To be argued by
ALAN G. KRAMS

NEW YORK SUPREME COURT
APPELLATE DIVISION: FIRST DEPARTMENT

YVONNE McCAIN, et al.,

Plaintiffs-Respondents,

-against-

RUDOLPH W. GIULIANI, as Mayor of the City of New York; THE CITY OF NEW YORK; PETER J. POWERS, as Deputy Mayor of Operations; NINFA SEGARRA, as Deputy Mayor; JOAN MALIN, as Commissioner of the New York City Department of Homeless Services; THE NEW YORK CITY DEPARTMENT OF HOMELESS SERVICES; DENNIS PIERVICENTI, as Deputy Commissioner of the New York City Department of Homeless Services; M A R V A L . H A M M O N S , a s Administrator/Commissioner of the Human Resources Administration of the City of New York; THE NEW YORK CITY HUMAN RESOURCES ADMINISTRATION; MEG O'REGAN, as Acting Executive Deputy Commissioner of Family Support Administration, New York City Human Resources Administration; DEBORAH WRIGHT, as

(caption continued on next page)

APPELLANTS' REPLY BRIEF

PAUL A. CROTTY,
Corporation Counsel of the
City of New York,
Attorney for Appellants,
100 Church Street,
New York, New York 10007.
(212) 788-1031 or 1010

LEONARD KOERNER,
THOMAS C. CRANE,
MURIEL GOODE-TRUFANT,
ALAN G. KRAMS,
of Counsel.

December 18, 1996

(Reproduced on Recycled Paper)

(continued from preceding page)

Commissioner of the New York City Department of Housing Preservation and Development; PETER CANTILLO, as Assistant Commissioner of the New York City Department of Housing Preservation and Development,

Defendants-Appellants,

-and-

BRIAN J. WING, as Acting Commissioner of the New York State Department of Social Services,

Defendant.

In the Matter of the Application of

MARIA LAMBOY and OSCAR SERRANO,et al.,

Petitioners-Respondents,

For a Judgment pursuant to Article 78 of the Civil Practice Law and Rules,

-against-

MARVA L. HAMMONS, as Administrator/Commissioner of the Human Resources Administration of the City of New York; THE NEW YORK CITY HUMAN RESOURCES ADMINISTRATION; MEG O'REGAN, as Acting Executive Deputy Commissioner of Family Support Administration, New York City Human Resources Administration;JOAN MALIN, as Commissioner of the New York City Department of Homeless Services; THE NEW YORK CITY DEPARTMENT OF HOMELESS SERVICES,

Respondents-Appellants,

-and-

BRIAN J. WING, as Acting Commissioner of the New York State Department of Social Services,

Defendant.

(caption continued on next page)

KAREN SLADE, et al.,

Plaintiffs-Respondents,

-against-

RUDOLPH W. GIULIANI, as Mayor of the City of New York; PETER J. POWERS, as Deputy Mayor of Operations; NINFA SEGARRA, as Deputy Mayor; JOAN MALIN, as Commissioner of the New York City Department of Homeless Services; THE NEW YORK CITY DEPARTMENT OF HOMELESS SERVICES; DENNIS PIERVICENTI, as Deputy Commissioner of the New York City Department of Homeless Services; MARVA L. HAMMONS, as Administrator/Commissioner of the Human Resources Administration of the City of New York; THE NEW YORK CITY HUMAN RESOURCES ADMINISTRATION; MEG O'REGAN, as Acting Executive Deputy Commissioner of Family Support Administration, New York City Human Resources Administration,

Defendants-Appellants,

-and-

BRIAN J. WING, as Acting Commissioner of the New York State Department of Social Services,

Defendant.

TABLE OF CONTENTS

NEW YORK SUPREME COURT
APPELLATE DIVISION: FIRST DEPARTMENT

YVONNE McCAIN, et al.,

Plaintiffs-Respondents,

-against-

RUDOLPH W. GIULIANI, as Mayor of the City of New York;, et al.,

Defendants-Appellants,

-and-

BRIAN J. WING, as Acting Commissioner of the New York State Department of Social Services,

Defendant.

(and two other actions)

APPELLANTS' REPLY BRIEF

PRELIMINARY STATEMENT

This brief responds to the answering brief of plaintiffs-respondents, which will be cited herein as "Pltfs. Br." Appellants' main brief will be cited as "City Br."

Two critical legal points are made in the City's main brief: (i) the only prohibition against overnight stays in an EAU was 83 ADM-47, the defunct SDSS directive enforced by this Court in Lamboy v. Gross, 126 A.D.2d 265 (1st Dept. 1987), and (ii) the process of taking applications for emergency housing, determining eligibility, and placing eligible families in emergency housing is now governed by 94 ADM-20, and the Supreme Court erred when it issued standards at variance with the State Commissioner's.

