



MR-TN-003-012

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 STATE OF TENNESSEE,)
 Don Sundquist, Governor of the)
 State of Tennessee; Marjorie)
 Nelle Cardwell, Commissioner,)
 Tennessee Department of Mental)
 Health and Mental Retardation;)
 Max Jackson, Superintendent,)
 Arlington Developmental Center,)
)
 Defendants.)

Civil Action
No. 92-2062 M1/A

FILED
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ROBERT R. DI TROLIO
U.S. DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE

CONTEMPT ORDER

BY
DEPUTY CLERK

On August 9, 1995, the Court held a hearing on the United States Third Motion for Contempt and on the status of defendants' compliance with the Court's orders of June 30 and July 10, 1995. After hearing the evidence presented by both parties and the Court Monitor's expert, the Court found defendants in contempt of the Court's orders and issued contempt sanctions in order to compel compliance and remedy the crisis in care at the Arlington Developmental Center ("ADC").

The history of this case amply demonstrates that the defendants have been given every opportunity to take appropriate corrective action and have continually failed to do so. Unlike the consequences of a party's failure to act in many other civil

42

cases, the defendants' inaction in this case directly impacts on the immediate health and safety of individual citizens. The documentary and oral evidence at the hearings on June 30, July 10, and August 9, 1995, and the entire record in this case demonstrate, by clear and convincing evidence, that the defendants violated the Court's orders of June 30 and July 10, 1995.⁽¹⁾ As set out in this memorandum and its attachments, defendants have failed to marshal their resources to achieve compliance with the provisions of the Emergency Order of June 30, 1995 and the Injunction of July 10, 1995.

The Arlington Developmental Center is a state operated, residential mental retardation facility housing approximately 385 developmentally disabled persons located in Arlington, Tennessee. ADC's population consists primarily of individuals currently assessed as severely or profoundly retarded or developmentally disabled, some of whom have associated physical handicaps, medical problems, or behavior problems. In 1991, ADC was the subject of a United States Department of Justice ("DOJ") investigation of possible statutory and constitutional violations regarding its resident population. A DOJ findings letter citing deficiencies was issued to the state of Tennessee in 1991. On

⁽¹⁾ The plaintiff also established by clear and convincing evidence that the defendants violated the Remedial Order of September 2, 1994, and the Plan of Correction of April 10, 1995. See n. 8 *supra*. The standard for civil contempt applied in this case is set out in Glover v. Johnson, 934 F.2d 703, 707-08 (6th Cir. 1991) (clear and convincing evidence that the defendant violated the Court's prior order). See NLRB v. Cincinnati Bronze, Inc., 829 F.2d 585, 590 (6th Cir. 1987).

January 21, 1992, after the state of Tennessee refused to comply with the DOJ findings letter, the United States of America filed suit against the state of Tennessee and Arlington Developmental Center pursuant to the Civil Rights of Institutionalized Persons Act (CRIPA), 42 U.S.C. § 1997 et seq. Trial began in this case on August 30, 1993.

On November 22, 1993, the Court issued its oral opinion, finding that conditions at ADC were in violation of the constitutional and federal statutory rights of the citizens living there, and issued a preliminary injunction directing defendants to take "immediate" action to correct several life-threatening deficiencies. In its opinion, the Court noted there was proof in support of the United States contention that defendants' resistance to taking meaningful, voluntary corrective action was so pronounced as to be deliberate (Opinion at 27), and specifically found in its Supplemental Findings of Fact that:

Defendants failed to begin remedial measures, even on life-threatening issues, until after the actual filing of a lawsuit in this case, even though state officials were informed as early as July 1990 that life-threatening conditions existed at ADC. In fact, some efforts undertaken by defendants did not occur until after the United States filed for a preliminary injunction in March of 1993. . . . ADC has demonstrated resistance and indifference to corrective action.

(Findings at 46 ¶ 150 and ¶ 151.)

