defendants' Response

A. The Motion

Plaintiffs include a class of developmentally disabled adults. On April 9, 1997, these individuals and the organizational plaintiff (the Association for Retarded Citizens or "ARC"), filed a Motion, Pursuant to the Consent Decree and 28 U. S .C. §2202, to Extend the Monitor's Appointment for Three Years, and For Other Relief ("the Motion").

The "monitor" the Motion referenced was John Rogalin, the "independent and impartial court monitor" this Court, pursuant to IVIII.A. 1 of the Decree, had appointed. The Decree anticipated that the Monitor would serve a term of at least four years, expiring on June 30, 1997. Decree at ¶VIII.E. 1. But it also provided that the Monitor's term may be "extended by order of this court." Id. Significantly, contrary to defendants' written response to the Motion ("Def. Resp. "), the Decree does not condition the Court's authority to extend the term of the Monitor under ¶VIII.E. 1, and other provisions too, upon plaintiffs' showing that defendants are not in compliance with the Decree. See §II.A.B., infra. However, as discussed in the Motion

(at ¶¶ 22-26) and below (at §III.C.), Monitor Rogalin has made extensive findings that defendants are not in compliance. Moreover, while defendants suggest otherwise, they dispute the Monitor's findings only in part, acknowledging non-compliance in important respects. See §II.C., infra.

The "other relief" the Motion referenced was a referral, pursuant to Fed. R. Civ. P. 16(a), to Magistrate Pallmeyer for a settlement conference or conferences that might assist the parties in resolving the so-called "compliance issues." The compliance issues are those that Monitor Rogalin's findings of non-compliance raise: he has found defendants in non-compliance with, inter alia, the Decree provisions relating to case coordination services, community placement, specialized services, and adaptive equipment. See Motion at ¶¶3, 17-26.

The Motion also explained that the parties had, since November, 1996, engaged in extensive discussions to settle their differences concerning the compliance issues and an extension of monitoring. Motion at ¶9. However, the Motion further explained, defendants had, on March 31, 1997, abruptly terminated these discussions because plaintiffs would not agree to drop their demand for an extension of monitoring. Id.

B. The April 18 Hearing

At the April 18 hearing on the Motion, counsel for plaintiffs first explained that the filing of the Motion had prompted defendants to agree to renew settlement discussions. April 18 Tr., Exh. A hereto, at 4-5. They emphasized, however, that the June 30, 1997 termination date for the Monitor's term would oblige them shortly to ask for a ruling on the Motion, if the revived settlement negotiations faltered. Id.

At the April 18 hearing, this Court correctly observed that the parties had "together

decided who.. . [the] monitor would be. " April 18 Tr. at 6. It also asked defendants' counsel two questions concerning monitoring. The' first was "what harm would come from an extension of the monitoring aspect of the decree." Id. The second was "How does one know if there is compliance without receiving reports from a monitor? How else would the Court be **advised[?]**" Id. at 7.

In response to the Court's first question, defendants' counsel did not identify any harm that would follow from an extension of monitoring. April 18 Tr. at 6. Rather, she responded simply that "an extension of **the** Monitor would not be appropriate." Id.

In response to the Court's second question, defendants contended that plaintiffs or their counsel could adequately assess compliance as a result of their "own investigations". April 18 Tr. at 7. This Court replied that such investigations would be "very burdensome", especially because plaintiffs "may **be** disabled, mentally or physically, **and...incapable** of articulating problems." Id. at 7-8.

C. Developments Following The April 18 Hearing

As a result of the settlement negotiations that immediately followed the April 18 hearing, the parties did agree to certain principles that, if implemented through specifically described policies, would reasonably address and might well resolve most, if not all, of the myriad compliance issues and the question of the extension of monitoring. But in terms of forestalling a prompt ruling on the Motion, this agreement as to principles was of no significance, because defendants were completely unwilling to agree to any procedural mechanism making their agreement to the principles, much less to any implementing policies, enforceable in this Court. For their part, plaintiffs were unwilling to agree to any negotiated resolution that did not confer

on them enforceable rights.¹ Defendants' determined non-compliance **with** the Decree, see e.g., Monitoring Report #7 (January, 1997), informed plaintiffs' position: plaintiffs could hardly be expected to accept a resolution of the parties' differences that would leave them without any enforceable means of even ascertaining compliance (i.e., a monitor), much less ensuring it, when it was defendants' non-compliance that gave rise to the negotiations and to the Motion in the first instance.²

In light of the failure of the renewed negotiations, plaintiffs asked the Court to set a briefing schedule on the Motion. The Court did so. Order, May 1, 1997. It also set June 16, 1997 as a ruling/status date on the Motion. Id.