Plaintiffs dispute the first proposition, arguing that McCain v. Koch, 117 A.D.2d 198 (1st Dept. 1986), rev'd in part, 70

N.Y.2d 109 (1987), holds that various constitutional and statutory provisions prohibit keeping any family overnight in an EAU at any time, whether it is awaiting a determination of eligibility or placement in emergency housing. Plaintiffs' misinterpretation of McCain treats 83 ADM-47 and Lamboy as pointless exercises despite this Court's explanation in Lamboy that McCain was about broad issues while Lamboy and 83 ADM-47 defined the City's duty in the period between a family's application for emergency housing and a placement. See Lamboy, 126 A.D.2d at 266-67. No holding in McCain barred SDSS from repealing the unrealistic standards in 83 ADM-47 and replacing them with the standards in 94 ADM-20, based on the knowledge gained over ten years of experience.

Plaintiffs sidestep the City's argument that the Supreme Court should have deferred to the standards in 94 ADM-20 rather than ignoring them. Plaintiffs misconstrue the City as arguing that SDSS directives can countermand court orders or trump judicial interpretations of statutes or constitutions (e.g. Pltfs. Br. at 56). That is not what the City said. The City's point is that the prohibition against overnight EAU stays was previously established only by the guidelines set by SDSS in 83 ADM-47 pursuant to its authority to set policy in social services matters. When SDSS changed its policy, it was acting within its lawful sphere, and the Supreme Court should have deferred to the new standards.

Plaintiffs' response to this argument is to repeat that McCain held that various constitutional and statutory provisions prohibit any and all overnight stays in an EAU, thus placing this question beyond the reach of an SDSS directive. If this Court

disagrees with plaintiffs, it then follows that 94 ADM-20 should be accepted as the current binding standard for processing shelter applications.

REPLY STATEMENT OF FACTS

Recent EAU conditions offer no guidance on whether the Supreme Court was correct when it ruled that two 1986 orders in McCain prohibit all overnight EAU stays. It was this ruling that led the Court to hold the City in contempt and disregard the time standards promulgated by SDSS in 94 ADM-20 (5078). Nevertheless, plaintiffs' brief details criticism of EAU conditions and operations (Pltfs. Br. at 10-19). Periodic crowding at the EAU unquestionably makes for "difficult and trying" circumstances for the affected families (1128), but the City has expended much effort and money to ameliorate these difficulties. Intensive management and beefed-up staff have improved many services offered at the EAU, such as advising people about cash grants that could eliminate the need for shelter (1151); provision of cribs, blankets, food, diapers, changing tables, and refrigeration for medicines (1153-54); and medical screening (1154). On the latter issue, the City agreed to perform its screening in the manner requested by the Special Master, despite disagreeing with the recommendation (City Br. at 13).

In his March 1996 report to the Court, the Special Masters noted problems that are created by "the predictable seasonal increase during the summer" (2869), but they also saw the City's "efforts to better the physical facility" (2869), including the "major renovation" then underway that "is anticipated will

ameliorate many of the complaints pertaining to the physical facility" (2870). The City's $600,000 renovation of the facility includes improvements in the physical plant that directly benefit shelter applicants (e.g., expanded dining room, renovated bathrooms) and enhance the processing of their applications (e.g., better computers for caseworkers) (2908).

Plaintiffs cite the Special Masters' criticism of the process of placing and serving domestic violence victims (Pltfs. Br. at 17), but omit mention of the Special Masters' statement in the same paragraph that "[i]ntensive efforts" led to an interagency agreement between the Department of Homeless Services and the Human Resources Administration to improve service delivery to this population (1377, 1381a-82).[1]

Plaintiffs raise other issues of internal City management, such as complaints that the division of responsibility between DHS and HRA delays the application process and lengthens EAU stays (Pltfs. Br. at 51-53). Plaintiffs complain that applicants at income support centers must see workers whose job it is to explore alternatives to shelter (Pltfs. Br. at 51-52), even though such applicants have "typically" run out of alternatives (Pltfs. Br. at 52 n.48). However, when families apply for shelter during business hours and go through this diversion process "75%

---

[1] Social services districts run programs that provide special shelters for domestic violence victims. See generally 18 N.Y.C.R.R. Part 452. However, this is not an open-ended entitlement program, so if no space is available, the victim is sheltered in the regular family shelter system, and the Department of Homeless Services "[makes] efforts to ensure that the location of the facility does not jeopardize the safety of the referred family" (1382).

. . . do not enter the shelter system at that time," reducing demand for emergency housing (2910).

