

Activity 7

April 29, 1996

2. The Order re: Noncompliance with Food Service Work Plan dated August 17, 1993, shall be vacated in full, provided, however, that the City may apply for recoupment of the fine of \$90,400, assessed thereunder for a 110-day delay in the design stage of phase I of the cook/chill kitchen rethermalization project. The City may apply for such a recoupment upon the timely completion of the short-term improvements set forth at Paragraphs 5-6 below, or at any time after the timely completion thereof. As indicated in Paragraphs 5-6 below, completion of those improvements will be timely if effected within 15 months of the entry of this Order.

*2 3. The Order re: Motion for Modification and Cross Motion for Sanctions and Contempt, dated September 8, 1994, is hereby modified to the extent that it shall have no further prospective effect.

4. The Stipulation of Settlement of Motion to Amend Food Service Contempt Order, "so ordered" by the Court on November 22, 1994, is hereby vacated in full.

I. SHORT-TERM EQUIPMENT PROCUREMENT AND INFRASTRUCTURE IMPROVEMENTS

5. Within 15 months of the entry of this order, defendants shall procure, install and have operational the equipment for each jail's food service operation listed in Appendix 1. Modifications to the list of Appendix 1 equipment may be made with the parties' consent or Court approval.

6. Within 15 months of the entry of this order, defendants shall complete the electrical wiring, gas, steam, hot water and ventilation improvements to each jail in general conformity with Appendix 2. In addition, defendants shall by that date provide the electricity necessary to support the installation and operation of the food service equipment referred to in Paragraph 5. Modifications to the list of improvements set forth in Appendix 2 may be made with the parties' consent or Court approval.

II. LONG-TERM CAPITAL PROJECTS

7. The defendants shall carry out a series of capital projects for renovations in their jail kitchen, food storage and food service facilities (including in-house food service areas). Generally, defendants shall do so by contracting for the services of design teams to prepare designs for the said projects and by contracting for

construction manager/construction services to implement the designs.

8. The capital projects referred to in Paragraph 7 shall substantially conform to those listed in Appendix 3. In that Appendix, the term "construct" means building a new structure or adding a new structure to an existing structure; "renovate" means the complete reconstruction of the area in question, unless otherwise limited in Appendix 3; "upgrade" means the provision of new equipment and utilities. Modifications to the capital projects listed in Appendix 3 may be made with the parties' consent or Court agreement.

9. The capital projects shall be commenced and completed consistently with the schedule set forth in Appendix 4.

III. INTERIM FOOD SERVICE DURING LONG TERM PROJECTS

10. When the capital projects listed in Appendix 3 commence at each of the jail kitchens, defendants shall ensure that each jail population is provided throughout the project with the appropriate amount of food for its population. This food shall be transported, held, and served at the temperatures required by the Food Services provisions of the Consent Decrees and the Order re: Consent Decree Compliance During In-House Food Service dated December 14, 1994 (the "In-House Food Service Order"). The Food Services provisions of the Consent Decree and the In-House Food Service Order are annexed together hereto as Appendix 9.

*3 11. Defendants shall provide equipment necessary to transport food from working jail kitchens to facilities whose kitchens are undergoing construction, renovation or upgrading. Defendants shall also provide equipment to ensure that transferred food is moved from the receiving area to the point of service. Such equipment shall generally conform to the numbers and types of equipment listed for each facility in Appendix 5. Defendants shall notify OCC and plaintiffs' counsel of modifications to the list of Appendix 5 equipment; modifications beyond those in general conformity with Appendix 5 may be made with the parties' consent or Court approval.

12. Defendants shall use insulated trucks to transport food to and from facilities off of Rikers Island, provided, however, that modifications to this usage of insulated trucks for off-Island routes may be made with the parties'

Benjamin v. Jacobson, Not Reported in F.Supp. (1995)

consent or Court approval.

13. During any period when the implementation of food service renovations requires that a jail's population be provided with food from another location, the defendants shall provide a sufficient number of dedicated trucks and dedicated drivers such that the jail population being fed through an interim plan is provided with food in accordance with Paragraph 10 hereof. The dedicated truck and driver coverage shall generally conform to the numbers listed in Appendix 6. Defendants shall notify OCC and plaintiffs' counsel of modifications to the list of Appendix 6 dedicated trucks and drivers; modifications beyond those in general conformity with Appendix 6 may be made with the parties' consent or Court approval.