Despite these findings, the Court gave defendants an opportunity to craft their own remedial plan -- rather than have such a plan dictated by the Court. Defendants' remedial plan was to be submitted to the Court by January 21, 1994. (Preliminary Injunction Order, November 22, 1993.) On December 23, 1993, the Court, while noting that "conditions at [ADC] require that the State of Tennessee proceed promptly with preparation of the remedial plan," nevertheless, granted defendants' request for an extension until February 18, 1994, to submit their plan. (Order on Defendants' Motion for an Extension of Time, December 22, 1993 at 1-2.) On February 18, 1994, defendants submitted a remedial plan that was inadequate, and the defendants moved for and were granted permission to submit a Supplemental Remedial Plan by March 21, 1994. See Order of February 24, 1994. Defendants submitted this Supplemental Remedial Plan on March 18, 1994. The United States objected to the inadequacy of the Plan. After reviewing the Plan and hearing testimony from the parties, the Court ruled at the March 21, 1994 hearing that this Supplemental Plan was also inadequate. After negotiation with the United States, and with input from the Court's Expert Facilitator, the parties submitted a joint Remedial Plan, which was accepted and

entered as the Remedial Order^[2] by the Court on September 2, 1994. Appendix A.

On July 29, 1994, the United States filed its first Motion for a Contempt Order, alleging that defendants had not complied with the Court's Preliminary Injunction issued November 22, 1993. The evidence presented at a hearing held on July 29, 1994, overwhelmingly demonstrated that defendants were in contempt of the Injunction, and the Court so held in its order of March 31, 1995. Because the Court ruled that the Remedial Order adequately addressed the concerns raised in the contempt petition, the Court did not issue contempt sanctions, other than ordering ADC professional staff to read the Court's orders and granting costs to the United States. (Contempt Order, March 31, 1995 at 6.)

Pursuant to the Remedial Order, at the end of 1994, the Court Monitor completed her first semi-annual review of

^[2] A Joint Motion of the United States and State of Tennessee for Entry of Remedial Order was filed on August 31, 1994. The Remedial Order is a 54-page plan, comprised of 19 specific categories with numerous subdivisions and an integrated timeline for implementation. Prior to entry, the Court carefully reviewed the proposal in its entirety, and determined that, if implemented as a whole and in accordance with an integrated timeline, conditions at Arlington Developmental Center could be brought into compliance with constitutional and statutory requirements.

The plan in essence calls for the recruitment and/or training of qualified professionals and direct care staff; the development of adequate planning, implementation, self-monitoring, and recordation procedures; implementation of a retention review procedure to allow defendants maximum latitude in improving personnel performance; and the appointment of a monitor to evaluate defendants' compliance. Provisions of the Remedial Order deal with specific problems identified at ADC. It should be noted that each component of the Remedial Order will be effective only if it is implemented in light of all of the other components. Thus, in order to successfully implement the Order, the defendants must at all times keep in mind how each component fits within the overall Remedial Order. See Appendix A.

defendants' compliance with the 1993 Preliminary Injunction and the Remedial Order. The Monitor's Report, which previously had been commented on by the parties, was presented at a hearing on April 10, 1995, and adopted by the Court. The Court concluded, in adopting the monitor's report, that defendants had only complied with five of sixty-six provisions that were to have been accomplished at the time of the Monitor's review. Appendix B. The United States filed its second motion for contempt based upon this identified lack of compliance with the Remedial Order and the 1993 Preliminary Injunction. Again, rather than order sanctions at the time of the hearing, the Court accepted and adopted, as an order of the Court, defendants' Plan of Correction that was submitted on April 10, 1995 and subsequently signed by the Commissioner of the Department of Mental Health and Mental Retardation ("DMHMR") and the Superintendent of ADC. Appendix C.