Plaintiffs also use outdated information in the current record to criticize the City's eligibility process as pointless since few families were found ineligible (Pltfs. Br. at 52-53, 59 n.58). The new eligibility process discussed by Mr. Piervicenti, made possible by rescission of 83 ADM-47's presumption of eligibility, has led to a far higher percentage of families being found ineligible. In fairness to plaintiffs, it should be noted that they have made motions in the Supreme Court, now sub judice, vigorously complaining about the new scrutiny of eligibility and arguing that many eligible families are being turned away. While none of this sheds light on the meaning of 1986 decisions and orders in McCain, plaintiffs' brief creates the impression that virtually all applicants for emergency housing are eligible and eventually require placement. The City simply wants to point out that the enhanced investigation allowed by 94 ADM-20 makes prior evidence on this point obsolete.

Plaintiffs suggest that overnight EAU stays result from defendants' lack of will since such stays were largely avoided under Mayor Koch (Pltfs. Br. at 1 n.1). This simplistic assertion ignores important changes in emergency housing that improved the quality of ultimate placements, but took away beds that had been used to accommodate applicants in the EAU. Tier I congregate shelters were outlawed by the City Council, effective September 30, 1991, N.Y.C. Admin. Code § 21-124(a), and in 1990 the City agreed not to use hotels unless they met SDSS standards (783, 787).

Moreover, the infamous "welfare hotels" housing hundreds of homeless families have been replaced by smaller Tier II shelters with private sleeping accommodations and intensive social services.

Even though this City has done more to shelter homeless families than any government, at any level, plaintiffs complain that problems persist because the City has not complied with orders directing it to make plans to address various aspects of the homeless problem (Pltfs. Br. at 7-8). The intractability of homelessness is not due to lack of plans. The City does not operate in a vacuum, nor does it have unlimited resources. As former DHS Commissioner Joan Malin explained, federal cutbacks in housing assistance "severely test the City's ability to maintain its system of services to homeless families," especially since the percentage of tenants in New York City who receive federal section 8 subsidies is twice as high as in the cities ranking second and third (763). Nor do plaintiffs acknowledge the City's "own fiscal crisis" (764) and the many competing legitimate demands on limited public funds.

Plaintiffs' understandably want more spending directed at their particular concerns, but City officials must address the needs of the public at large, including housing for the working poor, education for children in the public schools, and safer streets for everyone. Resolution of these issues is for the political process, not courts. When plaintiffs presented the Supreme Court with a laundry list of requests for injunctions (60-64), including orders dictating how the City should allocate in rem apartments and section 8 subsidies, the Supreme Court properly

denied the application because it was "reluctant to intrude upon Executive prerogatives" (5082).

The issue here is not how to solve the homeless problem or how the City should allocate housing or manage its homeless programs; it is whether 1986 court orders in McCain preclude all overnight EAU stays or whether SDSS had discretion to promulgate the standards in 94 ADM-20.

REPLY POINT I

THIS COURT'S 1986 DECISION IN McCAIN DID NOT PRECLUDE ALL OVERNIGHT STAYS AT AN EAU WHILE ELIGIBILITY WAS DETERMINED AND AN EMERGENCY HOUSING PLACEMENT SECURED FOR ELIGIBLE FAMILIES.

The City has explained its view that McCain addressed whether the City had to provide shelter to homeless families or could meet its constitutional and statutory obligations by furnishing cash assistance and referrals (City Br. at 42). It was 83 ADM-47, enforced by Lamboy, that dealt with the narrower question of how quickly the City had to provide an emergency housing placement to someone applying for shelter. (City Br. at 41-42).

Plaintiffs see 83 ADM-47 and Lamboy as irrelevant because, by the time this Court decided Lamboy, McCain supposedly barred all overnight EAU stays for reasons having nothing to do with 83 ADM-47 (Pltfs. Br. at 31, 35). In their brief, plaintiffs repeatedly defend this proposition with a mistaken description of this Court's holding in McCain. Intermingling their own paraphrase with a quotation from McCain, plaintiffs assert that "this Court

has held that the City's policy of denying shelter to homeless families and lodging them in welfare offices 'contravenes both the letter and spirit of the State's affirmative obligation to aid all its needy residents under NY Constitution, article XVII, ¶ 1.' McCain v. Koch, 117 A.D.2d at 216" (Pltfs. Br. at 31; see also, Pltfs. Br. at 2, 34).

A fuller quotation of the quoted passage highlights plaintiffs' error. This Court said:

> There is ample evidence in the record for us to conclude that the City DSS current policy of only providing cash allowances and information concerning housing availability amounts to the denial of aid to homeless families. The number of such families, approximately 2,500, and the average period of homelessness, seven months to one year, bespeak the dimensions of the problem. In view of the scarcity of decent low-income housing, the City's policy simply ignores the brutal realities of plaintiffs' situation. It contravenes both the letter and spirit of the State's affirmative obligation to aid all its needy residents under NY Constitution, article XVII, § 1.

