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United States District Court, E.D. Pennsylvania.

Martin HARRIS,
v.
The CITY OF PHILADELPHIA.

No. CIV.A. 82–1847. | Dec. 23, 1999.

Opinion

MEMORANDUM AND ORDER

SHAPIRO.

***1** The parties in this action entered into a consent decree on December 30, 1986, ("1986 Consent Decree") and a second consent decree on March 11, 1991 ("1991 Consent Decree"). Now before the court are plaintiff's petition for entry of an order to show cause why the City should not be held in contempt (Docket Number 1678), an "emergency" petition for a rule to show cause why the City should not be held in contempt (Docket Number 1803), a motion to admit an affidavit of Dr. Robert W. Powitz into the record (Docket Number 1801), defendant's request to vacate the release mechanism (Docket Number 1543), and plaintiff's cross-motion to reinstate the admissions and release criteria (Docket Number 1651).[1] The Powitz affidavit refers to conditions at the prisons during periods not at issue in the contempt motion, and will not be admitted for that reason. Because the defendants violated the terms of the 1986 Consent Decree, they were in contempt. It appears that the Philadelphia Prison System and the Philadelphia courts have made strides to alleviate the problems addressed by the release mechanism, but must continue to employ measures in addition to the release mechanism to address the situation. It is not appropriate to reinstate the release mechanism because it would permit the City and the court system to avoid their responsibilities to alleviate unconstitutional overcrowding in the prisons. However, implementation and compliance with the consent decrees are a continuing effort because the prisons continue to be severely overcrowded.[2] The court is reluctant to vacate the release mechanism before appropriate and effective alternatives have been instituted. The motions to reinstate and vacate the release mechanism are both denied.

BACKGROUND

In 1982, a group of inmates in the Philadelphia Prison System ("PPS") filed a class action complaint under 42 U.S.C. §§ 1983 and 1988 against the City of Philadelphia and individual Philadelphia officials in charge of the PPS for overcrowded conditions at Holmesburg Prison in violation of the First, Eighth, Ninth, and Fourteenth Amendments. The complaint was initially dismissed on grounds of res judicata, sovereign immunity, and abstention. *Harris v. Pernsley,* No. 82–1847, slip op. at 7–8, 12–13 (E.D.Pa. Dec. 30, 1983). The Court of Appeals, holding that there was no bar to the action proceeding in this Court, reversed and remanded for trial on behalf of the class. *See Harris v. Pernsley,* 755 F .2d 338, 343–46 (3d Cir.1984), *cert. denied,* 474 U.S. 965 (1985). After the plaintiff class was redefined to include all past, present, and future PPS inmates, the parties entered into the 1986 Consent Decree.

The 1986 Consent Decree

Under the 1986 Consent Decree, the plaintiffs agreed to surrender their claims for damages in return for obligations of the City, *inter alia,* to

> *adopt and implement* the following procedures and policies to reduce the population of the Philadelphia Prison System and maintain the population at agreed upon levels:
>
> ***2** ...
>
> b. At no time shall more than two inmates be housed in a cell in the Philadelphia Prison System.
>
> c. Every inmate shall be assigned to a long-term housing area within seventy-two (72) hours of arrival in the Philadelphia Prison System. Housing areas shall not include any gymnasium, corridor or bench area, or any area not set up for permanent housing. Every inmate shall receive a mattress by the first night after arrival and a bed and mattress within twenty-four (24) hours of arrival. Until his or her assignment to a housing area, each inmate shall remain in designated intake areas and shall receive proper bedding in accordance with this provision.

(1986 Consent Decree, ¶ 2) (emphasis added). The City agreed to construct a downtown detention center with a capacity of "at least 440 beds" by December 31, 1990. The City agreed to limit the number of inmates in Philadelphia Prison System facilities, and if the population exceeded a certain numerical limit, the City would seek the release of certain non-violent prisoners in

accordance with criteria and procedures in the consent decree. (1986 Consent Decree, ¶ 4). The terms of the release mechanism permitted release of sentenced inmates under some circumstances, but only pretrial detainees have been released by the court; "no sentenced offenders [were] released." *Harris v. Pernsley,* 1989 WL 16269, *1 (E.D.Pa. Feb. 27, 1989). If the population exceeded certain limits, the City also agreed to "admit no additional inmates," (1986 Consent Decree, ¶ 5), but this agreement did "not prevent the admission of any persons charged with the following:

> A. Murder, attempted murder, forcible rape, attempted rape, involuntary deviate sexual intercourse, corrupting the morals of a minor, arson, kidnapping, aggravated assault, a crime of violence committed or attempted with a firearm, knife or explosives, and escape from custody.
>
> B. Domestic Violence and Abuse Offenses
>
> ....
>
> C. Drug charges [provided the defendant is charged with possessing more than given amounts of certain drugs]
>
> [or]
>
> D. Persons who have two or more outstanding or open bench warrants on criminal charges[.]

(Order of September 21, 1990).

The 1991 Consent Decree

In 1989 it became evident that the City would not meet its obligation to complete a downtown detention center by the end of 1990. The City and the plaintiff class then entered into a supplemental consent decree, the 1991 Consent Decree. The 1991 Consent Decree strengthened the population control measures, renewed the City's obligation to construct additional prison facilities, and obligated the City to enter into a planning process designed to provide prisons meeting correctional industry standards with a number of beds adequate for the projected inmate population. The 1991 Consent Decree did not supersede the entire 1986 Consent Decree; it only replaced provisions of the 1986 Consent Decree when specifically stated. *See, e.g.,* 1991 Consent Decree ¶ 12 (superseding requirement that the City build a downtown detention facility); ¶ 18 (stating ¶ 1 and ¶ 2.a-c of the 1986 Consent Decree remained in effect).

***3** The 1991 Consent Decree provided that:

> 11. Defendants shall conduct expeditiously the orderly planning process set forth in the document entitled "Prison Planning Process" attached hereto and incorporated herein by reference. Defendants shall thereafter construct or arrange for such new facilities and close or renovate existing facilities in accordance with the plans produced pursuant to the Prison Planning Process and approved by the Court.

(1991 Consent Decree, ¶ 11). The parties agreed that once a plan had been proposed by the City under the planning process, and

> 23. ... [was] approved by the court, defendants shall carry it out, subject to the penalties set forth in Paragraph 27. ...
>
> 24. The Special Master shall monitor compliance with all plans approved by the Court. The Special Master shall provide the Court with reports on compliance with all approved plans ... at any time as the Court may direct.

(1991 Consent Decree, ¶¶ 23, 24)

The parties also strengthened the release mechanism, (1991 Consent Decree, ¶ 17), and agreed that the revised release mechanism would

> "supersede Paragraphs 4.A.-C. of the September 21, 1990 Order. Otherwise, this Stipulation and Agreement shall not affect the operation of the September 21, 1990 Order or Paragraphs 1 and 2.a-c and h-i of the remedial provisions of the Consent Order of December 30, 1986, as amended, which shall remain in full force and effect, except as they may be further amended."

(1991 Consent Decree, ¶ 18).

The parties also agreed that

> 30. As a possible alternative or concurrent mechanism to the release mechanism provided in Paragraph 17, defendants shall formulate, for submission to the court, other criteria and procedures for the release of inmates.... Nothing herein is intended to restrict the Court's authority to issue contempt citations or its

power under the All Writs Act.