During a compliance review by Court Monitor occurring the week of June 26, 1995, the Monitor informed the Court and the parties that a medical crisis existed at ADC. Because of the conditions asserted to exist at ADC, the United States and the court monitor requested an immediate hearing by telephone. The Court conducted a hearing by telephone with the Monitor, the Monitor's medical expert, Dr. Renee Wachtel, and the parties. At that hearing, Dr. Wachtel testified that two (2) people at ADC had died within the last four (4) days. (Tr. June 30, 1995 at 28

11. 21-22.) Dr. Wachtel further testified that eleven (11) ADC residents had died in the last nine (9) months and that, when compared with other similar populations, that number is "excessive, very excessive." (Tr. June 30, 1995 at 28-29.) Dr. Wachtel set out in her preliminary report (Appendix D) and further testified on June 30, 1995, regarding immediate critical conditions at ADC. See Tr. June 30, 1995 at 7-22 (inadequate comprehensive medical care, transfers of acutely ill patients, critical physician shortage,^[3] absence of psychiatric services, etc.). It was Dr. Wachtel's opinion that absent immediate action, ADC "will continue to have unnecessary deaths." (Tr. June 30, 1995 at 9.) See also Tr. June 30, 1995 at 21 ll. 7-10; Tr. June 30, 1995 at 22 ll. 12-25; Tr. June 30, 1995 at 26 ll. 2-4; Tr. at 28 ll. 2-17.^[4] The state of Tennessee acknowledged that the facts supporting the emergency conditions existed and substantially agreed and/or acquiesced in the imposition of a

^[3] The state of emergency at ADC arose in part because of the resignation or termination of primary care physicians at Arlington Developmental Center. The minimum complement of five (5) primary care physicians (including the Medical Director) had dwindled to essentially one (1) primary care provider plus the Medical Director. Contract and/or loan physicians were providing some support and night coverage, but it was clear from information presented by Dr. Wachtel that effective medical care for this population was collapsing, (Appendix D), leading to a serious risk of severe or substantial harm or death for numerous ADC residents.

^[4] The presence of a Developmental Physician at ADC is essential to adequate medical care at the facility. Remedial Order § VI A (September 2, 1995) (Appendix A); Tr. June 30, 1995 at 26 (Wachtel); Tr. June 30, 1995 at 36-37; Tr. June 30, 1995 at 42. The Developmental Physician, whom state representatives had testified on April 10, 1995 would be present in the facility by June 1, 1995, had declined employment with the state of Tennessee. No contract documents were ever presented as to that physician and there is no documentary evidence that an agreement was ever actually reached with that physician for her employment.

proposed Emergency Order. (Tr. June 30, 1995 at 15-16, 30.) After consideration of the documents before the Court and Dr. Wachtel's testimony, the Court adopted the proposed Emergency Order, directing the defendants to take various actions to correct the crisis. Appendix E. The Court scheduled a hearing for July 10, 1995 to ensure that defendants had complied with the provisions of the Emergency Order.

At the July 10, 1995 hearing, the Court heard evidence regarding the deficient medical conditions that existed at ADC and the defendants' non-compliance with the Emergency Order. That evidence included testimony by Dr. Akers, the Arlington Developmental Center Medical Director, who testified on July 10, 1995, that he had informed Commissioner Cardwell's office several months in advance of the need to obtain replacement physicians. (Tr. July 10, 1995 at 113.) No action, however, was taken by the central office. Moreover, Commissioner Cardwell admitted that as of July 10, 1995, a recruiting package had not been prepared for a developmental physician, (Tr. July 10, 1995 at 92), despite the fact that all parties have consistently acknowledged that the recruitment of a developmental physician is critical. (Tr. June 30, 1995 at 26, 36-37, 42.) Based upon the evidence presented, the Court ruled that defendants had failed to comply with the Emergency Order and that the requirements of the Emergency Order were still necessary. The Court incorporated the requirements of the Emergency Order into a preliminary injunction. (Order of

July 21, 1995 (Appendix E).) Again, rather than order sanctions for defendants' non-compliance, the Court gave defendants another opportunity to come into compliance by August 9, 1995, and a hearing was set for that date. Id. at 2. The Court made it clear at the July 10, 1995 hearing that if defendants did not comply by the August 9 hearing date, coercive and remedial sanctions might be imposed. (Tr. July 10, 1995 at 143-44.)

