

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES,

Plaintiff,

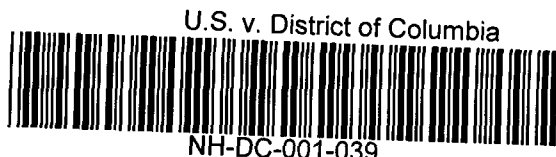
M. ANNE HART, the
DISTRICT OF COLUMBIA LONG TERM
CARE OMBUDSMAN,

Plaintiff-Intervenor,

v.

THE DISTRICT OF COLUMBIA et al.,

Defendants.



U.S. v. District of Columbia

NH-DC-001-039

C.A. No. 95-0948 TFH

FILED

MAY 14 1997

Clerk, U.S. District Court
District of Columbia

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff Intervenor M. Anne Hart has filed with the Court a motion for contempt sanctions, accompanied by proposed findings of fact and conclusions of law. After having reviewed the plaintiff intervenor's amended proposed findings of fact, the defendants' opposition to these proposed findings, and the plaintiff's and plaintiff intervenor's replies, and after having carefully considered the parties' oral arguments with respect to the plaintiff intervenor's proposals, the Court hereby enters the following findings of fact and conclusions of law to supplement its previous ruling holding the defendants in contempt of court.

FINDINGS OF FACT

I. CLEAR AND CONVINCING EVIDENCE DEMONSTRATES THE DISTRICT'S CONTEMPT OF COURT DUE TO NONPAYMENT OF VENDORS IN VIOLATION OF THE STIPULATED ORDER.

A. The Court's Previous Findings.

1. On December 20, 1995, in its oral findings from the bench in support of its finding of contempt, the Court found that the District owed well in excess of \$100,000 to vendors in arrearages in excess of the 45 day time frame set forth in the July 6 Order and that such arrearages had continued consistently throughout this Court's involvement in this matter with the result of causing potential shortfalls in essential health care, and food and other needed supplies. 12/20/95 Tr. 5, 11, Exhibit 1 to Intervenor's Motion for Contempt Sanctions ("Intervenor Exhibit"). These and other findings led the Court to conclude that "It's without doubt that the District is in violation of the court order." Id., Tr. 8.

2. The Court's written opinion on December 22, 1995 further held that "By the defendants' own admission, at least \$161,000 in vendor payments are overdue beyond the 45-day period. This figure was provided by counsel during the status call on December 20, 1995, but the defendant's written submissions suggest an even higher indebtedness total of \$380,323.34. . . . The nonpayment has caused more than one threatened removal of contract nurses and now threatens to deprive the residents of a physical therapist." 12/22/95 Memorandum and Opinion at 2.

B. The District's Admissions since December 20, 1995.

3. On January 18, 1996, the District represented that two full-time employees would spend 100 percent of their time processing invoices and purchase orders and "reduce the time lag for the payment of vendor invoices and to ensure the transmission of necessary documents to the financial management system and ultimately to the chief financial officer, as well as the city administrator for the issuance of a check." 1/18/96 Tr. 19-20, Intervenor Exhibit 2. Further, the District represented that, with respect to contracts requiring approval by the Finance Control Board, "Mr. Hawkins has addressed that situation by requesting that a contract officer for DHS set up and, administer all contracts involving D.C. Village and to ensure that those contracts reach the financial responsibility of Management Assistance Authority Board so that they can be put in place on a permanent basis." *Id.*, Tr. 20-21. In light of these and other developments, the District contended that "We think that at least the District should have the opportunity to purge itself of the contempt order." *Id.*, Tr. 22.

4. Subsequently, at the April 4, 1996 status conference, the District stated that as of April 2 "[w]e owe approximately . . . \$672,000. Of that amount, \$353,000 is beyond the 45-day requirement. Of the \$353,000, \$131,000 is beyond the 45-day requirement." 4/4/96 Tr. 18, Intervenor Exhibit 3. Jeanette Michael confirmed these figures as of April 2 at the April 29 contempt hearing. 4/29/96 Tr. 23.