(1991 Consent Decree, ¶ 30).

Prison Planning Process

The prison planning process, attached as an Appendix to the 1991 Consent Decree, required the following:

> B. Prison Population Management Plan. The defendants shall develop a Prison Population Management Plan based on policies and resources that are consistent with the population projections developed[.]
>
> To this end the defendants shall:
>
> ...
>
> 4. Design a comprehensive plan of alternatives to incarceration, for persons who would otherwise be committed to or retained in the custody of the Philadelphia Prison System.
>
> ...
>
> *C. Physical and Operational Standards.* The defendants shall develop physical and operational standards for the operation of their facilities.
>
> ...
>
> To this end defendants shall:
>
> 1. Develop physical plant standards and general design guidelines for renovation and new construction capital projects[.]
>
> ...
>
> *E. Operational Management Plan.* The defendants shall develop an operational management plan that shall address the management structures, staffing, operational budgets, equipment, procedures, and training necessary to open and operate the required facilities.
>
> ***4** To this end the defendants shall:
>
> ...
>
> 3. Develop a policy and procedural system, including manuals of policy and operating procedure, and post orders for all facilities and functional units.

(Prison Planning Process, App. to 1991 Consent Decree).

The Intake Process

When a new inmate is brought to the Philadelphia Prison System, the prison has a sixteen step intake procedure proposed by the City and approved under the 1991 Consent Decree. (Philadelphia Prisons Policies and Procedures, Policy 4.A.2) (*See also* N.T. 11/13/96 pp. 86–100). These steps include: accepting custody of the inmate; placing him or her in an intake area; issuing a plastic wrist bracelet for identification; allowing a phone call; strip searching the inmate; allowing a shower; holding him or her in a different cell after the strip search and shower; and assigning the inmate to intake housing. Under normal circumstances the entire intake process takes approximately four to six hours. (N.T. 11/13/97 p. 97). After completing the intake process, the inmate is taken to intake housing for medical screening. (N.T. 11/13/97 p. 101).

The 1986 Consent Decree requires that an inmate be provided with a mattress by the first night after arrival, and a bed and mattress within twenty-four hours of arrival; this requirement is not conditioned upon completion of the intake process. The requirement of assignment to long-term housing within 72 hours is also applicable whether or not the inmate has completed the sixteen step intake process.

The Suspension of the Release Mechanism

Consistent with the Prison Planning Process, paragraph B.4., the City submitted an Alternatives to Incarceration Plan. The plan called for the City to maintain the inmate population within a "management goal" of 5,600. The court ordered the parties to show cause why the court should not vacate certain provisions of the 1986 and 1991 Consent Decrees, including the non-admission and release mechanisms. After hearings on the Alternatives to Incarceration Plan on December 16 and 19, 1994, the court approved the Alternatives to Incarceration Plan on the condition that the City submit quarterly reports on the City's progress toward implementing its strategies. In the first few quarterly reports, it appeared that the strategies were functioning to maintain the inmate population below 5,600. On October 18, 1995, the court ordered the admission moratorium and pretrial release mechanism temporarily suspended. On March 14, 1996, the City, in its quarterly report on the Alternatives to Incarceration Plan implementation, requested that the court make the temporary suspension permanent. The plaintiffs filed a "cross-motion" to reinstate the admission and release criteria or, alternatively, to establish a bail fund.

By the time of the quarterly report, the cross-motion, and hearing, the PPS inmate population had increased above the City's stated management goal of 5600. Because it was, and still is, apparent that the City's Alternatives to Incarceration Plan is not sufficiently effective to warrant

vacating the release mechanism, the City has not actively pursued its request that the court make the temporary suspension permanent.

Contempt motions

***5** During the summer of 1996, the PPS inmate population hovered around or above the City's stated maximum goal of 5600.[3] For instance, between June 14, 1996 and July 14, 1996, the average PPS inmate population was 5,627. Defendants did not strictly enforce their own maximum limit, or achieve effective First Judicial District cooperation in managing the population under that limit by taking measures such as: fully implementing the bail guidelines and substituting city-court special release mechanisms; expanding the use of early parole and earned time/good time; restoring crash court; and/or reducing the sentence-deferred population. The only steps taken by defendants were a request for enhanced powers to release inmates without state court approval and a transfer of approximately 60 county prisoners to out-of-county jails.

At the same time, the City was working on the installation of Lock and Track, a new automated management information system. City officials decided to implement the new system on August 26, 1996, shortly before Labor Day weekend, when the inmate population traditionally increases markedly. The City expected there would be some problems in implementing the new system, but underestimated their magnitude.

When the new system was instituted and operational, there were severe performance problems, including slow response time in processing intake information. Because of the slow response time, processing an individual inmate took significantly longer than had been the case previously. Digital Equipment Corporation, the contractor, represented that the problems would likely be resolved within one week, but the problems persisted. The slow computer response time led to a substantial increase in the time spent by an inmate in the intake area. The City admits that "some of the inmates ... in the holding cells in the intake area at [the Curran Fromhold Correctional Facility ("CFCF")] on September 6, 1996 had been confined to those cells for more than 24 hours and that some may have been confined for three, four, five, or six days." (Defs.' Answer to Pls.' Pet. for Contempt, ¶ 11).

The intake area in which those inmates were held has a rated capacity of 125 individuals. (N.T. 10/16/96 p. 22). The intake area consists of a number of holding cells measuring eight by fifteen feet. Between August 12 and September 15, the number of inmates in the intake area at CFCF often exceeded 125 inmates, and exceeded 200 inmates on several days. (N.T. 10/16/96 p. 30). The City admitted that for 81 inmates between August 30 and September 15, 1996, the average length of confinement in the reception area was slightly over 48 hours. (N.T. 10/16/96, p. 34). Dr. Powitz, then the plaintiffs' sanitation expert, examined the conditions in the intake facility on September 16, 1996, and found: poor toilet and drinking fountain sanitation; very little air movement; and inmates in the intake area without personal hygiene items such as toothbrush and toothpaste, soap or towel. (N.T. 10/17/96, p. 50, 7). Blankets had been provided to some inmates, (N.T. 10/17/96, p. 57), but when they were returned the blankets were not washed before being issued to other incoming inmates, an unsanitary and possibly disease-spreading practice. (N.T. 10/17/96, p. 76).

***6** Because the intake area is designed to be a temporary holding area before an inmate is placed in intake housing, it is not designed to allow an inmate a mattress or bed. Substantial numbers of inmates were in the holding cells for days at a time, without beds or sanitary facilities. These inmates, who may have been held for as long as six days (by City admission), were not provided with mattresses by the first night after arrival, or beds and mattresses within twenty-four hours of arrival despite the requirements of the 1986 Consent Decree.

Plaintiffs filed a petition to hold defendants in contempt on September 11, 1996. Commissioner Hall, informed of the plaintiffs' petition, personally inspected the intake area on September 12, 1996, and found 170 inmates there. (N.T. 10/16/96, p. 31–32). The following day, September 12, 1996, Commissioner Hall ordered a second intake area opened to accelerate the admission process. (*Id.*) Although the intake problem had existed since shortly after the implementation of the new computer system on August 26, 1996, the City did not open a second intake area until September 13, 1996, after the plaintiffs' Petition for Contempt was filed. (See Defs.' Answer to Pls.' Pet. for Contempt, ¶ 24).