At the hearing on August 9, 1995, the defendants put on testimony of Marjorie Nelle Cardwell,^[5] Tennessee's Commissioner

^[5] Commissioner Cardwell is "the chief executive officer with the state responsible for complying with the terms of the Court's order" (Tr. April 10, 1995 at 104 ll. 17-20.) She began employment with the state of Tennessee in 1969 as assistant superintendent at Green Valley Developmental Center, was promoted to assistant superintendent in the early 1970s, and became superintendent at Cloverbottom Developmental Center in 1977. From 1980 to 1990, she was superintendent at the Green Valley Developmental Center in East Tennessee. In August 1990, she was appointed assistant commissioner (i.e. assistant to the Director of DMHMR) with direct oversight of mental retardation facilities in Tennessee. (Trial Tr. September 8, 1993 Vol. VII at 1402.) She remained in that position during the Department of Justice ("DOJ") investigation of the Arlington Developmental Center. In 1991, she received and reviewed the DOJ findings letter regarding Arlington. (Tr. April 10, 1995 at 104-106.)

The trial record shows that in June 1991, Cardwell came to Memphis and met with Dr. Roland Palmer, former Psychology Director ADC. At this meeting, Dr. Palmer reviewed with Cardwell a list of 39 concerns regarding conditions at Arlington. (Trial Tr. September 8, 1993 Vol. VII at 1403 and Trial Exh. 96 (Appendix M).) Prior to his resignation from Arlington Developmental Center, (Trial Exh. 97) (Appendix N)), Dr. Roland Palmer had participated in an in-house ADC investigation and report, which reflected that evidence against Arlington regarding the DOJ findings letter was "overwhelming," (Trial Tr. Vol. VII at 1405 l. 4), and that the state should make the required changes. (Trial Tr. Vol. VII at 1405-1407.) Palmer testified that the report went to Nashville, including to Cardwell and her superior. According to Palmer,

. . . after that report hit Nashville, things got a lot different at Arlington Nobody much wanted to talk to me much anymore Finally [I was] told . . . that the state had decided to fight the decision [the DOJ findings letter].

(Trial Tr. Vol. VII at 1406 ll. 8-12.) (Cont.)

of DMHMR, Dr. Fred Palmer, a medical consultant in developmental disabilities from the University of Tennessee, and Gaye Hansen, the defendants' Remedial Plan Facilitator at ADC.⁶ Ms. Victoria Therriault, an Advanced Nurse Practitioner specializing in developmental disabilities, testified for the United States. The United States placed the reports of Ms. Therriault (Appendix K) and Dr. Susan Hyman (Appendix L), a physician specializing in developmental disabilities, into evidence. The reports of the United States experts were based upon their tours of the institution and reviews of documents prior to the hearing.⁷ The Court Monitor's medical expert, Dr. Renee Wachtel, also testified based upon her review of documents and her discussions with personnel at ADC the day before the hearing.

(Cont. from previous page) Based on the proof at trial and the testimony of Commissioner Cardwell on April 10, 1995, it appears that, despite her knowledge of conditions at Arlington while she was assistant commissioner (1990-1993), the department did not hire any experts to provide assistance in correcting the deficiencies listed by Dr. Roland Palmer. See e.g. Tr. April 10, 1995 at 108-109; Trial Tr. September 8, 1993 at 1403-1408.

On January 21, 1993, Cardwell retired from the State of Tennessee. In January 1995, she was appointed Commissioner of the Department of Mental Health and Mental Retardation for the state of Tennessee. (Tr. April 10, 1995 at 105-106.)

⁶ At several points during defendants' presentation, defendants' witnesses or counsel for defendants stated that the Assistant Commissioner of DMHMR, Dr. Larry Durbin, or the Superintendent of ADC, Max Jackson, were the parties either responsible for ensuring that necessary actions were taken or had the information as to whether actions had been taken in compliance with the Court orders. Although both men were present at the hearing and the Court invited their testimony, defendants' did not call them to testify.

⁷ Dr. Hyman toured ADC on July 22-23, 1995. (Hearing Exhibit 11 and Hyman's Report of August 7, 1995 (Appendix L).) Ms. Therriault toured ADC on July 31 and August 1, 1995. (Hearing Exhibit 10, Therriault's Report of August 8, 1995 (Appendix K).)