5. At the April 4, 1996 status conference, Corporation Counsel stated to the Court "so in a technical sense, we understand that we are not in compliance" and "we are not in strict compliance with your order by any means." 4/4/96 Tr. 24, Intervenor Exhibit 3.

6. According to an exhibit submitted by the District at the April 4, 1996 status conference, the District owed overdue amounts of \$14,074 to American Therapeutic, \$93,662.51 to National Nurses, \$51,471.48 to Total Healthcare (a portion of which must be paid to the IRS as required by a tax lien), \$47,861 to National Patient Care, and \$14,917.47 to SRT Medical Staff. Intervenor Exhibit 4. This submission excluded numerous invoices referenced in the Monitor's Report.

7. The District admitted to the Court at the April 26, 1996 contempt hearing that "we are approximately \$78,000 beyond the 45 days." 4/26/96 Tr. 11.

8. The DHS response to the Monitor's Vendor Payment Report dated April 28, 1996 (submitted to the Court on April 29, 1996) admitted the following amounts, in addition to others, were 45 days past due: \$20,882.13 to CUP, \$12,652.76 to SRT Premier, \$202.84 to Abbott Lab, \$47,861 to National Patient Care Systems.

9. The DHS response to the Monitor's Vendor Payment Report dated April 28, 1996 also listed numerous invoices that were over 45 days past due from the "Date Invoices Submitted," but not from the "Dates Invoice Rec'd DHS." The differences between these two dates in some cases was as much as two months. It is unclear whether, in all cases, DHS came into physical possession of the invoices only on the day marked as "Day Invoices Submitted," and not on some earlier date.

10. At the April 29, 1996 contempt hearing, the District admitted to the Court that there is "approximately \$85,000 which is beyond the 45-day time line." 4/29/96 Tr. 4-5.

11. The District's May 9, 1996 report on vendor payments admitted that \$69,238.81 in payments remained 45 days past due. This figure was attested to under oath by Jeanette Michael and Wayne Casey, respectively the consent decree coordinator and Deputy Director of the Department of Human Services.

12. The District's May 15, 1996 report on vendor payments, also attested to under oath, stated that \$60,000.41 in payments remained 45 days past due. This amount includes overdue invoices discovered after the May 9, 1996 report.

B. The Monitor's Reports.

13. The Monitor reported on April 25, 1996 that the District was in violation of the Stipulated Order with respect to overdue amounts, including \$47,761 to National Patient Care System, \$20,882.13 (March 5 invoice) to CUP, and \$11,945 to Therapeutic Management Systems (February 13 and March 10 invoices).

14. The Monitor reported on May 9, 1996 that National Patient Care Systems invoice of \$47,761 remained outstanding. Monitor 5/9/96 Report at 5. Payment of this amount was approved by the Court on April 16, 1996.

II. CLEAR AND CONVINCING EVIDENCE DEMONSTRATES THE DISTRICT'S CONTEMPT OF COURT DUE TO MISREPRESENTATIONS TO THE COURT CONCERNING ITS COMPLIANCE WITH THE ORDERS OF THE COURT.

15. The Court stated in its December 22, 1995 Order that it would take further action with respect to its concerns about misrepresentations to the Court if such conduct continued.

A. Misrepresentations Concerning the Control Board.

16. In its April 24 Opposition to the Motions for Contempt Sanctions, the District stated, "As of April 18, 1996, the contracts for National Nurses and American Therapeutics were pending approval at the control board." District Opposition at 3. After the Monitor reported that this was inaccurate on April 25, the District admitted in a filing on April 29, 1996 that "this was an inadvertent error."

17. At the April 29 contempt hearing, counsel to the Finance Control Board, Daniel Rezneck, confirmed that the April 18 filing was false and that two contracts for National Nurses were approved respectively on February 28 and April 2, 1996 and two contracts for American Therapeutics on February 21 and March 28, 1996. 4/29/96 Tr. 31-34.