At the time the intake process was significantly delayed by the new computer system, the prison system as a whole experienced an increase in its population, and reached a then-record 5904 on September 7, 1996. (Defs.' Ex. 18, p. 5). The defendants ran out of space in existing housing areas, and "had to open up emergency housing areas." (Defs.' Post-hearing Mem. of Law in Opp. to Pls.' Pet. for Contempt, p. 5). These "emergency housing areas" included: the triage area, library, chapel and multi-purpose rooms at the Philadelphia Industrial Correctional Center, and day rooms at the Detention Center.[4] (Defs.' Answer to Pls.' Pet. for Contempt, ¶ 17). Defendants admit that "such areas were not designed as permanent housing." (*Id.*)

These areas were used for intake housing, after inmate intake processing but before assignment to long-term housing. During the crisis, the emergency housing areas were used for intake housing only, and were not intended

as permanent housing. (N.T. 1/12/97, p. 89).

Inmates who were assigned to these housing areas did not receive a regular bed and mattress; they slept on mattresses in portable blue plastic shells. Sometimes referred to as "canoes," these shells, about six inches deep, were placed directly on the floor. In testimony regarding the City's compliance with ¶ 2(c) of the 1986 Consent Decree, then Acting Commissioner Costello stated " 'canoes' are actually a temporary bed," (N.T. 1/12/97, p. 53), and are used "as temporary beds in the housing areas." (N.T. 1/12/97, p. 55). Commissioner Costello, then employed by the Philadelphia Prison System for more than twenty-five years, stated that the prisons only used those "temporary beds when [the prison was] out of permanent beds." (N.T. 1/12/97, p. 73–74).

***7** After hearings on the plaintiffs' Petition for Contempt, the Special Master issued a report on the City's September, 1996 non-compliance with paragraph 2(c) of the 1986 Consent Decree. The City objected to the Special Master's findings, and the court held a hearing. There was extensive testimony about the "canoes," temporary beds, and the interpretation of the 1986 Consent Decree provision that the City must provide housing in areas "set up for permanent housing."

The plaintiffs filed a post-hearing Brief in Support of the Petition for Contempt. Shortly thereafter, the plaintiffs' Emergency Petition alleged that the defendants "plan to house or have housed 18 inmates in three multi-purpose rooms at CFCF—six inmates in each room." The plaintiffs alleged that the defendants were not providing the housing and space required by the Consent Decrees. The City subsequently filed a post-hearing Brief in Opposition to plaintiffs' Petition for Contempt, and an answer to plaintiffs' Emergency Petition.

DISCUSSION

I. Motion to Admit Powitz Affidavit

Plaintiffs moved to admit an affidavit of Robert W. Powitz, Ph.D., ("the Powitz affidavit"), into the record of the Petition for Contempt. Dr. Powitz visited the prisons on December 4, 1996, and observed seventeen newly-admitted female inmates housed in the multi-purpose room at the Philadelphia Industrial Correctional Center. The affidavit details some of the conditions of the room at that time, the toilet and shower facilities available to the inmates housed there, and statements made to him by unidentified correctional officers.

As the City correctly points out, the Powitz affidavit is not relevant to plaintiffs' contempt motion under Federal Rule Evidence 401, defining relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed.R.Evid. 401. Plaintiffs' first Petition for Contempt was specifically directed at the period from late August, 1996, when the new computer system was implemented, to late September, 1996, when that particular intake crisis subsided. (N.T. 10/17/96, p. 17). The Powitz affidavit refers only to conditions on December 4, 1996. At no time during the hearings on the petition in October and November, 1996, did plaintiffs seek to broaden the scope of the contempt petition to include events after the intake crisis in early September. The City has admitted inmates were housed in the multi-purpose room at the Philadelphia Industrial Correctional Center during the time at issue in September. (*See* Defs.' Answer to Pls.' Pet. for Contempt, ¶ 17).

The Powitz affidavit detailing conditions in December, 1996, does not tend to make the existence of the housing conditions in September, 1996, more or less probable. The Powitz affidavit will be excluded.

II. Plaintiffs' Petition for Contempt and Emergency Petition

***8** In both the Petition for Contempt and Emergency Petition plaintiffs request orders to show cause why the defendants should not be held in contempt of court. The court has the "inherent power to enforce compliance with [its] lawful orders through civil contempt." *Shillitani v. United States,* 384 U.S. 364, 370 (1966). In order to hold the City in contempt, "the court must find that (1) a valid court order existed, (2) the defendant had knowledge of the order, and (3) the defendant disobeyed the order." *Harris v. City of Philadelphia,* 47 F.3d 1311, 1326 (3d Cir.1995). The first element is undisputed: the 1986 and 1991 Consent Decrees were and still are valid court orders; they are not presently challenged by either party.

A. The City's Knowledge of the Court Order

The corollary of the proposition that the City had knowledge of the order "is that the order which is said to have been violated must be specific and definite." *Harris v. City of Philadelphia,* 47 F.3d 1342, 1350 (3d Cir.1995) (citing *Eavenson, Auchmuty & Greenwald v. Holtzman,* 775 F.2d 535, 544 (3d Cir.1985)). A party cannot be held in contempt for violation of a court order so vague or indefinite that the party does not know what it prohibited or directed. *Id.*

"For the purposes of enforcement, a consent judgment is to be interpreted as a contract, to which the governing

rules of contract interpretation apply." *Harley–Davidson, Inc. v. Morris,* 19 F.3d 142, 148 (3d Cir.1994). The court is required to interpret the consent decree "to give effect to the parties' 'objective manifestations of their intent' rather than attempt to ascertain their subjective intent." *Griesmann v. Chemical Leaman Tank Lines, Inc.,* 776 F.2d 66, 72 (3d Cir.1985) (citing *Mellon Bank, N.A. v. Aetna Business Credit,* 619 F.2d 1001, 1009 (3d Cir.1980)). "A consent decree must be construed as it is written, and not as it might have been written had the plaintiff established his factual claims and legal theories in litigation." *Harris v. City of Philadelphia,* 47 F.3d at 1350 (citing *United States v. Armour & Co.,* 402 U.S. 673, 682 (1971)). Any ambiguities must be interpreted in favor of the party charged with contempt. *Harris v. City of Philadelphia,* 47 F.3d at 1350. The City cannot be held in contempt if there is "ground to doubt the wrongfulness" of its conduct. *Id.*

The court "must be careful not to impose obligations upon the parties beyond those they have voluntarily assumed." *Harris v. City of Philadelphia,* 47 F.3d at 1350 (citing *Fox v. United States Dep't of Hous. & Urban Dev.,* 680 F.2d 315, 319–20 (3d Cir.1982); *Johnson v. Robinson,* 987 F.2d 1043, 1046 (4th Cir.1993); *Walker v. United States Dep't of Hous. & Urban Dev.,* 912 F.2d 819, 825–26 (5th Cir.1990)). In *Harris v. City of Philadelphia,* 137 F.3d 209 (3d Cir.1998), the Court of Appeals reviewed this court's January 6, 1997 order that the City of Philadelphia meet deadlines to implement the MIS plan it developed pursuant to the 1991 Consent Decree, under penalty of fines. The Court of Appeals, vacating the order, reasoned that the language of the 1991 Consent Decree obligated the City to develop that plan, not to implement it. *See id.* at 213 ("agreeing to develop an implementation schedule for the MIS plan or a 'strategic systems plan' is not the same as agreeing to implement the schedule or the plan."). This court must ensure it avoids the "unfortunate outcome," *id.,* from expecting action to follow commitments.