McCain, 117 A.D.2d at 215-16 (emphasis added). The "policy" found unconstitutional in McCain was that of providing cash instead of shelter. Portions of the opinion saying that sleeping in EAUs constituted irreparable harm warranting a preliminary injunction were written in the same context. The opinion said that requiring the City to provide emergency housing was preferable to "forcing [plaintiffs] to find shelter and food that may be beyond their means to attain." Id. at 211. The decision did not hold that

there were constitutional or statutory provisions prohibiting overnight EAU stays for all applicants seeking shelter.[2]

Plaintiffs' analysis of Lamboy is equally faulty. They rely heavily on this Court's discussion of the SDSS fair hearing decision in Ms. Lamboy's case (Pltfs. Br. at 35, 37), which this Court said violated 83 ADM-47 and was "also . . . in conflict with this court's decision in McCain." Lamboy, 126 A.D.2d at 272. However, the conflict with McCain was not because Ms. Lamboy was kept overnight in an EAU, but because SDSS ruled that accommodation in the EAU "[constituted] the proper provision of emergency housing assistance." Id. The fair hearing decision found compliance with 83 ADM-47 because the City provided "temporary housing at the agency's emergency assistance unit." Supplemental Record on Appeal at S19, Lamboy, 126 A.D.2d 265. The Supreme Court in Lamboy also criticized the fair hearing decision on this point. The Court observed that SDSS's decision "suggests that the city complied with 83 ADM-47" by accommodating Ms. Lamboy in the EAU. Lamboy v. Gross, 129 Misc. 2d 564 at 575 (Sup. Ct. 1985), aff'd, 126 A.D.2d 265, and went on to say that it "does not agree that furnishing

---

[2] While the issue is therefore an open question, it should not be addressed on this record. Both in the Supreme Court and here, the parties have focused their arguments on the interpretation of previous rulings, and the Supreme Court's refusal to defer to the time standards in 94 ADM-20 is based on the view that prior appellate rulings cover the issue, not on any new constitutional or statutory analysis (5078). Briefs directed at whether all applicants have a constitutional or statutory right not to wait overnight in an EAU would be very different from those presented here. If this Court finds that prior court orders do not preclude enforcement of the time standards in 94 ADM-20, it should vacate the orders appealed from and leave to the future any claim that the time standards in 94 ADM-20 are in some way unlawful.

cots and a crib in an emergency assistance unit constitutes compliance with 83 ADM-47." Id. at 576.[3] Of course, SDSS's new standard supersedes 83 ADM-47.

Ignored by plaintiffs is this Court's direct holding in Lamboy that "our decision in McCain is not dispositive of the issue here presented." 126 A.D.2d at 266 (see City Br. at 41-42). Lamboy went on to note that, while this Court declared a right to shelter in McCain, it "most reluctantly" concluded it could not impose standards, 126 A.D.2d at 266, an obstacle not confronting it in Lamboy, where the Court was compelling the City's compliance "with the standards contained in a State-issued administrative directive." Id. at 267.

In McCain, this Court would not uphold the Supreme Court's standards for hotels even though it found that plaintiffs "persuasively documented the unsafe and squalid conditions prevalent in welfare hotel accommodations, conditions particularly undesirable for young children." McCain, 117 A.D.2d at 217. The decision said this Court could not "conclude that plaintiffs are likely to prove that article XVII substantively guarantees minimal physical standards of cleanliness, warmth, space and rudimentary convenience in emergency shelter." Id.

---

[3] SDSS retreated from this position in a June 1985 letter acknowledging that accommodation in an EAU is not the provision of emergency housing. See Appellant State Commissioner's Brief at 6, Lamboy, 126 A.D.2d 265. Of course, the issue here is how quickly shelter must be provided to an applicant, and the standard for speed is now set by 94 ADM-20, just as it was earlier set by 83 ADM-47.

This holding was expressly left unreviewed by the Court of Appeals, McCain v. Koch, 70 N.Y.2d 109, 118 (1987), and it is law of the case to the same extent as the holding, also expressly unreviewed, that the City must provide shelter, not just cash. Id.[4] While the Court of Appeals disagreed with this Court's total refusal to adopt standards for the habitability of hotels, it articulated a very limited standard-setting role for courts, allowing it only when governments "having undertaken to provide the homeless with emergency shelter," did not themselves enact standards. Id. at 119; see Mixon v. Grinker, 88 N.Y.2d 907, 911 (1996) (standard-setting "is an extraordinary judicial task reserved for a situation when no departmental guidelines exist"). In any event, at issue here is what this Court did in McCain, and the 1986 opinion holds that this Court had no role in making standards for the provision of shelter. This holding must be ignored to accept plaintiffs' reading of McCain.