Based upon the evidence presented, the Court found that the defendants clearly had not complied with five provisions of the June 30, 1995 Emergency Order/July 21, 1995 Preliminary Injunction.^[8] It was indisputable that defendants had not complied with the first and second provisions of the Injunction, as no Developmental Medicine Physician had been retained as of the date of the hearing, and the crucial duties of that Physician under the Injunction were not being fulfilled. See Tr. August 9, 1995 at 99-101 (Hansen), 157 (Wachtel).^[9] See also Remedial Order § VI A., C. & D. (Appendix A); July 21, 1995 Order ¶ 1 (Appendix F) n. 1. Similarly, there was little dispute that defendants had failed to retain the services of a full-time psychiatrist, as required by provision five of the Injunction.

^[8] The United States Third Motion for Contempt alleged that defendants were in non-compliance with not only the Emergency Order/Preliminary Injunction, but the initial Remedial Order and the Plan of Correction. Evidence was presented, including various admissions by defendants' witnesses, that supported the United States contention. For example, Ms. Hansen testified that defendants were not in compliance with the Remedial Order or the Plan of Correction (Tr. Aug. 9, 1995 at 91, 93-95, 102, 121-123), and Commissioner Cardwell agreed that defendants were not in compliance with the Court's Remedial Order (Tr. at 50). The findings of the United States and the Court Monitor's medical experts concur. See, e.g., Tr. Aug. 9, 1995 at 157-58 (Wachtel); 132 (Therriault); and Exhibits 10 and 11 (Reports of Ms. Therriault (Appendix K) and Dr. Hyman) (Appendix L). See also n. 1 infra. However, this Court's contempt finding and focus were on the immediate medical crisis addressed by the June 30, 1995 Emergency Order and the July 21, 1995 Preliminary Injunction. Thus, the Court's contempt ruling and sanctions are intended to ensure that defendants promptly comply with the Emergency Order/Preliminary Injunction requirements, which are intended to stabilize medical services and to put the necessary professionals in place to comply with the other court orders forthwith.

^[9] As noted by the Court in the July 21, 1995 Preliminary Injunction, the Remedial Order of September 2, 1994, required defendants to have hired a Developmental Medicine Physician by March 2, 1995. The June 30, 1995 Emergency Order required that defendants take immediate action to fill the position by July 5, 1995. When it became clear at the hearing on July 10, 1995, that defendants had failed to comply with that deadline, defendants were given another extension until the August 9, 1995 hearing.

See Tr. August 9, 1995 at 144, 157 (Wachtel). See also Remedial Order, § II. E. (Appendix A); June 30, 1995 Emergency Order ¶ 5 (Appendix E).

Provision seven of the Injunction required defendants to contract with two Developmental Nurse Consultants by July 14, 1995. Commissioner Cardwell testified and defendants' counsel confirmed that defendants had only signed memoranda of understanding upon which they planned to base contracts. See Tr. August 9, 1995 at 30 (Cardwell); 147 (Maloy). See also Tr. at 131 (Therriault) and Exhibit 10 (Appendix K) at 10. Defendants did not produce these memoranda at the hearing.

Under provision eight of the Injunction, defendants were to have hired one hundred thirty-six (136) nurses by August 8, 1995.^[10] The most nurses that defendants claimed were on duty by the date of the hearing were 132. See Tr. August 9, 1995 at 31 (Cardwell) (Appendix K). See also Tr. at 147 (Wachtel), 131 (Therriault); and Exhibit 10 (Appendix K) at 10.

^[10] As noted in the July 21, 1995 Preliminary Injunction, this was already to have been accomplished under the Plan of Correction by July 1, 1995. At the hearing on July 10, 1995, Commissioner Cardwell testified that defendants had failed to meet the requirement of 136 nurses by July 10, 1995 (just as they had missed their deadline of July 1, 1995) and that, as of July 14, 1995, the state would have only 111 nurses. (Tr. July 10, 1995 at 70-71.) This was, of course, still 25 nurses short of the minimum voluntary staffing level agreed to by the state in the April 10, 1995 Plan of Corrections II. C. 1 (Appendix C).

Commissioner Cardwell also acknowledged that at the time of the first compliance review, Arlington Developmental Center had obtained the services of only 90 nurses and that as of June 30, 1995, they had retained the services of approximately 106 nurses. (Tr. July 10, 1995 at 94.)