***9** Plaintiffs allege that the City violated provisions of both consent decrees: the 1986 Consent Decree requirement that an incoming inmate "receive a mattress by the first night after arrival and a bed and mattress within twenty-four (24) hours of arrival," and "be assigned to a long-term housing area within seventy-two (72) hours of arrival in the Philadelphia Prison System," (1986 Consent Decree, ¶ 2(c)); and the 1991 Consent Decree requirement that housing areas meet certain physical standards.

The City makes two basic arguments regarding clarity: (1) the consent decrees require the City to create and implement plans to address the overcrowding, it does not matter whether those plans are carried out at all times because the City is only required to make and implement plans; and (2) the terms of the consent decrees are vague with respect to whether certain actions are permitted or not.

i. The 1986 Consent Decree Requirements. Plaintiffs are correct that the City did not meet the 1986 Consent Decree requirements regarding bedding and assignment to long-term housing within certain periods. The City concedes: it was unable either to provide mattresses or beds to some inmates held in the holding cells for as long as six days, or "to assign to 'permanent' housing all inmates within 72 hours." (Defs.' Answer to Pls.' Pet. for Contempt, ¶ 16).

The City seeks to avoid these requirements by quoting the initial language of paragraph 2 of the 1986 Consent Decree, stating that the City is required to "adopt and implement the following policies and procedures to reduce the population of the Philadelphia Prison System." (1986 Consent Decree, ¶ 2). The City argues that to be held in contempt, it must have failed to "adopt and implement" policies and procedures to provide mattresses and long-term housing within a certain amount of time. From the City's perspective, it is irrelevant that the City did not fulfill its obligations under the plans during any given period, so long as the City has "adopted and implemented" such procedures and policies.

There is no doubt that the City has adopted a policy that inmates be assigned to long-term housing within seventy-two hours. *See* Philadelphia Prisons Policies and Procedures, Policy 4.A.4.[5] There is no evidence that the City has failed to adopt policies and procedures with respect to providing mattresses and beds within the twenty-four hour period prescribed by the 1986 Consent Decree. Since the party charging contempt must carry the burden by "by clear and convincing evidence," *Newark Branch, N.A.A.C.P. v. City of Bayonne,* 134 F.3d 113, 120 (3d Cir.1998), the City cannot be held in contempt for failing to adopt the policies required under the 1986 Consent Decree in this regard.

However, during the month in question, the City did fail to implement the given policies. Hundreds of inmates were held in the receiving area, many for up to six days, were not provided with mattresses or beds, and were not assigned to long-term housing within seventy-two hours. Inmates who were moved from the intake area to intake housing were housed in areas not "set up for permanent housing." In its answer, and in the testimony of Commissioner Costello, the City admits this. For instance, the City conceded that it was "unable to assign to 'permanent' housing all inmates within 72 hours." (Defs.' Answer to Pls.' Pet. for Contempt, ¶ 16). The City also acknowledged that "some of the inmates confined in the holding cells in the intake area on September 6, 1996, had been confined to those cells for more than 24 hours," (*Id.,* ¶ 11), and those inmates "had not received a bed or mattress." (*Id.,* ¶ 13). Commissioner Costello admitted

that the emergency housing areas never became designed for "permanent or long-term housing." (N.T. 1/12/97, p. 89).

***10** The City argues, in a footnote, that "one cannot establish a failure to 'implement' a policy over a 10–year period by looking at one week alone." (Defs.' Post Hearing Br. in Opp. to Pls.' Pet. for Contempt, p. 9, n. 1). Although this statement may be true, it is irrelevant. The Court is not deciding whether to hold the City in contempt for failing to implement the required policies over the past ten years. It is only examining whether the City had adopted the required policies and was implementing them during the time in question, namely late August, 1996, through late September, 1996.[6]

The City also contends that "there is no evidence in the record that such policies were not adopted or implemented." This statement is simply untrue. The record is replete with evidence that the City was not implementing the policies that: inmates receive a mattress by the first night after arrival and a bed and mattress within twenty-four (24) hours of arrival; inmates be assigned to a long-term housing area within seventy-two (72) hours of arrival; and housing areas not include any area not set up for permanent housing. During the month in question, the City was not implementing policies and procedures for providing mattresses, bedding, and long-term housing within the times prescribed by the 1986 Consent Decree.[7]

The City argues that in the 1991 Consent Decree, the parties defined "policies and procedures" as guidelines, and implementation as merely a goal, and that definition applies to the 1986 Consent Decree as well. (Defs.' post-hearing Br.Opp. Pls.' Pet. for Contempt, p. 14–16). The plaintiffs have challenged the City's actions as contrary to the 1986 Consent Decree, and the Physical Standards approved pursuant to the 1991 Consent Decree. Without determining whether the "policies and procedures" of the 1991 Consent Decree are binding or merely guidelines and goals, the fact that five years later the parties defined "policies and procedures" as having a specific meaning for the 1991 Consent Decree and Prison Planning Process does not necessarily retroactively amend the meaning of "policies and procedures" in the 1986 Consent Decree. *See Sportmart, Inc. v. Wolverine World Wide, Inc.,* 601 F.2d 313 (7th Cir.1979). The 1991 Consent Decree expressly provided that it would "not affect ... Paragraphs 1 and 2.a-c and h-i of the remedial provisions of the Consent Order of December 30, 1986, as amended." (1991 Consent Decree, ¶ 18). Even if the parties' definition of the term "policy" for the purposes of the 1991 Consent Decree could have retroactively amended the 1986 Consent Decree, the parties expressly agreed not to do so in paragraph 18 of the 1991 Consent Decree.

The City, arguing that the terms of the 1986 Consent Decree are not specific enough, emphasizes the "ambiguity" of the terms "set up," "long term," and "permanent."[8] Counsel for the City is allegedly unable to divine the meaning of language that inmates be assigned to "long term" housing areas, and housing areas must be "set up" for "permanent" housing. However, the City admitted that it "had been unable to assign to 'permanent' housing all inmates within 72 hours." (Defs.' Answer to Pls.' Pet. for Contempt, ¶ 16). Counsel was presumably not confused about "permanent" housing when he signed the answer to the Petition for Contempt. Despite counsel's alleged subsequent confusion, it is quite clear that the City of Philadelphia knew what was long-term or permanent housing and what was not when it signed the Consent Decree.