D. Defendants' Response To The Motion

In their response to the Motion, defendants do not argue against, or even **state that they** oppose, the "other relief" plaintiffs seek: a Rule 16(a) referral to Magistrate Pallmeyer for assistance in resolving the compliance issues. Accordingly, this Court should grant this **relief**.³

¹ The Federal Rules of Civil Procedure and federal common law offer at least two procedural means for ensuring that, in a case that has been settled by entry of a consent decree, the parties' subsequent agreements are enforceable in the court with jurisdiction over the case. The parties can agree to substantive modifications to the Decree itself; alternatively, they can enter into a stipulation that, by the terms of the Stipulation itself, or the Decree, is enforceable by the court. See McCall-Bev v. Franzen, 777 F. 2d 1178, 1187-89 (7th Cir. 1985). Defendants adamantly refused to agree to either means.

² Plaintiffs' own position aside, they respectfully suggest that it is highly questionable whether this Court, under Fed. R. Civ. P. 23(e), would even approve unenforceable modifications to the Decree.

³ In light of the parties agreement on principles that, if implemented by specifically described policies, would address most or all of the compliance issues, see p. 3 supra, plaintiffs are optimistic that the requested referral will give rise to a negotiated resolution of these issues, encompassing an agreement that this Court could enforce for future non-compliance with its terms.

Defendants do strenuously oppose any extension of the Monitor's term. Def. Resp. at 3-7. They rest this argument solely on the contention that this Court is without legal authority to extend Monitor Rogalin's term, absent a court finding, following an evidentiary hearing, that defendants are not in compliance with the Decree. Id. Defendants therefore still do not identify any harm that would follow from extension of the Monitor's term. See April 18 Tr. at 6. Nor do they suggest what mechanism, other than a court-appointed monitor, offers any reasonable promise for adequately assessing compliance with the Decree. See id. at 7.

During the April 18 hearing, the Court stated that the question of whether monitoring should be extended "might not be that tough [to resolve]." April 18 Tr. at 5. The Court was prescient; the question is not tough at all, as defendants' opposition to the extension of the Monitor's term is wholly without merit.

II. THIS COURT SHOULD EXTEND THE MONITOR'S TERM FOR THREE YEARS

In the Motion, plaintiffs advanced five legal bases that independently conferred authority upon this Court to extend monitoring. Motion at ¶34. Three bases are provisions of the Decree (¶¶VIII.E, X.A. 1., X.B. 1); the others are 28 U.S.C. §2202 and Fed. R. Civ. P. 53.

Defendants only summarily acknowledge any of this authority. Def. **Resp.** at 3. And they do not take specific issue with any one of the bases on which plaintiffs rely. See Def. Resp. at 3-7. Instead, in a single cursory paragraph, they seek to rebuke all the cited authority by the assertion that "none of [it]. . . **authorizes** such action without a finding of non-compliance on the part of the Defendants by this Court." Def. **Resp.** at 3. They pair this assertion with citations to two cases that do not support their position, even a little: Sweeton v. Brown, 27 F. 3d 1162 (6th Cir. 1994), cert. denied, 111 S.Ct. 118 (1995) and Norman v. McDonald, 930 F. Supp.

1219 (N.D. Ill. 1996). Def. Resp. at 3.

This argument is entirely bereft of legal support. Its poverty reflects the substantial weight of authority in plaintiffs' favor.

A. This Court Has Ample Legal Authority To Extend Monitoring Absent A Determination Of Defendants' Non-Compliance With The Decree

1. The Decree Provisions

The express language of the Decree itself rebuffs defendants' argument. Such language is the starting point in any case involving enforcement of a consent decree. South v. Rowe, 759 F. 610, 613 (7th Cir. 1985). Defendants nonetheless studiously avoid discussing what the Decree says. What it does say is that the term of the Monitor may be "extended by order of this court." Decree §VIII.E. 1. It also says that the Court may award "appropriate relief" to secure compliance with the Decree. Id. at X.A. 1. And it says further that this Court retains continuing jurisdiction over this case "for the purpose of enforcing the decree." Id. at par. X.B. 1.

