

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

Walter Barry, et al.,

Plaintiffs,

Case No. 13-cv-13185

Hon. Judith E. Levy

v.

Nick Lyon, in his capacity as
Acting Director, Michigan
Department of Human Services,

Defendant.

_____ /

**ORDER GRANTING IN PART PLAINTIFFS' MOTION TO SHOW
CAUSE [125], AND GRANTING IN PART PLAINTIFFS' MOTION
FOR EXPEDITED POSTJUDGMENT DISCOVERY [138]**

This matter is before the Court on plaintiffs' Motion for an Order to Show Cause why defendant should not be held in contempt for violation of previous orders in this case (Dkt. 125), and plaintiffs' Motion for Ex Parte Order Regarding 7/17/2015 Hearing, for Expedited Response to Plaintiffs' Motion for Discovery, and for Expedited, Postjudgment Discovery (Dkt. 138). The Court previously granted in part and denied in part docket no. 138, leaving pending the part of

plaintiffs' motion seeking expedited post-judgment discovery. A hearing was held on July 24, 2015, at which the Court indicated the remainder of docket no. 138 would be granted; that docket no. 125 would be granted in part; and that a written order would follow, based on a proposed order submitted by plaintiffs and defendant's response to that proposed order. The parties agreed that the Court should hold an evidentiary hearing to resolve the second step of its determination whether defendant is in contempt of the Court's January 9, March 30, and March 31, 2015 orders.

The Court finds that plaintiffs have established, by clear and convincing evidence, a prima facie case that defendant has violated definite and specific orders of this Court. The defendant has not stopped the conduct declared unlawful and enjoined by the Court on January 9, 2015. (Dkt. 91.) The evidence submitted establishes that defendant has repeatedly denied, reduced or terminated benefits under the "fugitive felon" policy and has repeatedly sent out the legally inadequate criminal justice disqualification notices for the purpose of terminating, reducing, or denying benefits to cash, food, or child care applicants or recipients, after being clearly and specifically ordered not

to do so. The defendant also has not provided the information required to be reported under the Court's March 31, 2015 Order (Dkt. 114), including information about hearing requests, claims for back benefits under the Food Assistance program, and applications submitted following the mailing of class notice as required by that Order.

The Court preliminarily finds that defendant has not taken all reasonable steps within his power to comply with the Court's orders during the months that have passed since the Court's ruling on the merits and the Court's order requiring defendant to report information to plaintiffs. Defendant concedes that he did not immediately take steps to comply after the January 9, 2015 order was entered and that, as of the July 24, 2015 hearing, he had not removed the enjoined policy from the manuals used by case workers to determine benefit eligibility.¹ He did not create a "red edit" telling caseworkers not to proceed with criminal justice disqualifications and did not insert a note that the enjoined policy was "suspended" until after plaintiffs brought their motion to show cause why he should not be held in contempt.

¹ BAM 811 and BEM 204 were removed effective August 1, 2015. (Dkt. 154-3.)

Defendant has provided no explanation as to why the steps taken could not have been taken earlier.

Defendant argues that it is impossible to modify his computer systems to prevent caseworkers from imposing criminal justice disqualifications (resulting in the denial, termination, or reduction of assistance), or to prevent caseworkers from issuing criminal justice disqualification notices that violate the January 9, 2015 Order. However, the Court is not convinced that the modifications necessary to prevent the erroneous and unlawful terminations and mailings, which violate the January 9, 2015 Order, cannot be made. Likewise, the Court is not convinced that defendant has taken all reasonable steps to compile and report the information required under the March 31, 2015 Order.

In order to ensure full compliance with the Court's orders is achieved as promptly as possible, pending final resolution of plaintiffs' contempt motion, while at the same time also ensuring that (a) defendant has an opportunity to meet his burden of proof, (b) plaintiffs have the information needed to cross-examine defendant's witnesses and to present rebuttal evidence, and (c) the Court has the benefit of a

neutral witness with the information technology database, programming, and systems expertise necessary to identify “all reasonable steps within defendant’s power” for the purposes of evaluating defendant’s defense to the motion to show cause and identifying remedial action that must be taken to comply with the Court’s orders, the Court ORDERS the following:

Defendant Lyon to Appear

1. Defendant Nick Lyon shall appear in chambers for a status conference on **September 11, 2015, at 3:00 P.M.** to discuss the following issues:

a. His understanding of the fact that he may be found in contempt of court, and any specific steps he has taken to avoid that contempt and ensure compliance with the Court’s orders;

b. The specific steps he has taken to communicate to all Department of Health and Human Services (DHHS) employees the imperative to comply with the Court’s orders, the urgency of that task, and the priority that must be placed on the work necessary to achieve compliance;

c. The specific steps he has taken to communicate that same imperative, urgency, and priority to the directors of the Michigan Department of Management, Technology and Budget (DTMB), the Michigan Administrative Hearings System (MAHS), and the highest level officials in any other state department or agency whose services or cooperation are needed to achieve compliance with the Court's orders;

d. His commitment to ensure the cooperation of his employees, contractors, agents and representatives, including employees of other state departments, agencies, and offices, with the Court and plaintiffs' attorneys, in achieving compliance with the Court's orders; and

e. Any other questions that the Court or plaintiffs' counsel may have regarding his compliance with the Orders in this case.

2. This status conference shall focus on defendant Lyon's efforts and actions to achieve DHHS compliance with the Court's orders. Testimony from other witnesses may be presented at the evidentiary hearing to be held at a later date, as set forth below.

3. At least one full business day before the status conference, defendant Lyon shall provide the Court and plaintiffs' attorneys with copies of (a) any interdepartmental agreements, protocols or priorities, memoranda of understanding, or similar documents that limit or affect DHHS' ability to comply with the Court's orders because of DHHS' reliance on other departments, contractors, or vendors, and (b) any non-privileged documents that defendant reviewed to prepare for the status conference.

**Defendant to Provide Detailed Answers to Initial Questions
Regarding Asserted Barriers to Compliance**

4. To assist the Court in understanding the current status of the defendant's efforts to come into compliance with the Court's orders, within seven days of the entry of this Order, defendant shall file written answers setting forth in detail the answers to the following questions. To the extent that defendant has already answered these questions in his August 21, 2015 compliance report (Dkt. 154-4), he may refile those answers in accordance with paragraph 5 below.

- a. Why DHHS did not disable the systems that allow caseworkers to terminate, deny, or reduce benefits based on the existence of an outstanding warrant?

- b. Why defendant did not enter a “red edit” to try to stop its employees from erroneously terminating benefits until June 1, 2015?
- c. Why workers in the more than 125 post-3/22/2015 disqualifications were tracking warrants (i.e. why computer fields for this information remain), and how those workers learned of outstanding warrants if, as defendant has represented, the automated felony match has been turned off?
- d. Why DHHS did not eliminate the template for the enjoined “criminal justice disqualification” notices and the EL1013/criminal justice disqualification message from the boilerplate messages that can be sent by caseworkers?
- e. Why DHHS, knowing that it had not made system changes to prevent worker error, did not seek to identify worker errors before plaintiffs’ contempt motion was filed?
- f. Why, when DHHS staff relies on the Bridges manuals for information about benefit eligibility, defendant continued to post BEM 204 (enjoined fugitive felon policy) and BAM

811 (enjoined automated match) as official policy for almost five months after the injunction issued, and did not remove them from published manuals until August 1, 2015?

- g. Why DHHS is unable to provide information about class members who applied for benefits with DHHS after receiving notice that they may now be eligible?
- h. Why, when DHHS has received at least 1,592 hearing request forms, it cannot report on all those requests or on any resolution of those requests by DHHS prior to a MAHS hearing?
- i. Why, when DHHS has received at least 3,373 claim forms, it cannot report on those claims?
- j. Why dates that criminal justice disqualification notices were sent are missing for over 7,000 class members?
- k. Why data that defendant belatedly reported on the 6/9/15 and 6/23/15 spreadsheets could not have been produced earlier?