***11** Commissioner Costello, who had been employed by the PPS since 1970 and held "every position from correctional officer to commissioner," (N.T. 1/12/97, p. 53) stated that the "canoes are ... *temporary bed[s]*." (*Id.*) (emphasis added). Although the parties may have used "long-term" and "permanent" interchangeably, they never confused those terms with "temporary." Commissioner Costello also stated the PPS "use[s] temporary beds when [it is] out of permanent beds." (*Id.* at 73). He admitted that "day rooms and multi-purpose rooms are not permanent housing within the system." (*Id.* at 88). Nor are they "long-term housing." (*Id.*)

The distinction was also included in then Special Master William Babcock's Reports 36 through 41 relating to intake and permanent housing. The City failed to object to the terminology in the reports Special Master Babcock made.[9] The City placed inmates in the "canoes" in the multi-purpose rooms when it ran out of space in permanent or long-term housing areas. Whether the 1986 Consent Decree required inmates to be assigned to "long-term" or "permanent" housing within seventy-two hours, their assignment to day rooms and multi-purpose rooms did not satisfy the City's obligation.

Counsel's alleged current confusion about the terms of the 1986 Consent Decree was not shared by his client, who admitted that the housing practices in late August 1996, through late September 1996, did not meet the requirements of the 1986 Consent Decree that inmates be assigned to long-term housing areas within seventy-two hours, and housing areas not include areas not set up for permanent housing.[10] The City cannot seriously contend that it did not know the requirements of paragraph 2 of the 1986 Consent Decree.

ii. The 1991 Consent Decree Requirements. In the Petition for Contempt and the Emergency Petition, plaintiffs also allege that the emergency housing areas do not meet the physical standard requirements of the 1991 Consent Decree. PPS Physical Standard 14, promulgated under the

1991 Consent Decree, "set[s] forth space requirements for ... housing areas" (PPS Operational and Physical Standards, Section I, p. 2), and details what the City considered appropriate housing areas.

Physical Standard 14 allows inmates to be placed in "Multiple Occupancy Rooms," defined as rooms "hous[ing] no less than two and no more than 50 inmates." (PPS Operational Standard 14.0, p. 2). Under Physical Standard 14, a multiple occupancy room is the only sleeping arrangement allowing more than two inmates to be housed in the same room. (*See* PPS Operational Standard 14.0, p. 10). "Where confinement to the multiple occupancy room exceeds ten hours per day," the room must have "at least seventy square feet of total floor space per occupant," and "at least one dimension of the unencumbered space [must be] no less than seven feet." (PPS Physical Standard 14.01). If more than four inmates are housed in one sleeping area, "[p]artitions are required." (*Id.*) Physical Standard 14 was approved by the court under the 1991 Consent Decree, and the City is required to "carry it out" subject to the court's power to fine or hold parties in contempt. (1991 Consent Decree, ¶ 23, 27, 30). This standard is specific enough for the City to know what was required and prohibited.

***12** In its post-hearing brief (*contra* N.T. 4/8/97 pp. 30–31) the City does not argue that the physical standards are "optional" or merely "guidelines." "At a baseline level, where pertinent, [the physical standards] set forth space *requirements* for ... housing areas." (Operational and Physical Standards, Section I, p. 2) (emphasis added). The 1991 Consent Decree never uses the term "guideline" to refer to a physical standard. The Prison Planning Process, attached to the 1991 Consent Decree, requires the City to "develop physical ... standards for the operation of their facilities." (Prison Planning Process, App. to 1991 Consent Decree, Section C). To that end, the City agreed to "[d]evelop physical plant standards" as well as develop "general design guidelines for renovation and new construction capital projects[.]" (*Id.*)

The general overview of physical standards, in addition to explaining that the physical standards "set forth space requirements," state that they "are the Prison System's method for ensuring inclusion of all *required* characteristics for such a correctional facility as well as all of the characteristics *required* by its own policies and guiding principles." (Operational and Physical Standards, Section I, p. 3) (emphasis added). Physical standards dictate the requirements for current facilities, and "[r]enovations are also guided by" them. (*Id.,* p. 3) (emphasis added). Since the physical "standards fully incorporate mandatory [American Correctional Association] Standards," (*id.,* p. 4), the City cannot reasonably argue that the physical standards are merely guidelines or goals so that it did not have to comply with the physical standards it submitted to the court.[11]

The consent decrees were sufficiently "specific and definite" to hold the City in contempt for violating them. *Harris,* 47 F.3d at 1350 (citing *Eavenson, Auchmuty & Greenwald v. Holtzman,* 775 F.2d 535, 544 (3d Cir.1985)).[12]

B. The City's Disobedience of the Court Order

In order to hold the City in contempt, the court must find that it disobeyed a court order. There was clear and convincing evidence that the City violated the 1986 Consent Decree requirements regarding provision of beds and mattresses, assignment to housing areas within seventy-two hours, and setting up areas for permanent housing.

However, the plaintiffs have not established that the City violated Physical Standard 14.01 of the 1991 Consent Decree. There was insufficient evidence on the record about whether the multi-purpose rooms and day rooms used as emergency housing areas in August and September lacked partitions or the total square footage of floor space required by PPS Physical Standard 14.01. The plaintiffs did not meet their burden of proving the emergency housing areas used in late August and September, 1996, violated PPS Physical Standard 14.01. The City will not be held in contempt of the 1991 Consent Decree for housing inmates in the multi-purpose rooms and day rooms in August and September, 1996.

***13** The plaintiffs also did not demonstrate that in March the City violated Physical Standard 14.01 by "by clear and convincing evidence." *Newark Branch, N.A.A.C.P. v. City of Bayonne,* 134 F .3d 113, 120 (3d Cir.1998). It is likely that the multi-purpose rooms in which the City was housing inmates did not provide the required 70 feet of floor space per inmate, or have partitions, even though more than four inmates were in the room, but the plaintiffs have failed to prove these allegations by clear and convincing evidence; on this record, the City cannot be held in contempt.[13]

The court finds that the City was in contempt for violating the provisions of the 1986 Consent Decree, but not the 1991 Consent Decree. The City "may escape contempt by showing that it could not possibly comply with the court's order despite making all reasonable efforts to do so." *Harris,* 47 F.3d at 1341 (citing *Citronelle–Mobile Gathering, Inc. v. Watkins,* 943 F.2d 1297, 1301 (11th Cir.1991)). "If a violating party has taken 'all reasonable steps' to comply with the court order, technical or inadvertent violations of the order will not support a finding of civil contempt." *General Signal Corp. v. Donallco, Inc.,* 787 F .2d 1376, 1379 (9th Cir.1986); *see United States Steel Corp. v. United Mine Workers,* 598 F.2d 363, 368 (5th Cir.1979); *Washington Metro. Area*

Transit Auth. v. Amalgamated Transit Union, 531 F.2d 617, 621 (D.C.Cir.1976). The City bears the burden of producing "evidence beyond 'a mere assertion of inability,' and to show that it has made 'in good faith all reasonable efforts to comply.' " *Harris,* 47 F.3d at 1324 (citing *Citronelle–Mobile Gathering, Inc. v. Watkins,* 943 F.2d 1297, 1301 (11th Cir.1991)).

The court is convinced that the City did not take all reasonable steps to comply. Despite the slowing of the intake process in late August and early September, 1996, the City did not open a second intake area until more than two weeks of crisis, and did so only after being prodded into action by the plaintiffs' motion for contempt. The City contends that a number of staff "felt it would be almost more disruptive and create more problems than it would solve." (N.T. 11/13/96, p. 116).