Although defendants also conceded they were not in compliance with provision six, that provision did not have a deadline and, therefore, defendants were not held in contempt of that requirement. See Tr. August 9, 1995 at 23-24 (Cardwell). As ordered at the hearing, the defendants now have until August 23, 1995 to comply with that provision.⁽¹¹⁾

In the instant case, the language of the District Court in Aspira of New York, Inc. v. Board of Educ. of New York, 423 F.Supp. 647, 654 (S.D.N.Y. 1976), is particularly appropriate:

⁽¹¹⁾ For each of the remaining provisions, the Court found defendants had complied or the deadline for complying had not expired. It should be noted that although the Court concluded that defendants had minimally complied with the letter of several provisions, that is all that could be said for defendants' efforts. For example, in order to demonstrate compliance with provision nine, (requirement pertaining to negotiation of written agreements with hospitals within 60 days of the June 30, 1995 Emergency Order), defendants testified that a memorandum of understanding was signed with the Regional Medical Center. (Tr. August 9, 1995 at 25 (Cardwell).) (A copy of this memorandum was handed to the Court, but was never entered into evidence by defendants.) However, defendants conceded that they had only an oral agreement with the Le Bonheur Hospital and they presented no evidence of agreements with any other hospitals that serve ADC residents. (Tr. August 9, 1995 at 26 (Cardwell); Tr. at 148-149 (Wachtel).) Moreover, defendants' minimal efforts to achieve this "paper compliance" have not solved the underlying problems which were the reasons for the provisions in the first place; namely, cooperation and communication about patient transfers between ADC and these hospitals, and clarification and oversight of Do Not Resuscitate ("DNR") practices for ADC residents sent to these hospitals. See, e.g., Tr. June 30, 1995 at 10-11, 20-23 (Wachtel); Dr. Wachtel's Report Exhibit 1 (Appendix D) at 3, 5; Tr. July 10, 1995 at 14 (O'Neill). Dr. Wachtel testified that as of August 9, 1995, ADC still had not received discharge summaries for seven ADC residents who were transferred from the hospital back to ADC during the month of July. (Tr. August 9, 1995 at 153.) Commissioner Cardwell testified that defendants still had not developed a DNR policy. (Tr. August 9, 1995 at 33-34.) As a consequence, defendants abdicate any responsibility regarding the utilization of DNR orders for ADC residents. Dr. Wachtel testified that the DNR clause in the memorandum of understanding with the Regional Medical Center is not clear and is inadequate. The Court agrees. Similarly, defendants did retain the services of additional physicians for night coverage in compliance with provision four, but defendants were unclear as to whether they had received or were to be given adequate training. (Tr. at 21, 29 (Cardwell), 118 (Hansen).)

Upon the facts disclosed in this proceeding, defendants have fallen far short of the requisite diligence. They have neglected to marshal their own resources, assert their high authority, and demand the results needed from subordinate persons and agencies in order to effectuate the course of action required by the consent decree. They have allowed deadlines to pass without advance announcements or volunteered explanations, awaiting complaints by the plaintiffs before even treating with the court concerning delinquencies. They have borne with seeming equanimity long periods of nonperformance, inadequate performance, or outright defiance. . . . They have displayed an evident sense of nonurgency bordering on indifference, contrasting vividly with the spurt of activity on the heels of plaintiffs' motion for a finding of contempt.

Compliance, or non-compliance with any injunction must, of course, be measured in the context of the case in which the order arose, including the circumstances and conduct causing the creation of the order and the objective or purpose of the order. The objective of all remedial action in this case, whether that action is the Remedial Order itself (Appendix A), the Plan of Correction (Appendix C), the Emergency Order (Appendix E), or the subsequent Injunction (Appendix F) is the objective stated in the first paragraph of the stipulated Remedial Order entered September 2, 1994. That paragraph provides in relevant part as follows:

Defendants are hereby Ordered to take the following actions to guarantee the statutory and constitutional rights of residents of Arlington Developmental Center (ADC). Defendants shall remedy the constitutional and statutory deficiencies identified in the Supplemental Findings of February 18, 1994.