IV. STAFFING

A. Requirements

14. By February 1, 1996, defendants shall fully staff the food service positions listed in Appendix 7 to this order, provided, however, that the number of positions for each category of food service employee listed in Appendix 7 shall automatically increase or decrease as the defendants open or close facilities. The amount of any such increase or decrease shall be consistent with the number of positions for each such category most recently listed in Appendix 7 for the facility that is opened or closed. If defendants open a new facility not included in Appendix 7 as of the date of this order, they shall comply with Appendix A of the order of February 14, 1995 in staffing food service positions, and shall modify Appendix 7 accordingly. As used in this order, "Appendix 7" shall refer to the most recent version of Appendix 7 at the pertinent point in time.

15. Defendants shall be relieved from any obligation based on any prior court order or work plan to staff "dietary aide" positions, and any such obligation is hereby vacated, provided however, that by February 1, 1996, defendants shall provide a combination of 139 inmate workers and dietary aides to perform the functions of the 139 dietary aide positions formerly included in Appendix 7. This number of inmate dietary aide positions shall automatically increase or decrease as the defendants open or close facilities. The amount of such increase or decrease shall be consistent with the number of inmate dietary aides most recently listed in Appendix 7 for the facility that is opened or closed. Defendants shall be required to notify OCC and plaintiffs' counsel of any change of 10% or more of the number of inmate dietary aide workers.

*4 16. With the exception of automatic adjustments due to facility closings, defendants shall be required to consult OCC and plaintiffs' counsel for any change of 10% or

more of the number of food service positions in Appendix 7. If an agreement on changes cannot be reached, court approval for such changes must be sought.

B. Method

17. The defendants shall use the "post-audit" method of hiring for Appendix 7 food service positions, without a requirement of clearance by the Office of Management and Budget or the Vacancy Control Board. Sanitarians are not considered food service positions for purposes of this paragraph.

18. By February 1, 1996, the defendants shall notify OCC and plaintiffs' counsel of their plans for expanding recruitment efforts, and for developing training programs designed to provide a pool of eligible applicants, for the positions listed in Appendix 7 that have more than two positions.

C. Enforcement

19. "Actually employed" or "actual employment," for purposes of the succeeding paragraphs, means that an employee is assigned to perform the duties of the position in question. "Actually employed" does not include (a) persons expected to be on leave of absence for up to six months, maternity leave for up to six months, or sick or disability leave for up to six months, after the expiration of that six-month period, or (b) persons absent without leave for a period greater than three months.

20. Beginning with the month of February 1996, and thereafter on a monthly basis, defendants shall report to OCC the number of persons actually employed in each category listed in Appendix 7 for that month.

21. Except as set forth below, defendants shall be subject to monetary sanctions by month for each month that the percentage of persons actually employed in any category of Appendix 7 positions is below 90%. When calculating the number of positions that make up the 90% fill rate, if the number of positions is not a whole number, fractions of numbers over .5 shall be rounded up, and fractions of .5 or below shall be rounded down.

22. The monthly sanctions shall be calculated at three times the monthly salary and benefits of the number of vacant positions by which the Department is below 90% actual employment in each category of Appendix 7 positions, for each month that the actual employment percentage in each Appendix 7 category remains below 90%, commencing the third consecutive month that the actual employment percentage is below that level. Adjustments to this sanction shall be at the Court's discretion, upon application of either party.

Benjamin v. Jacobson, Not Reported in F.Supp. (1995)

23. For the categories of Appendix 7 having more than two positions, such sanctions shall not commence until the third consecutive month that the actual employment rate for that category is less than 90%, provided, however, that for the categories of dietician, food service administrator, food service manager and public health sanitarian defendants shall not be sanctioned unless the specific jail positions pushing the fill rate below 90% have been vacant for three or more months.

*5 24. For the categories of Appendix 7 that consist of two or fewer positions, defendants shall have a four-month grace period during which they will not be subject to sanctions for failing to have persons actually employed in those positions. Such grace period shall commence at the time that an employee in one of these categories leaves or provides defendants with written notice of his/her departure, provided that the grace period shall not commence any earlier than one month before the departure of said employee. At the end of the four-month period, if no one is actually employed in the relevant position, defendants shall be sanctioned in the amount of three times the monthly salary and benefits of the vacant position for each subsequent month until the position is filled. If, however, at the end of the four-month period, an offer has been extended to a prospective employee, but that person rejects it, or the prospective employee is disqualified from employment for reasons unknown or not discerned by defendants at the time the offer was extended, the four-month period will commence again from the time of the prospective employee's refusal or disqualification.

25. The sequence described in paragraphs 21-24 shall repeat each month that a category declines from an actual employment rate of 90% of the Appendix 7 level, as reflected in defendants' monthly reports to OCC.