The City seems to argue that providing a second intake area was not reasonable; the court does not find this credible. Once the plaintiffs filed a contempt petition, the City immediately opened a second intake area in response; opening a second intake area was quite reasonable. There was no evidence that opening the additional intake area caused any problems or difficulties for the PPS. Opening another area was a reasonable step, but the City did not do so until it was confronted with plaintiffs' Petition for Contempt after several weeks of crisis.

The City did not set up additional areas for permanent housing. The City also refused to enforce its own maximum inmate "management goal," or insist that the First Judicial District cooperate in managing the population under that limit by: implementing the bail guidelines and special release mechanism; expanding the use of early parole and earned time/good time; restoring crash court; and/or reducing the sentence deferred population. *See Harris,* 47 F.3d at 1341 ("Because the problems [in meeting the requirements of the court order] stemmed at least partly from the City's own acts and omissions, the City cannot demonstrate that it exhausted all reasonable efforts comply with" the order). Defendants could also have requested that the court suspend operation of paragraph 2(c) of the 1986 Consent Decree. *See Harris,* 47 F.3d at 1324 (City held in contempt for failure to meet deadlines set by court, when "it is undisputed that the City had the opportunity to seek an extension of time from the district court, ... but did not do so.").

***14** The City took only two concrete steps: 1) the City requested enhanced powers to release inmates without state court approval; and 2) the City transferred approximately 60 county prisoners to out-of-county facilities. If the City then actually released any inmates pursuant to the enhanced special release mechanism, these statistics were not made of record in this contempt proceeding. In any event, the City was not limited to transferring these 60 inmates, and could have transferred more inmates to out-of-county facilities.[14]

In its post-hearing brief, the City argues not that it was impossible to obtain sufficient beds, but that it would have been impossible to put beds in the intake area holding cells. Such an argument misses the point. The City is not being held in contempt because the intake area did not accommodate beds; it is being held in contempt for failing to provide beds and mattresses within the deadlines agreed to in the 1986 Consent Decree. The City was not required to continue to hold incoming inmates in that intake area. It could have opened a second intake area as soon as it became clear that otherwise the City would violate the 1986 Consent Decree. It could have converted the multi-purpose and day rooms to permanent housing. Instead, for several weeks, the City continued to hold incoming inmates in the intake area "for three, four, five, or six days," (Defs.' Answer to Pls.' Pet. for Contempt, ¶ 11), and did not even open a second intake area until the plaintiffs brought the City's actions to the court's attention by filing a Petition for Contempt.

The City also argues plaintiffs offered no evidence that reasonable efforts could have avoided the intake delay. The burden is not on the plaintiffs to produce evidence that other efforts would have been successful; the burden is on the City to show that it took all reasonable steps to avoid violating the consent decree. *See, e.g., United States v. Rylander,* 460 U.S. 752, 757 (1983); *McPhaul v. United States,* 364 U.S. 372, 379 (1960); *Maggio v. Zeitz,* 333 U.S. 56, 75–76 (1948). "The burden of proving plainly and unmistakably that compliance is impossible rests with the contemnor." *In re Marc Rich & Co.,* 736 F.2d 864, 866 (2d Cir.1984). If the City "offers no evidence as to [its] inability to comply with the [ ] order, or stands mute, [it] does not meet [its burden]. Nor does [it] do so by evidence or by its own denials which the court finds incredible in context." *Maggio,* 333 U.S. at 75–76. The City cannot carry its burden of showing it would be impossible to comply merely by stating that plaintiffs have failed to show other efforts would have been successful.

In an earlier finding of contempt in this action, the Court of Appeals reinforced its conclusion that the City was in contempt by "look[ing] to the thrust of the order." *Harris,* 47 F.3d at 1353 (citations omitted). By its own terms, the "thrust" of paragraph 2 of the 1986 Consent Decree was to impose certain requirements on the prison "to reduce the population of the Philadelphia Prison System and maintain the population at agreed upon levels." (1986 Consent Decree, ¶ 2). The City cannot successfully argue that it was unable to implement the policies in question because there were too many inmates in the prison system, when the requirements to which it agreed were designed to avoid that very problem.

***15** The 1986 Consent Decree and Physical Standard 14 of the 1991 Consent Decree are quite specific. The 1986 Consent Decree requires the City to adopt and implement policies that: every inmate "receive a mattress by the first night after arrival and a bed and mattress within twenty-four (24) hours of arrival;" every inmate "be assigned to a long-term housing area within seventy-two (72) hours of arrival in the Philadelphia Prison System;" and housing areas "not include ... any area not set up for permanent housing." (1986 Consent Decree, ¶ 2(c)). Physical Standard 14.01 mandates multiple occupancy rooms contain "at least seventy square feet of total floor space per occupant," and "at least one dimension of the unencumbered space [must be] no less than seven feet." (PPS Physical Standard 14.01).

There was insufficient evidence the City failed to meet the requirements of Physical Standard 14 of the 1991 Consent Decree, but there was clear and convincing evidence that the City violated the 1986 Consent Decree with regard to the time requirements for provision of beds and assignment to long-term housing. The City could have taken other reasonable steps to avoid violating the 1986 Consent Decree, such as opening an additional intake area earlier, and transferring more inmates out-of-county. The City was in contempt of this court's orders.

The contempt occurred some time ago and the conditions have changed to some extent. However, as the overcrowded conditions are "capable of repetition, yet evading review," this court will not deprive the plaintiff class of compensatory relief. *Southern Pacific Terminal Co. v. Interstate Commerce Comm.,* 219 U.S. 498, 515 (1911). The Supreme Court has cautioned that "in selecting contempt sanctions, a court is obliged to use the least possible power adequate to the end proposed." *Spallone v. United States,* 493 U.S. 265, 276 (1990) (internal quotations omitted). However, the Supreme Court made clear that it left unaltered the "longstanding authority" of judges to enter broad compensatory awards for contempt. *International Union, United Mine Workers v. Bagwell,* 512 U.S. 821, 838 (1994). There are two purposes for civil contempt, coercion and compensation. *Id.* at 826; *see also Latrobe Steel Co. v. United Steel Workers, et al.,* 545 F.2d 1336, 1343 (3d Cir.1976). There must be a sufficient nexus between the actions which constituted contempt and the sanction. *See Harris v. City of Philadelphia,* 47 F.3d 1311, 1331 (3d Cir.1995) (Harris V).

When this court previously attempted to order implementation of a management information system plan to a satisfactory degree of operation by a certain date, subject to financial sanctions, the Court of Appeals vacated that order before any fines were actually imposed, and remanded for further administration of the Consent Decree consistent with its opinion. *See Harris v. City of Philadelphia,* 137 F.3d 209 (3d Cir.1998) (Harris VIII). The Court of Appeals held that this court's order threatening financial penalties illegally modified the 1991 Consent Decree establishing the parties' rights and obligations. *Id.* at 211. It could not be upheld as an exercise of the district court's power to fashion sanctions pursuant to ¶ 30 of the Consent Decree because there was no finding of lack of compliance by the City, and the district court had not conducted any contempt hearing. *Id.* at 213.