The defendants' failure to progress toward the overall objective of improving actual patient care and services at ADC has been the core problem and subject of previous hearings and orders.^[12] As previously noted, the central office allowed the number of primary care physicians to deteriorate to a crisis level despite warnings by the ADC Medical Director and the Superintendent. See Tr. July 10, 1995 at 110-113 (Akers) (informing superiors of physician shortage March 1995); Superintendent Jackson's February 17, 1995 Memo to Commissioner Cardwell (regarding "Pending Crisis in Medical Coverage") (Appendix G); Dr. Wachtel Preliminary Report, June 30, 1995 at ¶ 1 (Appendix D) (noting "Critical Shortage of Physicians at ADC"). The central office failed to recruit critical medical, nursing, and other expertise essential to the implementation of the agreed upon orders in this case. See Tr. July 10, 1995 at 114-115 (Akers); Dr. Wachtel Preliminary Report, June 30, 1995 (Appendix D); Hyman report August 7, 1995 (Appendix L). As recently as the beginning of August 1995, the Commissioner acknowledged that she still had never seen any state plan or written plan as to how to go about complying with the Remedial Order. (Tr. August 9, 1995

^[12] This core problem is also evident in the fact that the Commissioner reappointed the previously removed ADC superintendent to a high managerial position with direct planning authority over ADC. (Tr. April 10, 1995 at 110.) The former superintendent had been implicated in the cover-up of ADC employee misconduct and removed by the previous Commissioner from her position at ADC. See generally Tr. April 10, 1995 at 110-116 and Tr. July 10, 1995 at 95-101. The Commissioner acknowledged in her cross-examination during the April 10, 1995 hearing that she had not reviewed the trial testimony of the former ADC superintendent nor had she read the Court's findings regarding this individual. (Tr. April 10, 1995 at 115 ll. 9-12.)

at 46 ll. 15-19.) While the Commissioner professed good faith in recruiting, she could not even agree with her own University of Tennessee consultant, Dr. Frederick B. Palmer,^[13] regarding by whom the Developmental Physician would be employed (University of Tennessee or Arlington Developmental Center). Cf. Tr. August 9, 1995 at 35 (Cardwell) with Tr. August 9, 1995 at 79-80 (Palmer).

The proof is clear and convincing that the efforts of the State of Tennessee to effectuate the stipulated Remedial Order, Plan of Correction, Emergency Order and Injunction have been sporadic and uncoordinated and have not been directed to effectuate the case's central remedial purpose. (Remedial Order, at 1 ¶ 1) (Appendix A.) The state's resistance to needed change is reflected in an April 17, 1995 Memorandum by Dr. Robert Fisher, a consultant to Commissioner Cardwell hired by the state of Tennessee:

There appears to be some concern by our academic partners, the University of Tennessee (Memphis) and Vanderbilt University, that the state may not move as rapidly as necessary to correct the serious deficiencies that have been noted to exist in our Developmental Centers. The University of Tennessee Medical School, assisting the Department through our Arlington Developmental Center, and Vanderbilt University through the secondment of a faculty member to serve as the Medical Director of the Department, are interested from several perspectives.

Not only do our academic colleagues believe that the suggested changes from the court are [sic] necessary to

^[13] Dr. Frederick B. Palmer is Director of the Boling Center for Developmental Disabilities at the University of Tennessee.

improve health care for our residents; they also are concerned about maintaining the integrity of their reputations (which also, of course, benefits the state), and the increasing legal liability for assisting a health care system that may choose, for whatever reason, to not fully accept the advice of external medical consultants, the courts, and often the department's own personnel. (emphasis added).

(April 17, 1995 Memorandum (Appendix I).) See also Appendix G & J. It is clear from the record in this case that Dr. Fisher's statement is accurate.