The express terms of the Decree therefore do not cabin this Court's authority to extend monitoring with a requirement that plaintiffs first show that defendants are not in compliance with the Decree. To the contrary, ¶VIII.E. 1. places no limitations at all on the Court's authority to extend monitoring "by order". Thus, the established equitable constraints on the exercise of this Court's broad remedial power are the only limitations attending this provision. See National Labor Relations Board v. P*I*E* Nationwide, Inc., 894 F.2d 887, 893-95 (7th Cir. 1990). And defendants do not argue--nor could they with any force--that an order extending monitoring would transgress such constraints.⁴ Similarly, the only limitations, other than the

⁴ Indeed, as plaintiffs have noted at page 5 above, defendants' written response to the Motion offers no answers at all to this Court's pointed inquiries respecting the equitable play,

such constraints, that ¶¶X.A.1 and X.B.1 of the Decree carry with them is that this Court, in the exercise of its remedial discretion, deem an order extending monitoring to be “appropriate” or “for the purpose” of enforcing the Decree. And defendants do not challenge plaintiffs’ explanation, in the Motion, that an order extending monitoring would “appropriately” enforce the Decree in at least three respects--even assuming, contrary to fact, that defendants were currently in compliance with the Decree. See Motion at ¶¶36(a)-(c) and p. 11 infra (identifying enforcement purposes that would be served).

Defendants’ contention to the contrary (Def. Resp. at 3), it is apparent that it is they, not plaintiffs, who seek to trample upon the parties’ bargain by reading the Decree to require plaintiffs to show non-compliance to win an order extending monitoring. Nothing in the Decree even suggests such a pre-condition. See United States v. Armour & Co., 402 U.S. 673, 68 1-2 (1971) (“the scope of a consent decree must be discerned within its four comers and not by reference to what might satisfy the purposes of one of the parties to it”). Had the parties intended to limit the Court’s authority to extend monitoring by a requirement that plaintiffs prove non-compliance at an evidentiary hearing, the Decree would have spelled out that limitation. See Firefighters Local Union No. 744 v. Stotts, 467 U.S. 561, 574 (1984). It does not.

2. 28 U.S.C. §2202

The Judicial Code, 28 U.S.C. §2202, authorizes federal district courts to award “[f]urther

if any, of the order (extending monitoring) plaintiffs seek: whether any harm would arise from such an order; whether there is any means, other than a Monitor, for adequately ascertaining compliance with the Decree. As to the latter point, plaintiffs submit that the absence of any adequate mechanism other than a Monitor for ascertaining defendants’ compliance with the Decree in this complex institutional reform case is an “exceptional condition” within the meaning of Fed. R. Civ. P. 53(b), justifying extension of the Monitor’s term.

necessary or proper relief based on a declaratory judgment or decree.” As if the provisions of the Decree (cited in **§II.A.1 supra**) were not sufficient authority for an order extending monitoring here, §2202 is.

Judge Nordberg’s decision in Youakim v. McDonald, 926 F. Supp. 719 (N.D. Ill. 1995), **aff’d**, 71 F.3d 1274 (7th Cir. 1994), cert. denied, 116 S.Ct. 2571 (1996) is instructive. Youakim, like this case, was a class action suit against an Illinois state agency director with responsibility for the administration of public assistance programs. Plaintiff foster children in Youakim sought a civil contempt finding against the defendant Director for having violated the long-standing judgment order in the case. 926 F. Supp. at 719. However, after a trial, Judge Nordberg concluded that plaintiffs had not met their burden of proving contempt. **Id.** at 730. He nonetheless granted relief to the foster children pursuant to §2202. **Id.** at 734-36. Indeed, the relief he granted--which the court of appeals ultimately affirmed in most respects--was extremely broad, involving as it did the continuation of public assistance benefits to tens of thousands of foster children whose benefits would otherwise have been terminated or reduced. **Id.** If §2202 authorized such sweeping relief in Youakim, it surely authorizes the modest relief of an extension of monitoring that plaintiffs seek here.

B. Defendants’ Reliance On Sweeton And Norman Is Misplaced

The Sixth Circuit’s decision in Sweeton does not even address whether a party must prove non-compliance with a decree to warrant an order extending court-ordered monitoring of the decree. Rather, it merely recites that the district court, ruling on a defendants’ motion to dismiss or modify the consent decree there, had entered an order finding substantial non-compliance with it, ordering renewed monitoring, and denying the motion to dismiss or modify.

Sweeton, 27 F.3d at 1166. This recitation does not even make clear that monitoring was “renewed” in that case because the district court found non-compliance. Much less does it suggest that, in all cases, monitoring may only be extended based on such a finding. Sweeton offers no help to defendants. It stands only for the proposition that plaintiffs set forth in their motion: a judicial “determination that defendants are not in compliance with any or all of the significant provisions of the Decree would, of itself, warrant an order extending monitoring.” Motion ¶37.