18. The misrepresentation stated in the District's April 24 Opposition was repeated throughout April.

a. The D.C. Village payment report dated April 2, 1996, falsely stated that several vouchers for National Nurses and American Therapeutics are "waiting for CB approval."

b. The District falsely represented at the April 4, 1996 status conference: "In two cases, American Therapeutics, to whom we owe \$14,000, and National Nurses, to whom we owe \$93,000, we are awaiting Control Board approval on those contracts." 4/4/96 Tr. 18-19, Intervenor Exhibit 3.

19. In defending its "inadvertent error" and arguing it had not engaged in misrepresentations, the District reported in its April 29 submission that "The contracts referred

to in the monitor's April 25, 1996 letter for these two vendors are different from the contracts referred to by defendants." According to the District, this "different" contract for National Nurses was approved not on February 28 but on April 2, 1996 -- albeit before the April 18, 1996 filing. The District stated on this basis at the April 29, 1996 status conference:

[Intervenor's] counsel has, has duplicated the position of the monitor and has identified the incorrect contracts. We stand by our prior executive summaries. We have not misrepresented to the Court those contracts identified by specific numbers.

4/29/96 Tr. 68-69.

20. The Control Board has confirmed that the National Nurses contract approved on April 2, 1996 covered services for the period January 26, 1996 to February 29, 1996. Letter from Daniel A. Rezneck, dated May 14, 1996. The invoices that the District maintained were pending pursuant to this the contract approved on April 2, 1996, however, were dated January 22, 1996 and February 3, 1996. District Executive Summary, April 2, 1996 at 3. These invoices thus did not -- as represented by the District -- concern services for the period of the contract approved on April 2, 1996. These false representations were made by the District, moreover, in a hearing called by the Court to determine whether the District had made false representations.

21. The District's April 29, 1996 filing also admitted that the Finance Control Board was not responsible for some of the delay in paying vendors and stated "Defendants did not convey and did not intend to convey to anyone, the impression that the FRMAA or control board was responsible for delays in the payment of vendors."

Counsel to the Finance Control Board also confirmed that no delays have ever been attributable to the Control Board. 4/29/96 Tr. 35.

22. The District previously represented to the Court on April 4, 1996 that the Control Board was responsible for delays and stated that "there has been a new process imposed. We have to now refer additional costs to the Control Board for approval, so it appears that some of the delay is the result of the implementation of the new procedure." 4/4/96 Tr. 19, Intervenor Exhibit 3. This representation was false.

B. Misrepresentations Concerning Vendor Payments.

23. The District's April 2, 1996 report on vendor payments concluded that: "The District expects to resolve the problems associated with the late payments by April 18, 1996." Intervenor Exhibit 4. This did not take place.

24. At the status conference on April 4, 1996, the District stated that "we expect those checks to be cut by April 8." Tr. 18, Intervenor Exhibit 3. On April 12, 1996, the District again represented by its counsel that the District had mailed checks for overdue invoices. The District never complied with these representations to the Court and the steps it undertook do not indicate it intended compliance.

25. In its April 2, 1996 Executive Summary submitted to the Court, the recorded invoice date for Therapeutic Management Services is March 18 for \$12,030. Based on the March 18 invoice date, the District represented that the invoice was not overdue.

26. In actuality, two outstanding invoices from TMS were dated February 14 and March 11, and totaled \$12,030. Intervenor Exhibit 5 to 4/29/96 Contempt Hearing. These are two separate invoices, on two separate dates, and neither is dated March 18. Contrary to the report submitted to the Court, both invoices were overdue over 45 days on April 2, 1996.

