

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

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NIKITA PETTIES, <u>et al.</u>,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 95-0148 (PLF)
)	
DISTRICT OF COLUMBIA, <u>et al.</u>,)	
)	
Defendants.)	
_____)	

**FURTHER REPORT AND RECOMMENDATION OF THE SUPERVISING
COURT MASTER CONCERNING THE TRANSITION OF THE DIVISION
OF TRANSPORTATION BACK TO THE CONTROL OF DEFENDANTS**

Pursuant to the Court’s Order of April 27, 2011, I am submitting this Report and Recommendation to inform the Court and the Parties of (1) the results of my analysis of the management and operations of the Division of Transportation (the “Division”) and the extent to which it is in compliance with the Orders of the Court; and (2) my recommendations about what further actions should be taken and what orders should be entered in light of the compliance problems that the Division has experienced.

On August 9, 2011, pursuant to Section 8(b) of the Transition Order of May 5, 2010, I formally notified Defendants that they were in material breach of one or more of the performances standards set forth in the Plan for the Transition of Management and Ongoing Operations of the Division of Transportation. Pursuant to Section 8(c) of the Transition Order, I have determined that Defendants have not cured these material breaches. I have further determined that, in light of the good faith effort being made by Defendants under the leadership of City Administrator Allen Lew to cure those breaches,

I will not exercise my authority to assume control of the Division at this time. Rather, I believe it is appropriate to provide Defendants with more time to cure the Division's operational problems and to seek to come into compliance with the Court's Orders.

In light of Defendants' difficulties in operating the transportation system and the material breaches that have occurred during the last 12 months, I recommend that the Transition Period be further extended for one additional year, until October 31, 2012. At that time, the Court should make a further determination how to proceed based on an assessment of the Division's compliance with the Court's Orders after the start of the 2012/2013 School Year. In their Response to the Formal Notification of Material Breach of the Transition Plan submitted to the Court on September 21, 2011, Defendants themselves stated that the Transition Plan should continue in effect and that they should continue to exercise day-to-day control over the Division's operations subject to the oversight of the Supervising Court Master.

While I recommend that the Court should extend the Transition Period for one additional year, I wish to assure Defendants that if during the course of this year they can demonstrate to me that they have come into durable compliance with the Court's Orders and that they will be able to remain in compliance at the beginning of the 2012/2013 School Year, I will submit my analysis of their performance to the Court and recommend that the Transition Order be terminated at an earlier date.

DISCUSSION

On April 27, 2011, the Court amended Section 1 of the Transition Order to provide that the Transition Period should be extended until October 31, 2011. The Court further directed that after the start of the 2011/2012 School Year, the Supervising Court

Master shall conduct a comprehensive analysis of the management and operations of the Division under the day-to-day control of Defendants and submit to the Court and the Parties by October 11, 2011 a Report that analyzes the extent to which the Division is in compliance with the Court's Orders and his recommendations as to what further steps should be taken and what further orders entered.

In my prior Report and Recommendation recommending an extension of the Transition Period to October 31, 2011, I noted that the Division had been "non-compliant in key areas with Orders of the Court, notably the on-time arrival and ride time requirements." Docket No. 1886 at 2. After the Court had issued its Order, Gilmore Kean learned that the Division had experienced substantial deterioration in its performance, including in particular a failure to conduct required brake tests for buses that had created student safety risks. I discussed these problems at length with Defendants and demanded that they take urgent steps to remedy these problems. On July 21, 2011, the senior managers of the Division were terminated.

On July 22, 2011, I initiated the process under the Transition Order for declaring a material breach and assuming control of the Division by submitting an Informal Notice of Material Breach to the Defendants. I reported my action to the Court as part of a report that I submitted on July 22nd which summarized the results of an extensive End of School Year audit of the Division's performance under Defendants' control. Docket No. 1920. The report found that Defendants were in material breach of their obligations under the Court's Orders. It concluded that the Division's performance had markedly deteriorated due to its inability to organize and maintain its fleet of aging vehicles, resulting in violations of the performance standards set forth in the Transition Plan; and that, in

particular, Defendants' failures to have timely inspections of the brakes conducted had jeopardized the safety of special need students. The report also noted that the Division was experiencing a management vacuum due to the termination of its senior managers.

On August 4, 2011, I met with City Administrator Allen Lew, who assured me that Defendants were committed to curing the operational problems that had been disclosed by the End of School Year audit and stated that he would take the lead within the District government in that effort. On August 9, 2011, upon review of Defendants' response to the Informal Notice of Material Breach, I determined that they had not cured the material breaches. I therefore submitted a Formal Notification of Material Breach and provided the Defendants with an extensive, non-exclusive list of areas in which they were non-compliant. Docket No. 1926. Under Section 8(c) of the Transition Order, Defendants had 30 days in which to cure these material breaches.