While Sweeton is merely inapposite, Norman powerfully supports plaintiffs’ position, not defendants’. Like this case, Norman is a class action against a state agency director that the parties settled by a consent decree. The decree in Norman, as here, provided for four years of monitoring by a court-appointed monitor. Norman, 930 F. Supp. at 1221. Unlike the Decree here, however, the Norman decree contained no express provision authorizing the Court to extend monitoring at the end of the four-year period. Id. at 1221, 1223. After the defendant failed to agree to extend monitoring when monitoring reports showed non-compliance, plaintiffs moved for an extension of monitoring. Id. at 1221 .

Judge Hart extended the Monitor’s term, rejecting the Norman defendant’s argument--analogous to the one defendants press here--that he could do so only if he found defendants in contempt for having violated the decree. Id. at 1226. Judge Hart explained that, under ¶20 of the Norman decree, he had “specifically retain[ed] jurisdiction to enforce compliance with the Consent Order. ” Id. Paragraph X.B. 1. of the Decree here is to the same effect as ¶20 in Norman. Moreover, he further explained, “this court has inherent power to enforce an injunction, which is the form of relief in the Consent Order. ” Id. Here, ¶X.A. 1 of the Decree

codifies, in the Decree itself, that “inherent power.”

Defendants seek to distinguish this case from Norman by stating that “[d]efendants herein.. unlike the **Defendant[]** in Norman.. **dispute** the findings and methodology contained in portions of the Monitor’s Report relied upon by plaintiffs as evidence of non-compliance. ” Def. Resp. at 4. They also suggest (Def. Resp. at 3) that Norman stands for the proposition that monitoring may **only be** extended based upon a judicial determination of non-compliance with a court decree.

Defendants’ understanding of Norman is off the mark.

First, contrary to what defendant implies, the Norman defendant, like defendants here, contended that he **had** “substantially complied with the requirements of the Consent Order”. **Id.** at 1221. To be sure, for purposes of **the** Norman plaintiffs’ motion to extend monitoring, the Norman defendant did “not dispute the findings contained in the Sixth Report” concerning the “five areas of non-compliance” alleged by plaintiffs. As discussed below (in §II.C.), however, defendants here similarly do not dispute many, even most, of Monitor Rogalin’s factual findings.

In his ruling, Judge Hart identified three important functions of the monitor there. First, “her collection and reporting of information has been an important and useful aspect of **the** improvements that have resulted from implementation of the court order. ” Norman, 930 F. Supp. at 1225. Second, “[i]t is also her duty to make recommendations, many of which have been followed by.. . [defendant] and accepted by plaintiffs. ” **Id.** Third, “[i]t is further her role to help mediate disputes between the parties to the Consent Order. ” **Id.** Finally, Judge Hart noted that “this Court may enforce compliance with recommendations of the Monitor. ” **Id.** Significantly, the functions of the Norman Monitor are virtually identical to the functions of the Monitor here.

Compare id. with qVIII.A.1 of the Decree.

Judge Hart did find that there were “limited areas of [defendants]’ non-compliance” with the decree in Norman. Norman, 930 F. Supp. at 1225 (emphasis added).⁵ He also found that “further monitoring is likely to be beneficial in reaching compliance with the Consent Order.” Id. at 1226. But those findings offer no support for defendants’ suggestion that Norman stands for the proposition that monitoring may only be extended when there is a judicial determination of non-compliance with a court decree. To the contrary, every one of the duties that Judge Hart attributed to the monitor, id. at 1225, admirably serve the parties and the Court even if it were assumed that defendants are fully in compliance with the Decree. Put differently, even if the Court assumed that defendants were in compliance with the Decree, an order extending monitoring would serve precisely the purposes plaintiffs, in their Motion, identified as worth serving: it would help “ensure that defendants remain in compliance for a reasonable period of time”; it would help “ensure that defendants have in place adequate quality assurance controls and internal monitoring systems”; and it would help “‘identify and assist in resolving potential non-compliance issues’”. Motion at ¶36, quoting Decree at par. X.A. 1.

In sum, Norman, like Sweeton, establishes that a determination of non-compliance with a consent decree will virtually always be a sufficient ground for an order extending monitoring.

⁵ The Norman plaintiffs had not even alleged non-compliance with many important provisions of the Decree, including the development of policies against the separation of children from their parents for reasons of poverty. Connare Norman, 930 F. Supp. at 1223 (identifying “five areas of noncompliance” that plaintiffs contended supported continuation of monitoring) with id. at 1221-23 (summarizing principal provisions of Norman decree). Here, in contrast, the Monitor has found, and, based on his findings, plaintiffs have alleged non-compliance with, significant provision of the Decree. See Motion at ¶¶22-26 (citing Monitoring Reports ## 6 and 7).

