

1989 WL 82397

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United States District Court, S.D. New York.

Barbara HANDSCHU, Ralph Digia, Alex McKeiver, Shaba Om, Curtis M. Powell, Abbie Hoffman, Mark A. Segal, Michael Zumoff, Kenneth Thomas, Robert Rusch, Anette T. Rubenstein, Michey Sheridan, Joe Sucher, Steven Fischler, Howard Blatt and Ellie Benzzone, on behalf of themselves and all other similarly situated, Plaintiffs,
Rev. Calvin Butts, Sonny Carson, C. Vernon Mason, Michael Warren, Intervenors,
v.

SPECIAL SERVICES DIVISION, a/k/a Bureau of Special Services, William H.T. Smith, Arthur Grubert, Michael Willis, William Knapp, Patrick Murphy, Police Department of the City of New York, John V. Lindsay and various unknown employees of the Police Department acting as undercover operators and informers, Defendants.

No. 71 CIV. 2203 (CSH). | July 21, 1989.

Opinion

MEMORANDUM OPINION AND ORDER

HAIGHT, District Judge:

*1 Class counsel have moved for an order holding defendants in contempt of the Stipulation of Settlement and Guidelines entered in this case. *See Handschu v. Special Services Division*, 605 F.Supp. 1384 (S.D.N.Y.185), *aff'd*. 787 F.2d 828 (2d Cir.1986). This is a separate motion from that seeking comparable relief as the result of alleged post-settlement police conduct. That other motion is addressed in a separate memorandum opinion and order. The present motion arises out of defendants' alleged refusal to make the disclosure of documents required by the Stipulation and the Guidelines.

There is no question that disclosure of documents under the Stipulation and Guidelines have encountered initial difficulties. The main thrust of this contempt motion was that defendants had deliberately destroyed the access system to the records for the purpose of frustrating document disclosure under the Court's order. Based on that premise, class counsel argued that defendants' "obstruction of the Court's Order ... leaves them subject to the strongest contempt powers of the Court." Siegel

affidavit at ¶ 34.

Responding to the motion, defendants submitted affidavits tending to show that the retrieval difficulties arose from administrative decisions and actions taken prior to the execution of the Stipulation of Settlement. *See, e.g.*, Affidavit of Kevin W. Rohan at ¶ 26. Class counsel accept at least the possibility of that non-invidious chronology; Professor Chevigny said at oral argument: "We don't know whether that was a failure of management control of the document retrieval process or whether it was deliberate. But in any case it happened in just that manner." Tr. 7. At the hearing Court and counsel devoted primary attention to getting the document disclosure procedure back into operation. The Court suggested, and the parties agreed in principle, that the services of a Court-appointed document maintenance and retrieval expert would be useful.

I indicated my intention to appoint such an expert pursuant to Rule 706 of the Federal Rules of Evidence. With the assistance of counsel for the parties, which the Court much appreciates, a number of prospective appointees were suggested. By this order I now appoint Mr. Joseph A. Settanni, CRM, CA as the Court's expert. Counsel for the parties have indicated that Mr. Settanni is entirely acceptable to them.

After furnishing Mr. Settanni with pertinent and excerpts from the Court's opinions, I met with him in Chambers. Mr. Settanni submitted a statement of planned work. That statement seems to me to capture precisely what the parties and the Court hope of this expert consultant, and accordingly I quote it in full, thereby incorporating the text into this Order as a description of Mr. Settanni's responsibilities:

Statement of Planned Work

- 1.) Meet with officers and others in charge of the filing
 - a.) hold discussion(s)
- 2.) Examine actual filing system
 - a.) determine the nature of the record series

*2 1.) type of records to be found

- 2.) physical condition of records
- 3.) determine how confidential the files are
 - b.) estimate adequacy/efficiency of the system
 - c.) examine the cognate system indexes

Handschu v. Special Services Div., Not Reported in F.Supp. (1989)

- 1.) try to understand the information provided
- 2.) decide upon how usable and efficient they are
- d.) see actual records request form
- 1.) determine if it complements the filing system's data base capacity for needed retrieval
- e.) observe how a retrieval request would be fulfilled
- 1.) look at the actions involved with workflow sequence
- 2.) decide upon efficiency of retrieval operation
- 3.) Make assessment and recommendation(s) to:

Judge Charles S. Haight, Jr.

This order and statement of planned work may be modified or enlarged if subsequent events require.

By this order, Mr. Settanni is appointed by the Court as an expert witness, consultant and monitor in the discipline of professional records and information management. The complete and responsible assistance, by subordinate officers, their superiors and any other requisite personnel of the involved sections of the New York City Police Department is to be provided to Mr. Settanni with respect to all and any aspects and activities concerned with the records and information management work to be accomplished under this order.

Defendants are directed to grant access to Mr. Settanni, whenever needed, to all records relevant to the Stipulation Settlement and Order and defendants' obligations thereunder. Defendants are to promptly furnish Mr. Settani, upon his request, with any examples of blank forms used, directly or indirectly, in servicing the documents or index card files.

The foregoing language is not intended to be

all-encompassing. In essence, defendants are directed to comply with the expert's requests for information and assistance as if they were the requests of the Court itself; provided, however, that the Court will resolve any disputes that may arise with respect to the nature of the expert's mandate and the scope of his responsibilities.

Mr. Settanni advises that his rates are \$600 per day when fully engaged upon a project, and \$250 per hour consulting work in aid of continuing projects. I find these fees to be reasonable, and direct that the City of New York pay them promptly upon presentation of invoices to the office of the Corporation Counsel. Rule 706(b). Following Mr. Settanni's initial evaluation and report there will be the need for continued monitoring of the records and filing systems; but the nature, form and incidence of those monitoring procedures will be determined after the expert's initial report. He is requested to include recommendations for future monitoring in that report.

Mr. Settanni advises me that, given the vacation season, it may not be possible to assemble the responsible Police Department personnel for the initial evaluation until September. I leave the timing of the evaluation to Mr. Settanni. He is to forward his reports to the Court, and the Court will promptly distribute copies to counsel of record.

*3 I could not on this record find by clear and convincing evidence that defendants deliberately sabotaged the document retrieval system in derogation of the Court's order. Rather, the affidavits describing the chronology, and the efforts of defendants and their counsel to remedy the problem, persuade me of defendants' good faith efforts to implement it. Accordingly the motion for an order of contempt is denied. *Powell v. Ward*, 643 F.2d 924, 931 (2d Cir.1981).

It is SO ORDERED.