- l. Whether defendant has simply failed to inspect the spreadsheets before providing them, or whether defendant has reviewed them but has failed to notify either the Court or class counsel about the information missing from the reports and the steps being taken to provide that information?
- m. Why it is not possible to maintain the historical information and the systems, programs, or functionality needed in order to restore benefits or issue corrective payments to individuals or groups subjected to “fugitive felon” or “criminal justice” disqualifications prior to January 9, 2015, while at the same time modifying the systems so that, going forward, a data match between MSP and DHHS that identifies a person as having an outstanding felony warrant will no longer result in an eligibility determination and benefit calculation that treats that individual as ineligible for/disqualified from receiving benefits.

n. Why “the screen [that] must remain active and available for workers to update [in order to restore past benefits]” (Dkt. 133 at PgID 3746) cannot be modified, hidden, or partially protected in a manner that would prevent DHHS workers from coding / flagging an individual as a “fugitive felon,” or otherwise prevent workers from (a) causing the person to be disqualified based on alleged “fugitive felon” status, and (b) sending criminal justice disqualification notices? In other words, why is it not possible to maintain the historical information needed to restore back benefits while simultaneously ensuring that the systems used to maintain the historical information cannot be used to disqualify individuals from benefits going forward?

5. The answers provided shall be signed under penalty of perjury by the persons providing the answers, who shall be qualified to testify as to the information provided in the answers. Each person signing the answers shall disclose their title and job description and designate the specific questions they answered. Defendant Lyon and

his attorney shall attest that they have reviewed the answers submitted.

6. At the same time that defendant provides answers to these questions, defendant shall provide to the Court and to plaintiffs' counsel copies of all non-privileged documents that were consulted in preparing those answers or that form the basis for those answers, and shall label the documents in a logical manner that indicates the question(s) to which the document relates.

Appointment of Expert Witness

7. Based upon the parties' representations at the July 24, 2015 hearing and in subsequent filings, the Court will appoint an expert witness, pursuant to Fed. R. Evid. 706, to assist the Court with:

- a. Understanding and assessing the reasonableness of the steps that defendant has and has not taken to use or revise information technology (IT) and computer systems to comply with the Court's order;
- b. Understanding, and identifying solutions to, any computer programming or other systems problems that are delaying or preventing defendant from coming into compliance with

the Court's January 9, 2015 and March 30, 2015 Orders, while maintaining the systems functionality needed to proceed with the issuance of corrective payments or restoration of benefits for periods prior to January 9, 2015;

- c. Understanding, and identifying solutions to, any computer programming or other systems problems that are delaying or preventing defendant from coming into compliance with the data reporting requirements of the Court's March 31, 2015 Order;
- d. Identifying how the solutions in 7(b) and 7(c) can be implemented most expeditiously; and
- e. Identifying any barriers to the solutions in 7(b) and 7(c) and how those barriers may be overcome.

8. The parties shall consult regarding the identification of an appropriate expert, and may jointly propose one or more experts for consideration by the Court. In the event that the parties cannot agree upon an expert to propose to the Court, the parties may separately each submit the names of two proposed experts. The name(s) of the proposed expert(s), together with information about their qualifications, shall be

submitted to the Court no later than seven days after this order is entered.

9. Defendant shall provide to the court-appointed expert a copy of the detailed written answers and documents filed pursuant to this Order.

10. Defendant shall fully cooperate with the appointed expert and shall provide the appointed expert with access to documents, information, interfaces, and personnel as needed to investigate what steps can be taken to bring the defendant into compliance, including:

- a. An opportunity to examine all systems and interfaces that affect, reflect, or are relevant to the “fugitive felon”/“criminal justice” matches, disqualifications, screens, or notices at issue in this case;
- b. All specifications, source coding, or other information or documents requested by the expert to understand and assess the fugitive felon/criminal justice interface, demographic screens, and eligibility determinations/benefits calculations used to implement

the fugitive felon policy or to issue the criminal justice disqualification notices;

- c. All coding for any changes, patches, programs, or systems used to implement M.C.L.A. § 400.10b and 10c, upon request of the expert;
- d. All manuals or instructions for any changes, patches, programs, or systems used to implement M.C.L.A. 400.10b and 10c;
- e. All other specifications, source coding, or other information or documents requested by the expert to understand and assess the systems needed by defendant to calculate and issue corrective payments or to restore benefits that were denied, terminated, or reduced as a result of the “fugitive felon” policy and “criminal justice disqualification” notices for periods prior to January 9, 2015;
- f. All specifications, source coding, or other information or documents requested by the expert for purposes of understanding and assessing the usefulness of the “red edit” referred to in defendant’s responses and briefs, and

all subsequent messages or “fixes” instituted in an effort to comply with the orders in this case; and

- g. All queries, spreadsheets, databases, source code, or other information or documents requested by the expert for purposes of understanding the systems used to identify and report data regarding class members as required by the March 31, 2015 Order.