But it does not, remotely, support the proposition that a determination of non-compliance is a necessary basis for such a directive. Judge Hart's view, to the contrary, was that a **court**-appointed monitor may serve "an important and crucial function in the implementation of a consent order" even if defendants have come into compliance with the order. Norman, 930 F. Supp. at 1225.

C. This Court May And Should Extend Monitoring Without Affording Defendant An Evidentiary Hearing To Dispute The Monitor's Factual Findings.

Because this Court may and should extend monitoring without making a judicial determination of defendants' non-compliance with the Decree, see §II.A.B., supra, there is no justification for affording defendants an evidentiary compliance hearing, as **they** request.

However, even were it the law that this Court could not extend monitoring absent a judicial finding of defendants' non-compliance, that would not help defendants. This is because defendants here, as did the defendant in Norman, accede to many, even most, of the Monitor's factual findings--sufficient accessions easily to support a finding of non-compliance on the existing record. Moreover, as to the one set of findings as to which they do not accede, defendants have presented no evidentiary support for their dispute.

In the Motion, plaintiffs, relying on the Monitor's reports, alleged that defendants were "not in compliance with significant terms of the Decree" concerning four major obligations defendants had assumed. Motion at ¶22. These obligations were: to provide case coordination services (Motion at ¶23, citing Reports ## 6 and 7 as to non-compliance); to provide "community independent living arrangements" (or **CILAs**) to each class member who chooses a CILA (Motion at ¶24, citing Reports ## 6 and 7 as to non-compliance); to provide specialized services (Motion at ¶25, citing Reports ## 6 and 7 as to non-compliance); to provide adaptive

equipment (Motion at ¶26, citing Reports ## 6 and 7 as to non-compliance).

Their general statement that they “dispute” the Monitor’s findings notwithstanding (Def. Resp. at 4), when defendants explain what they “specifically” dispute (id. at 4, see id. at 4-5), it is apparent that they dispute the Monitor’s factual findings only in part. For example, as to their obligation to ensure the provision of case coordination services through Independent Service Coordinator agencies (or **ISCs**) that maintain a **1:30** ratio for case coordinators to class members, defendants acknowledge that some **ISCs** exceed that ratio, when **they** plead that “have taken steps See and enforcement... [of this] ratio.” Def. Resp. at 5 ¶A (emphasis added). a t ¶23 (citing to Monitoring Reports ## 6 & 7, which attest to substantial non-compliance with the **1:30** ratio). As to their obligation to provide specialized services to class members, defendants implicitly acknowledge that, as of August 31, 1996, a stunning 51% of class members did not receive such services at the “continuous and consistent” level the Decree requires as quantified by the Monitor (measuring two or more of the same categories of services for three consecutive months). Def. Resp. at 5 ¶C. See Motion at ¶25 (citing Report # 7, attesting to such non-compliance). Thus, they do not question the Monitor’s findings to this effect at all, but only whether the Decree “**mandate[s]** evaluating specialized services based on billing records, and **the** Monitor’s quantification of the “continuance and consistent” standard set forth in the Decree at ¶IV (Def. Resp. at 5 ¶C). These are questions that raise issues of law, not disputed factual questions requiring the evidentiary hearing defendants seek. Finally, defendants do not dispute at all the Monitor’s findings, and plaintiffs’ corresponding allegations, that they are not in compliance with their obligation to provide adaptive equipment to class members requiring it. Compare Motion at ¶26 (citing to Monitoring Reports that attest to defendants’ non-compliance)

with Def. Resp. at 4-6 (no suggestion that defendants' dispute any of Monitor's findings as to this issue). Each one of these concessions, by itself, would give this Court the evident&y record it would require to render a non-compliance finding, if such finding were the touchstone for a monitoring extension. See Norman, 930 F. Supp. at 1225 ("even if defendant were out of compliance in only one area, plaintiffs could seek enforcement as to that one issue.. . [including] extending the term of the Monitor.. . ." Id. Comnare id. with Decree at X.A. 1 (providing for relief from violation of "any of the terms of the Decree").

