

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TERRI LEE HALDERMAN, et al. :

v. : C.A. No. 74-1345

PENNHURST STATE SCHOOL AND :
HOSPITAL, et al.

PLAINTIFFS' PROPOSED FINDINGS
REGARDING CONTEMPT FOR FAILURE
TO PAY COSTS OF MASTERS

David Ferleger, Esquire
37 S. 20th Street, Suite 601
Philadelphia, Pa. 19103

Penelope A. Boyd, Esquire
1700 Walnut Street
Philadelphia, Pa. 19103

Attorneys for Plaintiffs

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OFFICE OF SPECIAL MASTER

Introduction

1. On June 4, 1981, the Court signed, and on June 5, 1981, the Clerk entered two routine monthly orders for payment of the costs of the Special Master and the Hearing Master in the amounts, respectively, of \$59,152.74 and \$8,593.34, for a total of \$67,746.08.
2. Pursuant to the Order of July 27, 1978, ¶4, the costs were to be paid by the Commonwealth defendants (*i.e.*, the Department of Public Welfare of the Commonwealth of Pennsylvania, the Pennhurst State School and Hospital, Secretary of Public Welfare Helen O'Bannon, Deputy Secretary for Mental Retardation Jennifer Howse, Pennhurst Superintendent George Kopchick, and other officials). The June 5, 1981 orders specified that payment was to be made "on or before the first day of July, 1981."
3. No payment was made on or before July 1, 1981. No request for an extension of time to pay was filed. No appeal was filed from either order.
4. On June 25, 1981, counsel for defendants Robert Hoffman wrote to the Court and stated that the "Commonwealth will deposit with the Clerk a check in the amount of \$35,000." He also stated that the "account will then be depleted, subject to supplemental appropriation." Ex. P-25. At conference in chambers on July 6, 1981, Ex. P-6, and in response to interrogatories, Ex. P-10 and P-11 (Question 10-12), the defendants have made it clear that not only will the June orders for payment not be obeyed but that "no further payments could be made," Ex. P-11, No. 10-12.

5. The reason given by defendants for their refusal to pay the costs of the masters is that the 1981-1982 Pennsylvania Appropriations Act provides \$35,000 specifically for "Pennhurst - Special Master - Hearing Master". The bill also states that "It is the intent of the General Assembly that this appropriation be used for shutdown costs and that no other funds of the Commonwealth be spent for these functions."

6. Plaintiffs have filed a motion for contempt against the Commonwealth defendants for failure to pay the costs of the masters. An evidentiary hearing was held on July 24, 1981.

7. The issue before the Court is whether the Commonwealth defendants in this litigation are in contempt of this Court's orders. There is no issue before the Court regarding the actions of the legislature. As the discussion below demonstrates, the defendants have acted in bad faith and in open defiance of the Court's orders; they have attempted to precipitate a "constitutional crisis" as a means of evading concededly valid orders of the Court. It is the actions of the defendants which must be examined and, if necessary, brought into compliance with the law.

The Special Master and Hearing Master

8. The Special Master and the Hearing Master perform the extremely limited functions of monitoring defendants' implementation of the Court's orders and assisting the defendants, often at their request, with specific aspects of defendants' activities.

9. The masters do not identify people for movement from Pennhurst, do not establish or design community placements,

do not make decisions regarding the appropriateness of particular services, do not manage or operate any service program either at Pennhurst or in the community. The Special Master does review individual habilitation plans for completeness and compliance with the Guidelines for Case Managers approved by the Department of Public Welfare. The Hearing Master receives from the county defendants notices of when those defendants themselves propose that a particular person would appropriately be moved to community services and the Hearing Master reviews the matter for compliance with the Court's orders; in virtually every case, there is no dispute or opposition (in fact, the Commonwealth defendants as a matter of custom do not bother to attend the hearings). In just a handful of cases has there been any dispute and, in those, no party has challenged the Court's rulings on exceptions to the Hearing Master's decisions. For functions of the Special Master, see ex. P-7a, Deposition of Carla Morgan. For the Hearing Master, see the Court's docket and the filed opinions of the Hearing Master.

10. The Special Master has endeavored to transfer many of its activities to the defendants and the defendants, at various times, have promised to undertake these functions. Thus far, the Commonwealth defendants have not taken up such critical functions and activities¹ as are necessary to implement the Court's orders. Exhibit P-7a.

11. The vacuum which is filled by the Special Master is illustrated in the Commonwealth and counties own "Plan

for the Implementation of the March 2, 1981 Order for FY 1981-82," dated June 12, 1981. Exhibit P-4. This plan promises to establish by January, 1982 a Special Management Unit to review individual habilitation plans, monitor schedules for such plans, monitor voluntariness of placement, train case managers and monitor individual habilitation plan implementation. Such a unit would be a welcome activity for defendants to undertake as it would mirror most of the masters' functions and would be a step toward reduction of the Court's direct involvement in implementation. Assuming that the Unit is established as promised, and assuming that the two persons to be hired to staff the unit can accomplish its purposes, it will be months before any party or the Court knows whether there remains any need for the masters or whether or how the masters' roles should be modified.

12. There remains a need for the masters; their activities are critical to continuing implementation of the Court's decrees. Exhibit P-4, the defendants' own plan, recognizes this need. Serious problems in implementation continue to arise, with deadlines set by the defendants themselves seriously exceeded despite what defendants say are their best efforts. The monitoring by the Special Master of the implementation of the first part of the March 2, 1981's orders requirements, and the conceded failure of defendants to comply with that order, show a need for the Court to have a means to both review and prod the defendants' actions. As to conditions at Pennhurst, while they have improved somewhat since the Court's orders were put into place (including an addition in staffing as a result of plaintiffs' motion), the state projects that, even by October, 1981, Pennhurst will be crowded to 104% of its capacity. Exhibit P-28.