Plaintiffs' also err when they characterize the City as arguing that this Court's order in McCain "rested only" on 83 ADM-47 (Pltfs. Br. at 35). To the contrary, the City acknowledged that McCain declared a right to shelter based on a variety of statutory and constitutional provisions and holds that this right is not vindicated by accommodations in an EAU. The City's point is that the decision does not contain any holding that these statutes and constitutional provisions carry with them a

---

[4] The latter holding is concededly law of the case in this Court, but the City has preserved its right to argue in the Court of Appeals that no constitutional or statutory provision requires that shelter be provided to homeless families (City Br. at 42 n.14).

right not to wait in an EAU while an application is considered and a placement found. McCain left it to SDSS to make standards, and when McCain was written, this Court was well aware that SDSS had promulgated 83 ADM-47. See McCain, 117 A.D.2d at 208.

Nor are plaintiffs aided by their reliance on the decisions in this Court and the Court of Appeals in the previous contempt proceedings. This Court's statement that overnight EAU stays violated McCain and Lamboy, see McCain v. Dinkins, 192 A.D.2d 217, 218 (1st Dept. 1993), aff'd, 84 N.Y.2d 216 (1994) (Pltfs. Br. at 1, 36), was correct when made because, at the time, 83 ADM-47 required immediate placement of every applicant not found ineligible, thus making it a violation of both the McCain and Lamboy injunctions to have a family stay overnight in an EAU (City Br. at 45).

Equally unavailing for plaintiffs is the Court of Appeals' self-described "[broad summary]" of the 1986 McCain ruling and Lamboy. See 84 N.Y.2d at 222; Pltfs. Br. at 29 n.25. Since 83 ADM-47 was in effect when this decision was written, the Court did not need to distinguish the two cases. The danger of reading a descriptive summary as a holding is highlighted by the Court of Appeals' statement that McCain, Lamboy, and Slade were all "started in the early 1980s . . . to induce the City to comply with" 83 ADM-47. 84 N.Y.2d at 221. This statement is mistaken, as plaintiffs acknowledged when they made a point of the fact that McCain predated 83 ADM-47 (Pltfs. Br. at 35). Looking at the Court of Appeals' complete decision, it is manifest that 83 ADM-47 was

the critical document in finding the City in contempt for failure to provide immediate shelter (City Br. at 44-45).

Finally, plaintiffs make certain legal arguments that are irrelevant to this appeal. They allege that the EAU is being operated as a barracks shelter in violation of section 21-124(a)-(b) of the City's Administrative Code (N.Y. Leg. Pub. 1991) (Pltfs. Br. at 39).[5] The local law bars "any Tier I shelters as defined in 18 NYCRR § 900.2 through § 900.18." N.Y.C. Admin. Code § 21'-124(a). The EAU is not a shelter and accommodation therein is not intended as fulfillment of the City's obligation to provide shelter. The question here is whether prior court orders preclude SDSS from adopting a policy that allows local social services districts some time between a family's application for shelter and the ultimate placement of eligible families. The local law does not speak to this.

Nor does Slade v. Koch, 135 Misc. 2d 283 (Sup. Ct., N.Y. County); modified, 136 Misc. 2d 119 (Sup. Ct. N.Y. County 1987), which precludes placement of pregnant women and infants in Tier I shelters (Pltfs. Br. at 39). The Slade provisions apply to placements, not the processing of applicants, a point made by SDSS in the Supreme Court (2630). When plaintiffs commenced the instant contempt litigation, they did not seek contempt for violations of Slade (58-59)

---

[5] The publisher and date are supplied because the City Council has adopted two provisions with this number, both currently in effect. The other one is in the pocket part of the cited volume.

It was error for the Supreme Court to conclude that McCain held that no shelter applicant could stay overnight at an EAU. That "precise issue" was addressed solely by SDSS directive, 83 ADM-47 then and 94 ADM-20 now. Lamboy, 126 A.D.2d at 267. McCain expressly said that courts were powerless to adopt minimum standards, and the City is not in contempt of either of the orders the Supreme Court held were violated.

REPLY POINT II

EVEN IF PRIOR DECISIONS IN McCAIN WERE INTENDED TO PROHIBIT ANY OVERNIGHT STAYS IN EAUs, NO JUDICIAL DECREE SO PROVIDES WITH THE SPECIFICITY NEEDED TO SUPPORT A CONTEMPT ADJUDICATION. MOREOVER, EVEN IF CONTEMPT WERE APPROPRIATE, NO FINES COULD BE ORDERED FOR FUTURE VIOLATIONS.