As to only one of the four compliance issues--the obligation to provide **CILAs--do** defendants fully take issue with the Monitor's factual findings. But they do so by **conclusory** assertion, not by any evidentiary submission that raising a genuine issue of material fact. See Def. Resp. at 4 (setting forth their factual "**conten[tions]**", but without citing to a scintilla of supporting evidence). **This** is significant, This court would not set a case for trial in the face of a factual record showing no genuine issue of material fact as demonstrated by affidavits or other evidentiary materials. See Fed. R. Civ. P. 56(c). So here, defendants are not entitled to an evidentiary hearing unless they first show a genuine factual dispute on a matter in issue. Indeed, given that the factual record against defendants is the record that the court-appointed Monitor prepared, defendants should have to make a substantial evidentiary showing as to why the Court should not simply accept the particular Monitor's findings that defendants' would seek to dispute without holding an evidentiary hearing. See also Fed. R. Civ. P. 53(e)(2) (court "shall accept a master's findings of fact unless clearly erroneous"). From from this substantial showing, defendants' make **no** evidentiary showing whatsoever.

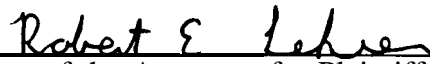
An evidentiary hearing did **not** precede Judge Hart's order extending monitoring in

Norman. Norman, 930 F. Supp. at 1225 n.7 (“the availability of the Monitor’s independent report avoided the need for any evidentiary hearing and its attendant costs”). Similarly here, even if a judicial determination of non-compliance were required to extend monitoring, which it is not, the justification for an evidentiary hearing here is even weaker than it was in Norman. The documented non-compliance that defendants accede to here is not, as in Norman, “limited. ” See n. 5, supra the contrary, the Monitor’s undisputed factual findings attest to defendants’ failure to comply with central operative provisions of the Decree: those requiring a 1:30 ratio for ISCs and the provision to class members of specialized services and adaptive equipment. See pp. 13-14 supra (reviewing facts defendants do not dispute); Motion at ¶¶23, 25, 26 (citing Decree provisions and Monitor’s findings).

III. CONCLUSION

This Court should grant the Motion.

Respectfully submitted,



One of the Attorneys for Plaintiffs

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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FRANK BOGARD, et al.,)	
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Plaintiffs,)	88 C 2414
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vs.)	Chicago, Illinois
)	April 18, 1997
ROBERT WRIGHT, Director of)	10:30 a.m.
Illinois Department of Public)	
Aid, et al.,)	
)	
Defendants.)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE CHARLES RONALD NORGLER, SR.

APPEARANCES:

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	(312)435-5576

1 (Proceedings heard in open court:)

2 THE CLERK: 88 C 2414, Bogard versus Wright. Motion to
3 extend appointment.

4 MR. LEHRER: Good morning, Judge Norgle.

5 THE COURT: Good morning.

6 MR. LEHRER: Robert Lehrer for the plaintiffs.

7 MS. REDLEAF: Diane Redleaf for the plaintiffs.

8 MS. CHERIAN: Limo Cherian, L-i-m-o C-h-e-r-i-a-n,
9 Assistant Attorney General, for the defendants.

10 THE COURT: Good morning. Are any other attorneys who
11 need to be present absent? Or is it just sufficient to proceed
12 with the three of you?

13 MR. LEHRER: Yes, Judge. We were substituted as class
14 counsel for the prior class counsel in November. That's why you
15 have not seen us on this case before.

16 THE COURT: Okay. I just wanted to make sure that all
17 the appropriate parties are represented by counsel.

18 MR. LEHRER: Yes.

19 THE COURT: How does the matter come before the Court?

20 MR. LEHRER: If I could address that for just a moment
21 Judge.

22 THE COURT: Yes: .

23 MR. LEHRER: A consent decree was entered in this case
24 on June 2nd, 1993. Central provisions of the decree provided
25 for appointment of an independent and impartial court monitor.

1 As explained in the decree, the function of the monitor was to
2 oversee compliance with the decree and facilitate defendants'
3 compliance with it so that there wouldn't have to be Court
4 intervention.

5 Now, under the decree the term of the monitor expires
6 on June 30th, 1997. It was a four-year term. But the decree
7 provides specifically that your Honor can extend the term of the
8 monitor.

9 THE COURT: The monitor has consistently filed reports
10 with the clerk, and I have had the opportunity to look at them.

11 MR. LEHRER: Yes.

12 THE COURT: And so he has been complying with the
13 decree.

14 MR. LEHRER: Yes. And we have obviously acquainted
15 ourselves with those reports since coming on the case. And as
16 your Honor knows from having reviewed the report, the monitor
17 has found non-compliance with various provisions of the decree
18 on defendants' part.

19 Immediately upon our substitution as counsel in
20 November, and pursuant to the provisions of the decree, we
21 sought to initiate negotiations with the defendants so that we
22 could arrive upon a plan of-compliance to cure the
23 non-compliance the monitor had found.⁶

24 The decree requires that before we seek Court relief.

25 I won't go into the details of those negotiations

1 except to say that they were intensive and protracted. We began
2 them in November, and from our perspective they really appeared
3 quite promising. We were negotiating all issues, including the
4 extension of the monitoring.