27. The District's April 24 Opposition stated that "Contrary to the arguments of plaintiff, there was never a threat to the health and safety of residents at D.C. Village. During the week of March 24, 1996, THR [Total Healthcare Resources] provided nurses through March 26, 1996 and assigned one treatment nurse on March 27, 1996." District Opposition at 4. The District omitted the highly material fact that Total Healthcare Resources suspended services of its nursing personnel on March 28, 1996. Monitor Report 4/3/96.

C. Misrepresentations Pertaining to Personal Needs Allowances ("PNA").

28. The District told the Court on January 18 that "With respect to patient accounts, as we've indicated, those accounts have been transferred to a private bank account, which will make the availability of patient funds quicker." 1/18/96 Tr. 16. Based on this representation, the Court stated at the January 18 hearing, "The Court is also pleased to see that the patients' monies have been recognized as their monies and have been put into separate, private accounts and trusts that in the past that all the

monies that came in that were due to these patients have been credited to them as appropriate." 1/18/96 Tr. 29, Intervenor Exhibit 2.

29. The District's representation on January 18 was false. In actuality, all residents' PNA accounts remaining in the D.C. Treasury were not transferred to separate interest-bearing PNA accounts at Independence Federal Savings Bank until March 18, 1996 and only after the Monitor pursued this issue further. Monitor 4/3/96 Report at 5.

30. Prior to March 18, 1996, the therapeutic recreation staff reported in March, 1996 that five residents transferred on December 27 did not have their PNA. Monitor 4/3/96 Report at 7. At this time, the PNAs were being "Drawn down from the D.C. Treasury" and that "some monies are not totally transferred." Monitor 4/3/96 Report at 7.

31. Prior to the transfer of these monies to a private savings account, the District admitted that each resident's PNA was maintained in the District treasury and had to be obtained by requisition, leading to delays in payment. The Court was advised that each PNA "is accounted for separately, but all the District cash is kept in a pool cash arrangement, so that in order for [residents] to have access to this money, D.C. Village must requisition cash from our central treasury." 12/12/95 Tr. 20. "I believe the monies are accounted for separately, but now, when you need to get the cash, then that's a process that goes through the chief financial officer in order to get the

cash released.” *Id.* “Ms. Fountain confirms what I was saying to you. And that, evidently, there has been some holdup there, . . . the paperwork has to arrive in the chief financial officer’s office so he can approve it for the cash to be released, to be sent out to D.C. Village so that people can walk up to the window and get money.” *Id.*

D. Misrepresentations Concerning the Outplacement of Residents with Mental Retardation.

32. The District considered outplacing certain residents with mental retardation to D.C. Family Services. The District told the Court on February 2, 1996 that with respect to D.C. Family Services, “We have an agreement on a tentative rate.” 2/2/96 Tr. 8.

33. There was no agreed upon rate for the services of D.C. Family Service on February 2. Monitor 4/3/96 Report at 3 & Monitor 4/25/96 Report at 4. The District subsequently admitted on March 22 that “a proposed interim rate is anticipated in the near future.” 3/22/96 Biweekly status report.

E. Misrepresentations Relating to Notices to the Ombudsman of Discharges.

34. In many cases, the District has failed to provide the Long Term Care Ombudsman notices of the transfers and discharges from D.C. Village since the announcement of its closure. Exhibit 1 to Intervenor 12/11/95 Memorandum. At the status conference on December 4, 1995, the Court inquired to counsel for the District of Columbia about the notice issue. Counsel for the District of Columbia responded that

notice to the Long Term Care Ombudsman is not required by law where another person is designated as the resident representative. 12/4/95 Tr. 18-19, Exhibit 3 to Intervenor 12/11/95 Memo.

35. The statement of counsel to the District of Columbia at the status hearing is contrary to the law of the District as is confirmed by the prior filings of the Corporation Counsel's office in other cases. District of Columbia law provides that, even where the Ombudsman is not the resident representative, a nursing facility must in all cases provide a notice of transfer and discharge to the Long-Term Care Ombudsman. D.C. Code § 32-1432(e). Further, the Corporation Counsel's Office has previously confirmed its knowledge of this statutory requirement in other cases. Exhibit 3 to Intervenor 12/11/95 Memorandum, Exhibit 3 to Intervenor 12/11/95 Memorandum.