A. The Decrees Cited to Support the Finding of Contempt Do Not Contain Explicit Directives Prohibiting All Overnight EAU Stays.

If this Court agrees with plaintiffs' reading of McCain, it should still vacate the contempt finding because no judicial decree in McCain contains an express and specific directive precluding all overnight EAU stays.

This Court's 1986 McCain order contained no specific directives; the relevant portion merely reversed a Supreme Court order denying a preliminary injunction and granted the motion (City Br. at 8), which sought an order prohibiting "defendants from denying movants, their families and other homeless families, emergency shelter" (Record on Appeal at 36, McCain, 117 A.D.2d 198). This directive says nothing about standards for processing applicants, determining eligibility, or securing placements for

eligible families. It simply implements the McCain holding that the City had to provide homeless families with shelter, not just financial aid.

Plaintiffs seek to read more into it because the movants, Ms. James and Mr. Wright, complained about being kept overnight in an EAU (Pltfs. Br. at 2 n.2). This Court acknowledged those complaints, but in the context of the lawfulness of the City policy to provide cash aid and referral rather than shelter (supra at 8-9). The fact that plaintiffs need to engage in this kind of reasoning process to construe the order as they wish only highlights the absence of the kind of unequivocal direction needed to support a contempt finding.

The other order allegedly violated is the Supreme Court's July 3, 1986 order implementing this Court's ruling in McCain. It says only that the City must "[p]rovide lawful emergency housing to all eligible homeless families with children, such emergency housing not to include overnight accommodations" at EAUs (94). The first clause of this order requires the City to provide shelter to homeless families, and the second clause defines such shelter ("lawful emergency housing") to the extent of stating that overnight accommodations in an EAU are not shelter. Again, no mention is made of how quickly an applicant must be processed, determined eligible, and placed in "lawful emergency housing."[6]

---

[6] Thus the City correctly cited Bryant v. D'Elia, 82 A.D.2d 902 (2d Dept. 1981) (City Br. at 28). Plaintiffs' effort to distinguish Bryant describes it as "[involving] only a general directive . . . , without any time frame" to do the required act (Pltfs. Br. at 58 n.57). That is the same kind of directive issued (continued...)

Even if this Court were to reject the City's reading of these orders, the City's interpretation is sufficiently logical to preclude a finding of contempt. See Benson Realty Corp. v. Walsh, 54 A.D.2d 881, 882 (1st Dept. 1976), appeal dismissed, 43 N.Y.2d 732 (1977) ("[w]hatever may be the true interpretation of the order alleged to be violated, we think appellants were not unreasonable in interpreting it as permitting performance in the alternative method they pursued").

By and large, plaintiffs' criticism of the cases cited by the City on the question of specificity amounts to nothing more than claiming that the orders in the cited cases were unclear while the orders here are not (Pltfs. Br. at 60-61 nn.60-62), a point already answered (supra at 14-16).[7]

Plaintiffs make no mention of the limitation in the Supreme Court's 1986 McCain order requiring aid only to "eligible homeless families." Whatever that order directs, it benefits only eligible families, not all shelter applicants. Properly, the Court

---

[6] (...continued)
here--a general order to provide shelter, with accommodations at an EAU deemed not to be shelter. The timing of the placement was controlled by 83 ADM-47 and Lamboy, not by any holdings or orders in McCain.

[7] Plaintiffs contend that the City erroneously relied on New York State Ass'n of Counties v. Axelrod, 213 A.D.2d 18, 22 (3d Dept. 1995), motion to appeal dismissed, 87 N.Y.2d 918 (1996), because the case turned on whether the order allegedly involved was stayed, not whether it was clear (Pltfs. Br. at 60 n.61). Two decrees were the subject of contempt proceedings in that case, and while the later decree was unambiguous but stayed, 213 A.D.2d at 23, the earlier one, a May 1989 judgment, was held too uncertain to support a finding of contempt where it did not "specifically direct or prohibit the performance of a certain act." 213 A.D.2d at 22, 22-23.

made no effort to instruct SDSS or the City how to establish whether an applicant for shelter is an "eligible homeless family." See Goodwin v. Perales, 88 N.Y.2d 383, 395 (1996) ("[t]he particular documentation required to establish eligibility--rarely a topic covered in statutes--is one example of a matter relegated to [SDSS's] sound discretion"). At the time, 83 ADM-47 made everyone not demonstrably ineligible entitled to immediate placement in lawful emergency housing. Exercising its discretion in light of a decade of experience, SDSS changed the eligibility process in 94 ADM-20.