On the entire record in this case, and for the reasons set out in this Memorandum Order, the Court finding the defendants in CONTEMPT of the Court's orders, ordered the following remedial and coercive sanctions effective August 9, 1995:

1. Defendants shall pay \$1,000 per day for each numbered provision of the Preliminary Injunction with which they are not in compliance. The Court finds that they are in non-compliance with provisions 1, 2, 5, 7, and 8 of the Preliminary Injunction. The fines commence as of the day of the hearing, August 9, 1995, and continue for each provision until defendants are in compliance. Defendants shall pay bi-weekly sums into a Court escrow fund. The Court will later determine whether this fund will either be utilized to enhance implementation of appropriate

remedies at ADC, or be ultimately forfeited to the United States. Provision 6 is ordered to be accomplished by August 24, 1995.^[14]

2. The Commissioner for the Department of Mental Health and Mental Retardation shall spend every fourth weekend^[15] at ADC until defendants are in compliance with the Courts' orders. Weekends are defined as the period Friday from 6:00 p.m. until Monday at 7:00 a.m. The Commissioner is to be on grounds the entire weekend except if she wishes to attend religious services off grounds, and is to reside in a resident living unit, not a physician or administrative area. The Court believes that the Commissioner's personal presence at ADC on weekends will motivate ADC staff to provide appropriate care required by the Court's orders -- especially during weekends, those times which the record reflects are times of particularly poor staffing and care, -- and will allow the Commissioner and ADC staff uninterrupted time to focus on bringing the institution into compliance.

3. Defendants are to communicate with the United States, the Court Monitor, and the Monitor's medical expert regarding defendants' compliance efforts. At any time defendants believe

^[14] See Tr. of telephone hearing, August 23, 1995 (proper procedure for seeking extension of deadline for compliance with injunctive provision).

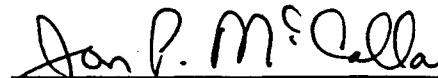
^[15] It should be noted that the Court appointed monitor, after the Emergency Order of June 30, 1995, remained present at ADC during each day for the holiday weekend period of Saturday, July 1, 1995, until Wednesday, July 5, 1995. The parties, the monitor, and the Court, based on the record in this case, consistently have been aware of the particular problems at ADC posed by weekend medical and direct care staffing. See Tr. June 30, 1995 at 39-41 (historical concern about holiday and weekend coverage).

they have achieved compliance with any numbered provision, they may communicate this fact to the United States or to the Monitor and her expert, and seek their concurrence. The Court will consider the recommendations of either party or the Court Monitor and her expert regarding whether to find defendants in compliance with any provision and to subsequently cease the imposition of sanctions for that provision.

The Court will schedule another compliance hearing in approximately forty-five (45) days to review the status of defendants' compliance with the Court orders.

In addition, the Monitor's second compliance report is due on or before September 20, 1995. The parties shall submit their comments to the Monitor by no later than 5:00 p.m. on Tuesday, October 10, 1995. The Court Monitor will present the final report at a compliance hearing scheduled for October 27, 1995 at 9:00 a.m.

ENTERED NUNC PRO TUNC this 9th day of August, 1995.



JON PHIPPS McCALLA
UNITED STATES DISTRICT JUDGE
Signed: August 24, 1995

INDEX OF APPENDICES

- Appendix A Remedial Order (September 2, 1994)
- B Monitor's First Compliance Review (April 10, 1995)
- C Defendant's Plan of Correction
(submitted April 10, 1995 as Exh. 6 in the
April 10, 1995 hearing)
- D Preliminary Report - Expert Consultant ADC
prepared by Dr. Renee C. Wachtel (June 30, 1995)
- E Emergency Order (effective June 30, 1995)
- F Preliminary Injunction (entered July 21, 1995)
- G February 17, 1995 Memorandum Max G. Jackson to
Marjorie Nelle H. Cardwell
- H March 13, 1995 Memorandum Marjorie Nelle H.
Cardwell to Max Jackson
- I April 17, 1995 Memorandum Robert Fisher, M.D. to
Marjorie Nelle H. Cardwell
- J June 8, 1995 Memorandum Velda Shore to Robert
Fisher, M.D.
- K Report of Victoria M. Therriault (August 8, 1995)
- L Report of Susan L. Hyman (August 7, 1995)
- M Cardwell Meeting with Dr. Roland Palmer (June
1991) (Trial Exh. 96)
- N June 3, 1991 Letter of Resignation, Roland Palmer,
Ph.D., Psychology Director, ADC