11. In the event that defendant believes the information requested by the expert is covered by attorney-client privilege, defendant may file a motion for a protective order with the Court.

12. Defendant shall promptly make appropriate staff or contractors available to the court-appointed expert to answer questions about the relevant computer systems and any barriers to implementation of the orders in this case.

13. Defendant shall promptly take all reasonable steps to secure the cooperation of other departments or agencies of state government that assist defendant in carrying out his obligations to administer the Food Assistance Program, Family Independence Program, Refugee Assistance Program, State Disability Assistance Program and Child

Development and Care program, to ensure that the court-appointed expert has prompt access to the personnel and information he or she needs.

14. Plaintiffs' attorneys shall be entitled to be present at the inspections conducted by the expert.

15. Defendant shall provide to plaintiffs' attorneys, in electronic form, copies of all information that is provided to the court-appointed expert.

16. Defendant shall, within seven days of this Order, file (a) proposed language regarding the disclosure of proprietary or confidential information to be included in any agreement or court order setting forth the duties of the expert witness, if defendant believes such language should be included; (b) the specifics of any other protections defendant deems necessary to protect applicants and recipients of public assistance; and (c) the specifics of any other protections needed to comply with contracts or agreements with defendant's vendors or contractors (along with copies of any relevant contractual provisions). Plaintiffs shall have three days to inform the Court whether they wish to object and seven days thereafter to file objections.

17. The court-appointed expert shall submit an initial report to the Court with preliminary findings within 28 days of appointment, and a final report to the Court at least seven days prior to the evidentiary “show cause” hearing ordered below, outlining her or his findings on the matters set forth above. The report shall include recommendations as to the best course of action to achieve compliance.

18. If the expert’s opinion is that the identified solutions cannot be promptly implemented by State of Michigan personnel or contractors, she or he shall so inform the Court, shall provide the basis for that opinion, and shall propose what other steps should be taken to implement the identified solutions.

19. If it is not possible to submit a final report within the timeframe set in this order, the expert shall inform the court and the attorneys as soon as the need for additional time is identified, and shall set forth the reasons why more time is needed and the amount of additional time needed.

20. The court-appointed expert shall be available to meet with the attorneys for the parties individually and shall meet, on the record, with the Court and the attorneys following submission of the report.

21. The expert shall attend and be prepared to testify at the evidentiary show cause hearing ordered below. The Court shall set the terms of payment of reasonable fees for the expert.

22. The Court finds it appropriate for defendant to pay the full cost of the expert, pending a final decision on plaintiffs' Motion to Show Cause (Dkt. 125), because (a) defendant has repeatedly failed to comply with the Court's orders; (b) it is defendant's responsibility to remedy any issues with his computer systems that prevent DHHS from coming into compliance; (c) defendant has represented to the Court that Michigan governmental staff have not been able to remedy the alleged computer system issues preventing compliance, which suggests that outside technical expertise is needed; (d) defendant's piecemeal approach to compliance, whereby he has repeatedly identified additional steps he can take towards compliance after plaintiffs have filed motions, suggests that defendant has failed to seek a comprehensive solution to the alleged computer system problems; and (e) plaintiffs are indigent. The expert shall submit invoice(s) for reasonable fees and costs directly to the defendant for reimbursement, with copies provided to the Court and to plaintiffs' attorneys.

23. The court-appointed expert may communicate freely with any or all attorneys or parties without such communications being considered *ex parte* communications.

Rescission of Policies that Violate the Orders in this Case

24. Within seven days of this Order, defendant shall file with the Court an affidavit from a person with personal knowledge, regarding the date of removal of the BEM 204 and BAM 811 policies from both internet and intranet sites.