5 Then, as described in our motion, on March 31st
6 defendants, for reasons we frankly still don't fully understand,
7 abruptly broke off these negotiations. They no longer continued
8 to discuss these issues. And that prompted this motion to the
9 Court, which essentially asked for two forms of relief.

10 One form of relief was that your Honor extend the
11 monitoring term past June 30th. And the second form of relief
12 was simply that all the other compliance issues be referred to
13 Magistrate Pallmeyer, who is the magistrate on this case, under
14 Rule 16, so that she could oversee continued negotiations, with
15 the hope that we would be able to settle these other compliance
16 issues.

17 But the monitoring issue was an issue that we didn't
18 see really any hope of any agreement on. And so there would be
19 no interruption in that monitoring term, we felt it necessary to
20 bring that issue directly to the Court for its resolution.-

21 Now, our motion did, however, have the desirable effect
22 of I think jump-starting these stalled or defunct negotiations.

23 Counsel for defendants and ourselves did have
24 discussions just a couple of days ago in which we agreed, in
25 order not to burden the Court if there was no need to do so, to

1 try intensively within the next week to try to resolve all the
2 issues, including the monitoring issue, without asking the Court
3 for any ruling.

4 The opportunity for that settlement in terms of the
5 exploration of the monitoring was short of, from plaintiffs'
6 perspective -- and your Honor can correct me if I'm wrong -- we
7 feel we have to -- the monitoring issue is going to have to be
8 resolved by the Court. We feel we have to present it to your
9 Honor by April 30th.

10 That would give your Honor two months -- the parties
11 some time to submit briefs to your Honor, and your Honor a
12 couple of months to resolve the issue.

13 THE COURT: If you were to agree on an extension of the
14 monitor, I would likely accept your agreement.

15 MR. LEHRER: Oh, I'm sure. I'm sure. And that's what
16 we are going to try to do in the next week.

17 But if we can't, we don't feel we can come in here on
18 May 25th or on June 25th and say: "Okay. We want a ruling by
19 June 30th extending the monitoring.*" So the monitoring issue is
20 --

21 THE COURT: Well, it might not be that tough.

22 MR. LEHRER: We hope it won't be, and we are going to
23 try very hard in the next week to try to see if we can reach
24 agreement. If we can't reach agreement, at least on the
25 monitoring issue, then we feel we have to present it to the

1 Court while the parties hopefully will continue to resolve the
2 other issues.

3 THE COURT: What harm would come -- I don't want to
4 jump ahead too much here -- but from the defendants' standpoint,
5 what harm would come from an extension of the monitoring aspect
6 of the decree?

7 MS. CHERIAN: Your Honor, with respect to the motion
8 for extension of the monitoring, throughout the course of these
9 negotiations the defendants have expressed from the beginning
10 their reluctance to extend the monitor.

11 Some of the reasons that have been discussed have been
12 whether this is an efficient way of continuing monitoring of
13 this compliance.

14 The defendants also believe that because -- they do
15 believe they are in substantial compliance with the decree, and
16 that therefore an extension of the monitor would not be
17 appropriate, that the --

18 THE COURT: First, the monitor was selected by your
19 agreement, I believe.

20 MS. CHERIAN: That's correct, your Honor, to --

21 THE COURT: You together decided who this monitor would
22 be.

23 MS. CHERIAN: That is correct, your Honor. And I think
24 that the defendants' issue with the extension of the monitor is
25 that they think that the extension of the monitor should be

1 based -- should not be extended unless there is substantial
2 non-compliance, which the defendants do not believe there is,
3 and that it should not be extended for minor issues or -- or if
4 not perfect compliance, but substantial non-compliance.

5 And so the defendants' position is that before the
6 monitor can be extended there would have to be a finding of
7 substantial non-compliance to require the extension of the
8 monitor.

9 The decree certainly does not expire, and the
10 defendants certainly intend to continue abiding by the terms of
11 decree and working to increase --

12 THE COURT: How does one know if there is compliance
13 without receiving reports from a monitor? How else would the
14 Court be advised?

15 MS. CHERIAN: Well, your Honor, as in most -- as in
16 consent decrees where there are no monitors, plaintiffs are
17 always able to bring issues of non-compliance with the consent
18 decree before the Court, without a monitor, regular interim
19 reports, if plaintiffs become aware of any issues of
20 non-compliance or due to any of their own investigations or
21 anything like that. Certainly there is nothing to preclude
22 that.