As directed in McCain, eligible homeless families get shelter, not just cash assistance, and the City continues to honor the McCain orders by sheltering upwards of 5000 families a night in lawful emergency housing. The contempt is mistakenly predicated on a finding that the City does not place families fast enough, but there are no time standards in the orders allegedly violated.

B. The Court Should Not Have Directed Contempt Fines for Future Violations.

Plaintiffs respond to the City's argument that the Court erred when it directed fines for future violations by saying that the City agreed to the procedure, making the cases relied on by the City "simply not relevant" (Pltfs. Br. at 64 n.66). In September 1994, plaintiffs agreed to withdraw a new contempt application, and the City agreed to pay the fines ordered in the earlier contempt proceeding for any future violations, without the necessity of a new contempt motion. However, plaintiffs reserved the right to file a new contempt motion, seeking other "contempt findings and

sanctions." Order of Sept. 23, 1994 ¶ 2.[8] Having done so and having received higher fines than those previously directed, plaintiffs cannot now hold the City to a 1994 agreement to pay an earlier round of fines on a continuing basis.

Plaintiffs also err in characterizing the fines levied in the Supreme Court as lenient because they "are less than the $250 statutory fine level for civil contempt violations" (Pltfs. Br. at 62). The $250 fine authorized by section 773 of the Judiciary Law is levied in cases where damages are not shown, and it is a single $250 payment that cannot be multiplied on a continuing violation basis or some other theory. See Geller v. Flamount Realty Corp., 260 N.Y. 346, 351-52 (1932) (reducing fine of $250 against each contemnor to single $250 fine); Page v. Cheung On Mansion, Inc., 138 A.D.2d 324, 325 (1st Dept. 1988) (impermissible operation of factory--"erroneous to conclude that [section 773 of the Judiciary Law] permitted a daily fine of $250"); Department of Housing Preservation and Development v. Deka Realty Corp., 208 A.D.2d 37, 43-44 (2d Dept. 1995); Rechberger v. Rechberger, 139 A.D.2d 906, 907 (4th Dept. 1988) (setting aside daily fine and replacing with single $250 fine).

---

[8] While not part of the record on appeal, this Court can take judicial notice of prior orders in this proceeding.

REPLY POINT III

THE SUPREME COURT SHOULD NOT HAVE ADOPTED TIME STANDARDS FOR EMERGENCY HOUSING PLACEMENTS AT VARIANCE WITH THOSE IN SDSS's 1994 DIRECTIVE.

Plaintiffs' attack on the time standards in 94 ADM-20 rests on the proposition that McCain has already held under various constitutional and statutory provisions that the time standards in 94 ADM-20 are unlawful. This mistaken assumption leads plaintiffs into an extended discussion of the obvious principle that SDSS may not use an administrative directive to authorize something precluded by constitution or statute (see, e.g., Pltfs. Br. at 31, 35, 41-46, 56).

The City is not arguing that 94 ADM-20 "somehow overruled the 1986 McCain orders" (Pltfs. Br. at 56). The City's position is that this issue was not addressed in the 1986 McCain orders and that McCain does not foreclose SDSS from adopting a new time standard based on ten years of experience with 83 -47. When viewed as an open matter not resolved by McCain, the City's argument defending SDSS's discretion to adopt the new standard stands essentially unrebutted by plaintiffs.

Nor are plaintiffs correct in suggesting that the City's position leads to the conclusion that applicants for shelter may be required to remain in an EAU "indefinitely" (Pltfs. Br. at 20). SDSS's standard is not open-ended: it sets a 48-hour expectation of placement, allowing room for some flexibility to account for circumstances such as periods of high demand, large-size families, etc. It balances the applicant's interest in a speedy

determination of eligibility and ultimate placement against the social services districts' legitimate interest in verifying the need for government-provided shelter and making a placement.

The only challenge to 94 ADM-20 here is that this Court's McCain decision precludes all overnight EAU stays. If this view is accepted, the standard in 94 ADM-20 yields; if, however, this Court agrees with the City that the 1986 McCain ruling was about homeless families' right to shelter as contrasted to financial assistance, and not about the speed with which applicants had to be processed, then the standards in 94 ADM-20 should be left in place by vacating the more rigid standards imposed by the Supreme Court. The absence of a holding in McCain that prohibits all overnight EAU stays makes the issue one resting in SDSS's discretion. See Goodwin v. Perales, 88 N.Y.2d 383, 395-96 (1996); Mixon, 88 N.Y.2d at 910-11; City Br. at 35-36, 40.

REPLY POINT IV

THE SUPREME COURT SHOULD NOT HAVE INTERFERED WITH THE OPERATION OF THE HOT LINE.