26. The defendants shall not be sanctioned under this order for circumstances occasioned by unforeseen events or circumstances beyond the control of the agencies and personnel of the defendants. The unexpected termination of an employee, by resignation, discharge, or disability, does not constitute an unforeseen event for purposes of this order.

V. MAINTENANCE AND REPLACEMENT

27. The defendants shall ensure that food preparation, storage, service and sanitation equipment is well maintained and shall use their best efforts to ensure that food preparation, storage, service and sanitation equipment is in a state of good repair.

A. Repair

28. By November 1, 1995, the defendants shall identify to OCC and to plaintiffs' counsel the types of food service equipment for which they intend to enter into contracts for service and/or scheduled maintenance; those items for which they intend to enter into repair contracts; and those items for which they intend to rely on Department of Correction staff for maintenance. The defendants shall report changes in these designations annually.

29. Defendants shall create specifications for critical Appendix 1 equipment service contracts and/or contracts for scheduled maintenance and repair by December 1, 1995. Defendants shall produce or make available said specifications to OCC and plaintiffs' counsel.

30. The defendants shall enter into service contracts and/or scheduled maintenance contracts and/or service and repair contracts, for critical Appendix 1 food service equipment, when said equipment is purchased.

31. The defendants shall by April 30, 1996 prepare a directive covering key aspects of maintenance of food service equipment.

*6 32. By January 1, 1997, the defendants shall have operational a system that tracks repair requests and response times for food preparation, service and storage equipment, including those subject to service or repair contracts.

33. By December 1, 1995, defendants shall submit to OCC and plaintiffs' counsel a plan for maintaining an inventory of kitchen equipment parts that most often fail and are difficult to procure on short notice, and shall begin creating that inventory as equipment is purchased.

B. Replacement

34. The defendants shall establish a life-cycle replacement program for capital items of food service equipment, which shall incorporate manufacturers' estimates as modified to reflect the greater stresses of the jail environment. Defendants shall incorporate said life-cycle replacement program into the City's ten-year capital plan, commencing with the next ten-year plan.

C. Maintenance Training and Staff

35. The defendants shall by July 31, 1996 establish a training program for appropriate maintenance staff on the service requirements of food service equipment.

36. The defendants shall by July 31, 1996 establish a training program for appropriate kitchen staff on food service sanitation and maintenance procedures.

Benjamin v. Jacobson, Not Reported in F.Supp. (1995)

37. The defendants shall by July 31, 1996 establish a training program for facility managers on oversight of food service operations.

38. The foregoing training programs shall provide for the training of new staff and shall provide for refresher training of existing staff as needed.

39. At the inception, the foregoing training programs shall be provided by service companies on the maintenance of Appendix 1 equipment. Service company maintenance training shall be provided at the introduction of new types or models of critical food service and preparation equipment which are covered by scheduled maintenance or service and repair contracts.

40. The defendants shall utilize the post-audit hiring procedure for hiring the maintenance positions listed in Appendix 8 of this order, as set forth in paragraph 17.

D. Budget

41. The defendants shall, no later than October 1, 1996, develop a budget that yields an annual dollar figure for each jail's budget for maintenance of all food service-related facilities and equipment, based on a rational estimate of the actual amount needed to keep all facilities and equipment in good repair. The budget figure for each jail shall be based on available historical expenditure data for that jail, data regarding equipment replacement life cycles, warranties, and service contracts, and such other relevant data as the defendants may obtain or develop.

VI. SANITATION

42. Defendants shall ensure that the food service preparation, storage and dining areas, limited in housing areas, however, to communal areas where food is consumed, are maintained in a sanitary manner in compliance with the Food Services provisions of the Consent Decrees and In-House Food Service Order. To this end, *inter alia*, defendants shall maintain adequate sanitation equipment and supplies.

*7 43. The defendants shall prepare and submit to OCC and plaintiffs' counsel, 60 days before the opening of the new central storage facility at the James A. Thomas Center, procedures for ensuring that food items are not retained in that storehouse past their expiration dates.

44. Within three months from the date of this order, the defendants shall promulgate Directive 3902 and 3905.

45. Commencing six months from the date of this order,

the defendants, through DOC's Inspectional Services and Compliance Division, shall prepare and circulate to OCC and plaintiffs' counsel a monthly report listing, for each jail, all deficiencies in food service area sanitation discovered through the monthly DOC sanitarian facility inspections required in Directive 3905. The monthly report shall include DOC's actions taken in response to all deficiencies and shall indicate whether that action conformed to the requirements of Directive 3905. The defendant shall also circulate to OCC and plaintiffs' counsel the reports prepared by DOC sanitarians during their monthly food service area inspections.