23 THE COURT: That would-be very burdensome for the
24 plaintiffs here to be going into these institutions to discover

25 --

1 MR. LEHRER: Exactly.

2 THE COURT: -- or investigate the nature of
3 allegations, especially in situations where the -- where the
4 person may be disabled, mentally or physically, and at least
5 theoretically incapable of articulating problems.

6 MS. CHERIAN: And we understand that. And part of the
7 discussions have been an alternative monitoring type of
8 situation as opposed to the Court-appointed monitor that has
9 been in place at this point, and that's part of the discussion
10 that at least had been going on up until the March date.

11 And then actually part I think of the reason the
12 negotiations are not -- "breaking down," I guess is probably the
13 best way of putting it -- is because it seemed that the
14 defendants were under the impression that the plaintiffs tied
15 all of their negotiations to the extension of the monitor, which
16 the defendants had pretty consistently expressed that they --

17 THE COURT: Well, you have given me a rough enough idea
18 as to some of the issues here. And I want to, to the extent
19 that I can, leave it to you to resolve these matters, and to act
20 judicially only when I should or must.

21 Now let me ask this, however: Does the individual
22 monitor, whose name escapes me at the moment, have any personal
23 objection to his extension?

24 MS. REDLEAF: No.

25 THE COURT: If one were to extend the monitor, would i

1 be this individual?

2 MS. CHERIAN: Yes, I believe that is --

3 MS. REDLEAF: Yes.

4 MR. LEHRER: Yes. His name is John Rogalin, sir.

5 THE COURT: That is correct. But as far as he
6 personally is concerned --

7 MS. REDLEAF: He is available for the function.

8 THE COURT: He would be available.

9 MR. LEHRER: He absolutely is available. And he is
10 concerned that if the term is to be extended, that there would
11 be no interruption in his responsibilities. I mean, part of his
12 responsibilities and part of -- from his perspective he can only
13 do a good job if there is a continuity of investigation, a
14 continuity of statistical gathering.

15 THE COURT: Well, this is before the Court basically
16 for status.

17 MS. REDLEAF?: Yes.

18 THE COURT: And I have received from you a sufficient
19 status, so --

20 MS. REDLEAF: Your Honor --

21 THE COURT: -- are you simply asking for more time to
22 try to work this out? And that if not, you will advise me and
23 then there would be some responsive pleading regarding the
24 extension of the monitor, and the suggestion of giving the
25 matter to Judge -- Magistrate Judge Pallmeyer --

1 MS. REDLEAF: Yes. Actually we would like, because the
2 negotiations do have a fast track right now, to set this over
3 just one week. We have a meeting scheduled for Wednesday. We
4 will be in a position to advise the Court next week.

5 THE COURT: Today is the 18th. So we will put the case
6 back on for further status on April 25th at 10:30.

7 MS. REDLEAF: Thank you.

8 MR. LEHRER: That's fine. And if at that time we can
9 advise the Court the status of the negotiations in the matter,
10 the issue of monitoring in particular does have to be resolved
11 by the Court, and we can discuss the schedule.

12 THE COURT: Yes. And you can also advise Court that
13 somehow you have reached an agreement on these matters.

14 MR. LEHRER: I certainly hope we will be able to do
15 that. We don't wish to engage in protracted litigation if we
16 can possibly avoid it.

17 THE COURT: Well, I know that the attorneys who have
18 represented the parties in this case are truly concerned about
19 the people who are in these institutional placements. There has
20 been good faith, as I have perceived it over the years, on both
21 sides.

22 And so do your best to try to resolve these matters if
23 you can. If not, April 25th at 10:30.

24 MS. REDLEAF: Thank you.

25 MR. LEHRER: Thank you very much, your Honor.

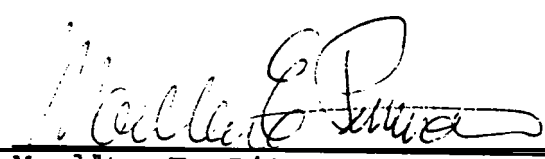
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MS. CHERIAN: Thank you, your Honor.

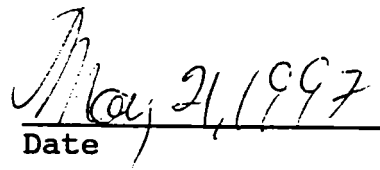
(Proceedings concluded.)

CERTIFICATE

I hereby certify that the foregoing is a true and accurate transcript of proceedings from the record in the above-entitled case.



Maellen E. Pittman
Official Court Reporter



Date