36. After concerns were raised about notices and care plans for hospitalized D.C. Village residents at the status conference on December 4, 1995, Corporation Counsel stated that "our policy is not to refuse the return of any patient who is sent to the hospital because of the need for acute medical care. We don't discharge patients to the hospital." 12/4/95 Tr. 32, Exhibit 3 to Intervenor 12/11/95 Memorandum.

37. That same month, two D.C. Village residents were discharged to new facilities from hospitals, one on December 1 -- three days before the status conference -- and one on December 15 -- ten days after the status conference. The District's Response to the Inquiries of the Court dated January 30, 1996 at 1, 24. Both residents were discharged without

notice being provided to the Ombudsman or preparation of care plans and assessments required by law. Id.; Monitor 1/17/96 Report at 14.

38. At the January 18, 1996 status conference, Corporation Counsel, in response to questions from the Court, stated that notice was given to the Ombudsman of the ten discharged residents since December, 1995. 1/18/96 Tr. 27-28, Intervenor Exhibit 2.

39. On January 29, 1996, the District notified residents that a federal regulation "requires" D.C. Village to "discharge" residents from the facility after a resident has been hospitalized for the 18 day period known as the "bed hold" period. Exhibit 1 to Intervenor's 2/1/96 Memo. The District informed residents that "If you are in a hospital when your bed hold period expires, the social services department of the hospital will assist you in obtaining services in another nursing facility." Id. In January, five hospitalized residents of D.C. Village were as a result characterized in D.C. Village records as "Patients who are discharged from the census but remain in the hospital." Exhibit 4 to Intervenor 2/1/96 Memo.

40. On January 30, 1996, the District told the Court that two of the ten recently discharged residents had in fact been discharged without statutorily required notices being provided to the Ombudsman because they "were discharged directly from hospitals after being hospitalized and away from DCV more than eighteen days." District Response at 1 & Exhibit Y. Corporation Counsel admitted at the February 2 status conference that "The District was not initially involved in that decision" to discharge. 2/2/96 Tr. 8.

41. By notice dated February 5, 1996, the District rescinded its illegal January 29 directive and represented to the Court that the policy was issued by "mistake." Affidavit of Alberta Brasfield, dated February 7, 1996.

42. On January 30, 1996, D.C. Village issued four notices of discharge of individuals falsely stating that "Ms. Sarodel Childs [of the Ombudsman's office] agreed" to the transfer. Childs Dec., dated February 1, 1996. In each case, Ms. Childs and the Ombudsman's Office had not agreed to and was not asked to agree to the proposed transfer. Id.

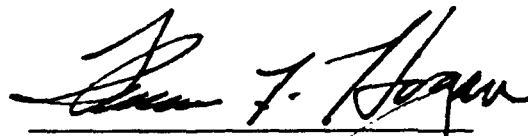
CONCLUSIONS OF LAW

1. Since the Court's first finding of Contempt on December 20, 1995, the District has repeatedly been in contempt of the Section C of the Stipulated Order requiring defendants to pay in full all outstanding debts to individuals and vendors who have supplied goods and/or provided services to or on behalf of DCV residents and thereafter to provide prompt payments in full to such individuals and vendors for goods supplied and/or services rendered not later than forth-five days from the date a legitimate invoice is received by the defendants.

2. The District has been in violation of Court orders as detailed in the Court's order of February 23, 1996.

3. The District has made misrepresentations to the Court with respect to its compliance with Court orders and other matters.

May 12th, 1997


Thomas F. Hogan
United States District Judge

Richard James Farano, Esq.
U.S. DEPARTMENT OF JUSTICE
Suite 1708
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

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