Modification of EL 1013 Message

25. Within seven days of this Order, defendant shall modify the content of the EL 1013 message, so that if defendant's systems still generate such a message in FAP, FIP, SDA, RCA, and CDC cases, it shall say: **"IF YOU RECEIVED THIS MESSAGE YOU ARE BEING UNLAWFULLY DENIED OR TERMINATED FROM RECEIVING BENEFITS DUE TO A COMPUTER OR CASEWORKER ERROR IN VIOLATION OF A COURT ORDER. CONTACT YOUR CASEWORKER OR THE *BARRY V. CORRIGAN* HELP LINE AT 313-578-6826. MORE INFORMATION IS AVAILABLE AT ACLUMICH.ORG/PUBLICBENEFITS."**

Discovery

26. To the extent plaintiffs' attorneys believe it necessary to conduct discovery to supplement the work of the court-appointed expert, plaintiffs shall be entitled to conduct expedited discovery related to the issues of whether defendant and DHHS have taken all reasonable steps within their power to comply with the Court's orders, and the reasonable steps necessary for defendant to come into compliance with the Court's orders.

27. If plaintiffs' attorneys pursue discovery, defendant shall respond to any interrogatories, requests for inspection or production, or requests to admit within 21 days, and depositions shall be scheduled within 21 days after the production of written discovery.

Evidentiary Hearing

28. An evidentiary hearing shall be held at a date and time to be set by the Court, at which defendant must show cause why he should not be held in contempt for his violations of this Court's orders that plaintiffs have proven by clear and convincing evidence, by producing evidence showing that he has promptly taken all reasonable steps within his power to comply with those orders.

29. Defendant shall file a witness list at least fourteen days before the date of the evidentiary hearing. If plaintiffs intend to call witnesses, plaintiffs shall file a witness list at least seven days before the hearing date.

Reasonable Attorney Fees and Costs

30. If the Court finds after the evidentiary show cause hearing that defendant has not met his burden of proving that he promptly took all reasonable steps to comply with the Court's orders, defendant shall pay reasonable attorney fees and costs to plaintiffs' attorneys for their time and expenses on the Motion for Order to Show Cause (Dkt. 125) and Motion for Ex Parte Order Regarding 7/17/2015 Hearing on Motion to Show Cause, and for Expedited Response to Plaintiffs' Motion For Discovery, and for Expedited, Postjudgment Discovery (Dkt. 138), including time spent assessing defendant's compliance, such as interviewing and responding to questions of class members, reviewing spreadsheets, reports, and mailing lists, and conferring and corresponding with defendant's attorneys regarding defendant's compliance.

31. If the Court finds after the evidentiary show cause hearing that defendant has not met his burden of proving that he promptly took all reasonable steps to comply with the Court's orders, defendant shall also pay reasonable attorney fees and costs to the plaintiffs' attorneys for their time and expenses related to defendant's post-judgment non-compliance and remedies for such non-compliance. This includes time and expenses for conducting discovery related to defendant's non-compliance; drafting a proposed order for the Court as directed at the July 24, 2015 hearing; preparing the motions for attorney fees and costs, including the motion in paragraph 32 below; identifying and working with an expert to be appointed by the Court; preparing for and attending the status conference with defendant Lyon; attending inspections conducted by the court-appointed expert; reviewing documents or electronically-stored information provided by defendant under this Order; reviewing the detailed answers provided by defendant pursuant to this Order; preparing for and attending the evidentiary hearing; and other time spent assessing Defendant's compliance.

32. If the Court finds, after the evidentiary show cause hearing, that defendant has not met his burden of proving that he promptly took

all reasonable steps to comply with the Court's orders, plaintiffs shall submit a Motion for Attorney Fees and Costs within 30 days after entry of a final order disposing of plaintiffs' Motion for Order to Show Cause, setting forth the time reasonably spent, appropriate hourly rate for attorneys involved, and costs incurred.

33. Defendant shall file a Response no later than 21 days after the motion in paragraph 32 is filed. Plaintiffs' reply shall be due 7 days thereafter.

34. Plaintiffs' attorneys shall be entitled to file a supplemental motion for attorney fees for work performed after the motion in paragraph 32 is filed.

35. The award of fees and costs for these motions and discovery shall be separate and apart from any award of attorney fees under 42 U.S.C. § 1988.

IT IS SO ORDERED.

Dated: September 1, 2015
Ann Arbor, Michigan

s/Judith E. Levy
JUDITH E. LEVY
United States District Judge

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon counsel of record and any unrepresented parties via the Court's ECF System to their respective email or First Class U.S. mail addresses disclosed on the Notice of Electronic Filing on September 1, 2015.

s/Felicia M. Moses
FELICIA M. MOSES
Case Manager