46. Within three months from the date of this order, the parties shall negotiate protocols for monitoring defendants' compliance with the food service sanitation standards and procedures set forth in Directive 3902, and for updating the Directives 3902 and 3905 as needed. Within one month of the establishment of such monitoring protocols, defendants shall include in the monthly reports described in paragraph 45 information from these monitoring protocols regarding the jails' compliance with the food service sanitation standards and procedures set forth in Directive 3902.

47. After six months of receiving such reports, and at any time thereafter, OCC shall assess whether there are systemic and/or persistent problems with sanitation in food service areas as defined in paragraph 42, or with DOC's system of monitoring sanitation that need to be addressed by further remedial relief. OCC's assessment shall be based on the reports described in paragraphs 45 and 46, and on OCC's own observations and inspections of food service areas, including periodic inspections of food service areas by a trained sanitarian retained by OCC. If OCC believes that there are such systemic and/or persistent problems, after comments by the parties, OCC may at its discretion submit a proposed supplemental order to the Court, upon notice to the parties, to address such problems. Any such order may include the imposition of sanctions for repeated noncompliance with the food service sanitation requirements of the Consent Decree.

VII. ENFORCEMENT OF COMPLETION DATES

48. If the defendants believe they cannot comply with any deadline contained within this order, they shall in writing request an extension of time from the Court via OCC as soon as the need for an extension becomes apparent, and in any case no later than one week before the date stated in the order.

49. The parties, with OCC's assistance, shall attempt to resolve in good faith all adjustments in completion dates and/or substantive provisions of this order as are necessary, and shall consult with each other before

Benjamin v. Jacobson, Not Reported in F.Supp. (1995)

seeking court approval for such changes. The Court shall be notified in writing of such agreed upon changes. To the extent that the parties are unable to reach agreement on extensions of completion dates or changes in substantive provisions, the appropriate party shall promptly and in writing request such extensions of time or changes in substantive provisions.

***8 50.** The following enforcement mechanism is adopted for all completion dates in this order, except for those pertaining to the hiring of staff:

a. In any case in which defendants fail to meet a completion date set forth herein, and have not obtained an extension of the completion date by agreement or from the Court, defendants shall be fined \$100 a day for each day of noncompliance for a period of 14 days. If noncompliance continues after 14 days, the fine shall be increased to \$500 a day for each day of noncompliance for a further period of 28 days. After the 28th day of noncompliance, the fine shall be increased to \$1000 a day for each additional day of noncompliance.

b. The amount of the fine imposed pursuant to subparagraph (a) above may be adjusted by the Court after the 14th day of noncompliance:

(1) upon a showing by the defendants that the amount is unreasonable and oppressive in relation to the seriousness of the noncompliance; or

(2) upon a showing by the plaintiffs that the amount is too small relative to the cost of compliance effectively to coerce defendants' efforts to achieve prompt compliance; or

(3) on the basis of any other factors the Court deems in its discretion to be relevant.

c. Any fine imposed for the failure to meet a "design" date or construction "start" date for a capital project will be recouped by defendants in the event that the defendants meet the construction "completion" date for the relevant capital project as determined by OCC. Any fine imposed for the failure to timely meet the reporting requirements of Paragraphs 28-29 will be recouped by defendants in the event that the defendants meet the

"completion" date for the purchase of critical Appendix 1 equipment and the critical Appendix 1 equipment service contracts and/or contracts for scheduled maintenance and repair referred to in Paragraph 29 as determined by OCC.

d. Defendants shall be excused from paying the above described fines in any case in which they show that their noncompliance with the relevant completion date was occasioned by unforeseen events or circumstances beyond the control of the agencies and personnel of the defendants.

e. All fines collected hereunder shall be set aside in a fund for the benefit of the plaintiff class, and shall be used specifically to purchase non-mandated literature/book/services for the plaintiff class, as determined by the Court. Such monies shall not replace monies previously planned for this purpose. Fines subject to recoupment provisions shall be held in escrow until such time as it is determined that there can be no recoupment.

51. OCC shall compute the amount of any fines owed under Paragraph 50 above, subject to the parties' right to be heard in opposition and to *de novo* review by the Court. The defendants shall be given a reasonable period, and in any case no less than two weeks from receipt of written notice, to respond to any allegations of noncompliance prior to OCC requesting the imposition of fines from the Court.

***9 52.** In the event that defendants are unable to consistently maintain compliance with the staffing, maintenance and sanitation requirements of this order, plaintiffs' counsel may apply hereunder for further remedial relief. Conversely, in the event that defendants consistently maintain compliance with the staffing, maintenance and sanitation requirements of this order, defendants may apply for vacatur of specific provisions of this order addressing those areas in accordance with prevailing law.

SO ORDERED.