***16** Here, after hearing the plaintiffs' Petition for an Order to Show Cause why the City should not be held in contempt, the Special Master issued a report on the City's September, 1996 non-compliance with Paragraph 2(c) of the 1986 Consent Decree. The City objected to the Special Master's findings and the court held an extensive hearing. After the plaintiffs filed a post-hearing Brief in Support of the Petition for Contempt and an Emergency Petition, the City filed a post-hearing Brief in Opposition to Plaintiffs' Petition for Contempt and an Answer to plaintiffs' Emergency Petition. The procedure required by the Court of Appeals prior to a finding of contempt and imposition of compensatory sanctions has been met. *See also International Union, United Mine Workers v. Bagwell,* 512 U.S. 821, 829 (1994) (distinguishing procedural requirements for compensatory and coercive civil contempt sanctions); *Harris v. City of Philadelphia,* 47 F.3d 1333 (3d Cir.1995) (affirming finding of contempt and $125,000 penalty against the City) (Harris VI).

The Court of Appeals has also affirmed this court's sanction requiring the City to pay a stipulated penalty of $584,000 for chronic failure to submit a Facilities Audit and a Ten Year Plan by the dates agreed to in the Consent Decrees. The Court of Appeals reversed because the sanction of dismissal of the City's motion to modify the 1986 and 1991 Consent Decrees was insufficiently related to the City's contemptuous acts. *See Harris v. City of Philadelphia,* 47 F.3d 1311, 1331 (3d Cir.1995) (Harris V). Here, the purpose of the remedy here will be to benefit and compensate the plaintiff class by relieving overcrowding at intake facilities.

The Prison Litigation Reform Act, 18 U.S.C. § 3626, as amended, is arguably relevant. It limits all prospective relief in a civil action respecting prison conditions to that necessary to protect the federal rights of the plaintiffs; the relief must also be narrowly drawn, extend no further than necessary to correct the rights violated, and be the least intrusive means necessary for that purpose. *See* 18 U.S.C. § 3626(a)(1). Under Section (a)(3)(B), a prisoner release order should be entered only by a three-judge court. But it is unclear that the release provisions apply at all to settlements. Settlements are the subject of a separate section providing for compliance with the prospective relief provisions if a court enters or approves a consent

decree. *See* 18 U.S.C. § 3626(c)(1). The imposition of compensatory sanctions is neither the entry nor approval of a consent decree.

Consideration of the Prison Litigation Reform Act may be unnecessary. The prisoner release mechanism is not being reinstated at this time, and the sanction for contempt to be imposed is not only necessary to provide compensatory relief to the plaintiff class for violation of rights under the Consent Decree, but extends no further than necessary to correct the rights violated and is the least intrusive means necessary for that purpose.

***17** The 1991 Consent Decree required the City to build a Detention Facility to aid in relieving severe overcrowding in the Philadelphia Prison System, to be financed by certain Justice Revenue Bonds. The Trust Indenture covering the bonds for construction of the Detention Facility and a Criminal Justice Center provides that upon their substantial completion, and after reservation of funds required for unpaid costs of construction, the City is to be reimbursed for certain advances it made to plan and prepare for that construction.

The City of Philadelphia is building a new Women's Detention Facility at the City's prison campus. This new Women's Detention Facility will substantially relieve overcrowding in the Philadelphia Prison System. The City has committed to using the reimbursed funds for that construction; it is the most significant remedial step the City is willing to take at this time. To be sure the City keeps its commitment, and as a compensatory sanction for the contempt caused in large part by prison overcrowding, the City will be required to use the funds distributed to it in reimbursement for initial advances[15] only for the construction to which the City has committed. In the event there are reimbursed funds still available upon completion of the new Women's Detention Facility, they should be earmarked for capital improvements to the House of Correction or its replacement.

The relief imposed by the court does not require any government official to exceed his or her authority under State or local law. Moreover, the decision to build the Women's Detention Facility has already been made and the site has been selected and prepared by City officials, not the court. In imposing relief, the court neither orders the construction of a prison nor raises taxes for that purpose. *See* 18 U.S.C. § 3626(a)(1)(C). Instead, the court will require that:

> "[a]ny Justice Lease Revenue Bond Funds (1991 Series A, Series B and Series C) approved for distribution to the City in reimbursement of initial advances made in respect of the pertinent capital projects and for City funds deposited in the Philadelphia Municipal Authority account together with interest therein shall not be diverted, expended or committed by presently binding obligation or transferred except for the construction of a Women's Detention Facility at the City's prison campus. In the event the funds are not necessary to complete said construction, they shall be used for capital improvements to the House of Correction (other than routine maintenance) or its replacement."

This use of available City funds for the construction of the Women's Detention Facility will aid inmates by easing the overcrowding that created the conditions causing the City to be in contempt of the Consent Decree.

Appropriate Orders follow.

ORDER

AND NOW this 23th day of December, 1999, upon consideration of plaintiffs' motion for rule to show cause why the defendants should not be held in contempt filed September, 1996, the defendants' answer thereto, the plaintiffs' memorandum of law in support of the motion for contempt, the plaintiffs' motion to admit the Powitz affidavit filed March, 1997, the defendants' response in opposition thereto, the plaintiffs' emergency petition filed March, 1997, the defendants' answer thereto, the plaintiffs' post hearing brief, the defendants' post hearing brief, defendants' motion to vacate the release mechanism, the plaintiffs' cross-motion to reinstate the release mechanism filed July, 1996, and the hearings held on these matters, it is ORDERED that:

***18** 1. The plaintiffs' motion to admit the Powitz affidavit is DENIED.

2. The plaintiffs' motion for a rule to show cause why the City should not be held in contempt is GRANTED; the City is found in contempt of the 1986 Consent Decree, ¶ 2(c).

3. The plaintiffs' emergency motion for a rule to show cause why the City should not be held in contempt is DENIED.

4. The defendants' request to vacate the release mechanism is DENIED.

5. The plaintiffs' cross-motion to reinstate the release mechanism is DENIED.

6. Relief for the contempt will be provided by separate order.

ORDER

AND NOW, this 23rd day of December, 1999, it appearing that:

1. The parties entered into a consent decree on December 30, 1986 ("1986 Consent Decree") and a second consent decree on March 11, 1991 ("1991 Consent Decree").

2. The plaintiffs sought a rule to show cause why the City should not be held in contempt for violation of the consent decrees and an emergency petition to hold the City in contempt.

3. There was also a request by defendant to vacate and a cross-motion by plaintiffs to reinstate the admission moratorium and pretrial release mechanism (1991 consent Decree, Paragraph 17) temporarily suspended by this court's order of October 18, 1995.

4. In accordance with the memorandum and order of this date, the City is found in contempt by clear and convincing evidence for violation of the terms of the 1986 Consent Decree.

5. The court declined to impose fines to sanction the proved violations, but decided to deal with the underlying problem of serious overcrowding and inadequate prison capacity by requiring the expenditure of funds to increase prison capacity as a compensatory remedy for contempt.

6. By letter of December 23, 1999 the court approved the release to the City of $20,969,655. from the Justice Lease Revenue Bond Funds for advances made with respect to the Northeast Detention Facility Project and the Criminal Justice Center; it is the court's position that these funds be used for construction of a new Women's Detention Facility now planned at the City's prison campus.