Pursuant to the Transition Order, I directed Gilmore Kean to conduct a review of the Division's performance during the opening of the new School Year. On September 15, 2011, I submitted to Defendants a Report on DOT Opening of the 2011/2012 School Year. (Attachment 1) The Report concluded, among other things, that:

The Division remains non-compliant with the On-Time Arrival standards established by the Court.

The Orders established an on-time arrival requirement of 94%. Defendants had averaged 86% on-time arrival for the 2010/2011 School Year and reported an on-time performance rate of 77.81% for the first three weeks of the new School Year.

Defendants had failed to demonstrate that brake inspections had been performed on all vehicles in its fleet that were being utilized to transport special needs students.

Defendants had been able to resolve some fleet issues, as a result of the efforts of new management in the Division to clear the backlog of overdue District of Columbia inspections. However, issues remained concerning their compliance

with the brake inspection requirement. Problems with the Division's data management system substantially complicated efforts to determine the level of non-compliance. As of September 15th, Gilmore Kean concluded that 121 vehicles were without documentation of adequate brake inspection.

Buses were being used to service routes despite pre-trip inspections which indicated that safety or operational issues had been identified during on-site observations by Gilmore Kean.

On September 21, 2011, Defendants filed a Response to the Formal Declaration of Material Breach. It asserted that “[a]t this time, Defendants are not in material breach of the Transition Plan” and had made good faith efforts to achieve full compliance. Docket No. 1937 at 2. At other points in the submission, however, Defendants essentially admitted that they were not in full compliance with the provisions of the Transition Order, notably the on-time arrival requirement. They claimed, however, that “the purposes of the Transition Order are being achieved, with only some limited noncompliance with its exacting requirements.” *Id.* at 4.

Defendants framed the issue to be decided by the Court as whether “Defendants are serving the Transition Order’s primary purpose, with sufficient systemic improvement to justify the continued operation of the DOT by OSSE”; expressed their gratitude that the Supervising Court Master had not elected to assume responsibility for the Division’s management; and stated that they welcomed the “continued assistance” of the Supervising Court Master “in a collaborative effort to create a safe, effective, and durable transportation system for special education students in the District of Columbia.” *Id.* at 4-5.

Upon review of the Response to the Formal Notification of Material Breach, I have concluded that Defendants are in material breach of the Transition Order, for the reasons set forth in the Notice of Material Breach itself and my Reports of September 15,

2011 and July 22, 2011. I am not persuaded by Defendants' claim that they are in substantial compliance. Based on my independent review of the facts, I believe that they have overstated their case in various respects and that material breaches continue to exist.

I have decided, however, not to take back control over day-to-day operations of the Division at this time. I do not believe that this course of action would represent the best way of pursuing the goal of all parties to this litigation to bring Defendants into durable compliance with the terms of the Court's Orders. The improvements that have occurred in the Division since early August are, in my judgment, the result of the personal involvement in the problem of City Administrator Allen Lew and other senior officials of the District of Columbia government. Mr. Lew has given me his personal commitment to have the Division operate in compliance with the Court's Orders. The actions he has taken to date have confirmed his assurance, and there is some evidence that performance is beginning to improve. In my judgment, continued pursuit of the process that has been established, under Mr. Lew's oversight, offers the best available course toward the ultimate goal of bringing Defendants into durable compliance.

For these reasons, I recommend that the Court further amend Section 1 of the Transition Order to provide that the Transition Period shall be extended to October 31, 2012. To assist the Court and the Parties in determining what further actions should be taken at that time, the Court should further require the Supervising Court Master to perform an audit and submit a report by no later than October 11, 2012 concerning whether the Division operated in compliance with the Court Orders at the opening of the 2012/2013 School Year.

In recognition of the efforts that Defendants are making to come into compliance, I will represent that if, during the course of this year, they are able to demonstrate to me that they have come into durable compliance with the Court's Orders and that they will be able to remain in compliance at the beginning of the 2012/2013 School Year, I will come to the Court and recommend termination of the Transition Order at an earlier time.

I have informed the Parties of my position so that they may submit their views to the Court within the time period established by the Transition Order.

I have attached a draft Order that would implement these Recommendations.

Respectfully submitted,

/s/ David Gilmore

David Gilmore
Supervising Court Master

October 7, 2011