Plaintiffs' anecdotal evidence of technical problems, enhanced marginally by a small number of test calls by the Public Advocate's office, is more than outweighed by the City's routine, day-in-day-out testing of the line, which reveals that technical malfunctions are very infrequent. However, even if plaintiffs' evidence were accepted, the proper remedy would be an order that the City not insist on a hot line referral to the EAU during periods when there are technical malfunctions. The record shows

that the City dropped the referral requirement on occasions when malfunctions were brought to its attention (City Br. at 50-51).

Plaintiffs' other complaint is that the hot line has been misused to deny shelter by refusing admission to the EAU even though callers have the right to insist on making formal application for emergency housing at the EAU (Pltfs. Br. at 66-67). Plaintiffs cite evidence that, on some occasions, people working for the City have said that EAU referrals have been denied on the hot line, but the bulk of plaintiffs' complaints flow from a difference of opinion over what constitutes an impermissible denial of shelter via telephone. Plaintiffs' view is that a properly run hot line can do little more than ask if a person wants to come to the EAU and refer the family there if they say they do. As a result, plaintiffs complain about workers asking questions to obtain basic case information and details about the caller's claimed homelessness (Pltfs. Br. at 67).

However, there is nothing wrong with the City using the hot line to obtain and verify certain information in an effort to avoid unnecessary EAU referrals, thereby lessening EAU crowding. If a phone worker asks a caller for basic information, then contacts the primary tenant and is told that the caller may go back, no rights are violated if this information is relayed to the caller. Conceivably, the caller might decide to return home, even for one more day. This would allow an application to be made at an income support center during business hours, where diversion teams often can address the problem without the need for shelter placement. Such a sequence of events is not a denial of shelter.

In another case that plaintiffs refer to as a denial of shelter (Pltfs. Br. at 67, citing record at 4163-66), the hot line gave the caller a way to get housing, by asking the police to rectify an illegal lockout (City Br. at 16-17). Shelter is not denied by such outcomes.

True, if a caller insists on going to the EAU, a referral must be made; however, plaintiffs' evidence does not establish systematic denials of EAU referrals of that kind, and the injunction against requiring a hot line referral should be vacated.

Plaintiffs contend that the City's policy is inconsistent with representations it made in Court that the hot line would take the caller's assertions at face value (Pltfs. Br. at 65). If a primary tenant is questioned and says the caller may stay, and if the caller then acknowledges that he is not being thrown out at present, the caller's veracity is not being questioned. It could simply be that the primary tenant, often a close relative, has relented and decided to let the caller stay. If the caller offers a different version of events than the primary tenant or persists in seeking referral to the EAU in the face of the primary tenant's statements, a referral should still be issued. The injunction prevents the City from making even the most minimal effort to divert people from the EAU.

Plaintiffs note that the hot line is not equipped to deal with hearing-impaired or non-English-speaking callers, but the

testimony shows that such people are not required to have a hot line referral before coming into the EAU (City Br. at 67).[9]

The hot line lessens EAU crowding by making sure that the EAU contains only people who claim they have no place else to go that night. If the hot line were being misused to keep the truly homeless out of the EAU, there should have been evidence of numerous families forced to stay in the streets, subways, or the like because they were denied access to the EAU. That evidence is not here.

---

[9] Plaintiffs' brief contains a sentence referring to denials of "hotline and EAU access to hearing-impaired and non-English speaking people," followed by a string of record citations (Pltfs. Br. at 67). The only citation in this group where there is evidence of inability to get an EAU referral because of hearing or language difficulties is at 4163. This claim has already been addressed in the City's main brief (City Br. at 16, 23).

CONCLUSION

THE ORDER ENTERED OCTOBER 31, 1995 SHOULD BE MODIFIED TO DELETE THE PROVISIONS REQUIRING THE CITY TO MOVE PREGNANT WOMEN AND CHILDREN LESS THAN SIX MONTHS OLD FROM THE EAU WITHIN 24 HOURS OF THEIR ARRIVAL AND TO DEVELOP A PLAN THAT WILL ELIMINATE KEEPING ANY FAMILIES IN THE EAU. THE ORDER ENTERED MAY 1, 1996 SHOULD BE MODIFIED TO DELETE THE PROVISIONS LIMITING ANY FAMILY'S STAY AT THE EAU TO 24 HOURS AND THE PORTIONS REFERRING TO THE HOT LINE. THE ORDER ENTERED MAY 29, 1996 SHOULD BE REVERSED AND THE MOTION TO HOLD THE CITY AND VARIOUS AGENCIES IN CONTEMPT SHOULD BE DENIED.

Respectfully submitted,

PAUL A. CROTTY,
Corporation Counsel of the
City of New York,
Attorney for Appellants.

LEONARD KOERNER,
THOMAS C. CRANE,
MURIEL GOODE-TRUFANT,
ALAN G. KRAMS,
of Counsel.