Therefore, it is ORDERED that:

Any Justice Lease Revenue Bond Funds (1991 Series A, Series B and Series C) approved for distribution to the City in reimbursement of initial advances made in respect of the pertinent capital projects and for City funds deposited in the Philadelphia Municipal Authority account together with interest therein shall not be diverted, expended or committed by presently binding obligation or transferred except for the construction of a Women's Detention Facility at the City's prison campus. In the event the funds are not necessary to complete said construction, they shall be used for capital improvements to the House of Correction (other than routine maintenance) or its replacement.

This order does not apply to the balance of approximately $3,958,790 transferred to the Special Account for debt service, as provided by the Trust Indenture.

Footnotes

1 This memorandum does not cover the motion for contempt filed in July, 1999. A separate opinion is forthcoming.

2 At a hearing on November 29, 1999 concerning the contempt motion filed in July, 1999, the City admitted the prison's population reached an average of 6,922 inmates in July, 1999.

3 The City originally stated that the maximum population should be 5,300, but because inmate population fluctuates on a daily and weekly basis, the maximum management goal would be 5,600. (N.T. 12/12/97 pp. 102–03). The City was of the opinion that emergency mechanisms should be instituted when the prison population reached 5,600 to avoid the population reaching or exceeding 6,000, because the prison capacity would then reach a management danger point. The prison population has exceeded 6,000 for over a year.

4 Defendants, concerned about the connotation of the terms library and chapel, contend that all of these "emergency housing areas" should be called "multi-purpose rooms." (N.T. 1/12/96, p. 94–95). For the purposes of this memorandum and order, the court will refer to the rooms used as "emergency housing areas" as "multi-purpose rooms" or "day rooms."

5 Although this policy was adopted pursuant to the Prison Planning Process under the 1991 Consent Decree, it meets the requirement that the City adopt such a policy and procedure regarding assignment of inmates to "long-term housing." The policy actually states that the inmates be moved to "*permanent* housing" within seventy-two hours (emphasis added), but the error in language is irrelevant. The parties acknowledge that, unfortunately, the terms "long-term" and "permanent" have been used interchangeably by the parties and the court during the course of monitoring the Consent Decrees. (N.T. 1/12/97, p. 95). Since a "contract must be

interpreted in light of the meaning which the parties have accorded to it as evidenced by their conduct in its performance," *Capitol Bus Co. v. Blue Bird Coach Lines, Inc.,* 478 F.2d 556, 560 (3d Cir.1973), the court will use the terms interchangeably. In the 1986 Consent Decree requirement that the housing area be "set up for permanent housing," the term "permanent" apparently originally referred to how the prison viewed the housing area. The assignment of inmates to "long-term" housing presumably originally referred to the inmate's relationship to the particular housing area. In the future, the court will endeavor to use the terms as originally intended, but, for the purposes of this contempt petition, long-term and permanent will be considered interchangeable.

6 The City's argument is also inconsistent with the language of the 1986 Consent Decree. Paragraph 3 of the decree (immediately following the paragraph at issue here) provides "[t]he Court recognizes that the prison population fluctuates on a daily basis; therefore the maximum allowable population of the Philadelphia Prison System or of any individual facility may be exceeded temporarily, but never for more than seven (7) consecutive days or for more than twenty (20) out of any forty (40) days." (1986 Consent Decree, ¶ 3). No such provision was made for the requirements in the preceding paragraph regarding mattresses, bedding, and long-term housing. The City may not now seek to amend the plain language of the consent decree. *See Harris v. City of Philadelphia,* 137 F.3d 209, 212 (3d Cir.1998) ("A court should not later modify the decree by imposing terms not agreed to by the parties or not included in the language of the decree.").

7 The 1986 Consent Decree specified that the City is required to "adopt and implement the following policies and procedures to reduce the population of the Philadelphia Prison System." (1986 Consent Decree, ¶ 2). This stands in contrast to those provisions of the 1991 Consent Decree requiring only that the City "develop an implementation schedule" for a particular policy and procedure. *See Harris v. City of Philadelphia,* 137 F.3d 209, 213 (3d Cir.1998) (finding that "agreeing to develop an implementation schedule for [a plan] is not the same as agreeing to implement the schedule or the plan."). In this instance, the City explicitly agreed to "adopt and implement" the policies and procedures for which they are being found in contempt.

8 The City does not allege any ambiguity in the requirements that inmates be provided with mattresses by the first night, and a bed and mattress by within twenty-four hours of arrival.

9 Even if Commissioner Costello had not conceded the clarity of the distinction between intake and long-term or permanent housing, the City would have been bound not only by its answer but also by its failure to object to the Special Master's reports. *See Donaldson v. Bernstein,* 104 F.3d 547, 556 (3d Cir.1997) (doctrine of judicial estoppel "prevents a party from playing fast and loose with the court by using intentional self-contradiction ... as a means of obtaining unfair advantage") (internal quotation marks omitted).

10 The City is not precluded from redesigning areas of the prison system in order to "set [those areas] up for permanent housing." The City may, consistent with the 1991 Consent Decree, the Prison Planning Process, the requirements of Physical Standard 14, and other orders of the court (after notice to the plaintiff class and hearing if appropriate), set up multi-purpose rooms for permanent housing. However, as Commissioner Costello acknowledged, merely placing "temporary beds" in those rooms does not "set [them] up for permanent housing" under the 1986 Consent Decree.

11 The specific history of Physical Standard 14.01 further illuminates its mandatory nature. By Order of July 10, 1995, the court approved "all the Physical Standards ... with the exception of Physical Standard 14.01." (Order, July 10, 1995). That particular standard was not approved because it did not "compl[y] with the minimum standards of the American Correctional Association." (*Id.*) The City resubmitted the standard in a form that met the American Correctional Association requirements, and the court approved it on September 13, 1995. (Order, Sept. 13, 1995).

12 The 1986 Consent Decree is a valid order of this court, enforceable, as any other, by the court's contempt power. *See Shillitani v. United States,* 384 U.S. 364, 370 (1966). The Prison Litigation Reform Act, 18 U.S.C. § 3626, does not invalidate the 1986 Consent Decree per se. In addition, Physical Standard 14 was approved by the court under the 1991 Consent Decree, and the City is required to "carry it out" subject to the court's power to fine or hold parties in contempt, (1991 Consent Decree, ¶ 23, 27, 30), and the contempt procedures, as set forth in the consent decree, have been followed. Consideration of plaintiffs' Petition for Contempt and Emergency Petition is therefore within the court's province to determine the appropriateness of sanctions. *See Harris v. City of Philadelphia,* 137 F.3d 209, 213–14 (3d Cir.1998).

13 This finding is without prejudice to a subsequent motion to compel conversion of multi-purpose or day rooms to permanent housing in compliance with the physical standards of the 1991 Consent Decree.

14 The City notes that plaintiffs objected to transferring more inmates to out-of-county facilities. (N.T. 4/8/97, p. 23–24). Nevertheless, the City could have reasonably transferred more inmates in order to comply with the requirement that inmates only be housed in areas "set up for permanent housing." The court "never said that [transferring inmates out-of-county] was an inadequate solution," (N.T. 4/8/97, p. 24) although, like other temporary remedies it would be imperfect. Whether such action would have been agreeable to plaintiffs is irrelevant to whether the City could have taken that reasonable step to comply with the 1986 Consent Decree.

15 The court order will not apply to the balance of approximately $3,958,790 transferred to the Special Account for debt service, as provided by the Trust Indenture.