Employees have been arrested at Pennhurst for aggravated assault and recklessly endangering the lives of residents. The Special Master's regular reports on Pennhurst, which compile the defendants' own lists and charts of accidents and injuries show that Pennhurst remains a dangerous place in which to live and that more needs to be done. It would be irresponsible for the Court to permit the dissolution of its intense monitoring of Pennhurst.

Defendants' Commitment to Deinstitutionalization

13. The record of the hearing regarding the failure to pay the masters' costs reveals a fact which has been true since the trial of this case, and before. The defendants have a "commitment to deinstitutionalization." Ex. P-8, dated June, 1981.

14. That commitment has been expressed in several ways. Defendants have not withdrawn their statement at trial of their intention to close Pennhurst by the early 1980s. In June, 1981, defendant Howse issued, for the Department of Public Welfare, a Bulletin ordering that all mental retardation admissions be closed to Pennhurst, Hamburg, Marcy Ebensburg and the retardation unit at Harrisburg State Hospital, and, in addition, that severe restrictions be placed on admissions to other retardation facilities. Ex. P-8. The Secretary of Public Welfare Helen O'Bannon has committed herself to replacing institutional with community care for people with retardation:

The Governor and I are fully committed to de-institutionalization and the placement of retarded persons in less restrictive, appropriate community living settings.

P-9 (July 16, 1979 Press Release).

15. As will be seen below, and as the protracted history of this case demonstrates, that policy -- which comports with the mandates of the Court -- has been one which the defendants have had great difficulty in fulfilling. Throughout the time which has elapsed since the December 23, 1977 opinion of this Court, the defendants have resisted the Court's orders and, simultaneously, have refused to submit any plan or proposal of their own which would protect the declared rights of plaintiffs. That resistance has now escalated to recalcitrance and bad faith which, on the record of the hearing on the present motion, is shown beyond doubt.

Defendants' Contention

16. Defendants concede that the payment orders are valid orders. They concede that the masters do their work and they are entitled to be paid. They concede that the orders are proper.²

17. Defendants do not challenge the fact that for more than three years they have regularly and without protest paid the expenses of the masters and that this payment has taken place without any specific appropriation of the Pennsylvania legislature. In fact, the Secretary of Public Welfare made the decision in 1978, and the decision was confirmed since that time, to pay for the masters from the Department's institutional appropriations. Exhibits P-20, P-21, P-22, P-23 and P-24. The current Secretary, Helen O'Bannon, has been personally involved in these prior activities regarding payment of the master. Exhibits P-22 and P-23. For the past budget requests, see Exhibits P-13 and P-14 and P-15.

18. Defendants' sole expressed reason for refusing to pay the costs of the masters is the state legislature's line-item appropriation and its expression of "intent" against future payments. The history of that legislative prohibition, and its relevance vel non to the legal issue before the Court are discussed below.

Past Treatment of Master Cost
in Defendants' Budgets

19. The Governor's budget requests to the state legislature for 1978-1979, 1979-1980 and 1980-1981 did not include any specific funds for the Pennhurst masters. Exhibit P-14.

20. The Department of Public Welfare's budget requests to the Governor for 1979-1980 and 1980-1981 similarly did not include any specific funds for the Pennhurst masters. Exhibit P-13.

21. In fact, the Pennhurst masters' costs have never before this year been included as a separate request. See above exhibits, Exhibit P-7b (Kopchick Deposition), P-15 (Pennhurst Center, Budget Proposal, dated July 31, 1979).

22. Why has this been the case? The earliest reference to the Pennhurst master costs provided by defendants in response to discovery requests calling for all such documents is a memorandum dated October 18, 1978 to Secretary of Public Welfare Aldo Colautti from his deputy secretary for mental retardation and an assistant and titled "Special Master's Office Budgetary Consideration Fiscal Year 79-80." Exhibit P-20. This document, from the current Secretary's files opens with the following:

Following my meeting last week with the Special Master, Peter Polloni and Mel Nolton

regarding the development of the separate PRR [Program Revision Request for the budget], the Master discussed the situation with Judge Broderick. Judge Broderick is not inclined to support the development of the separate PRR by the Special Master. In my discussions with Dr. Audette, he indicated that Judge Broderick felt that proceeding in this way may result in a "constitutional crisis" if the Legislature decided to refuse to approve this separate PRR. We have proceeded to develop 79-80 funding projection with the Special Master's Office and the work that is to accomplish in the following manner:

1. Continued funding of the operations of the Special Master's Office through the Pennhurst appropriation.
2. [Regarding services' funding, omitted]

[end of memorandum]

Regardless of the accuracy of the attributions in this memorandum, it demonstrates the consciousness of the decision-making process among the defendants in paying for the masters from money not appropriated for that purpose. P-22 shows, as of December 19, 1978, that \$183,695 had been paid in the latter half of 1978.

23. Before this year, the masters' costs had consistently been treated as "contracts" within the "Institutional Budget (Appropriation 40)". Exhibit P-16 (fifth and sixth pages in), P-17.

Treatment of Master Cost
in 1981-1982 Budget

24. The past practice changed in late 1980 and early 1981. Defendant Secretary of Public Welfare Helen O'Bannon requested "a distinct appropriation of \$900,000 for the Masters'

Offices." Exhibit P-11 at ¶1 (Defendants' Interrogatory Replies). She did not continue the prior practice. The Governor's request to the legislature also included O'Bannon's request. Ex. P-27 (p. 601), P-28. O'Bannon personally requested a "separate appropriation for this program, formerly in State Centers for the Mentally Retarded." as early as October 31, 1980. Exhibit P-25.

25. A context for this change in practice aids in understanding it. In March, 1980, the defendants petitioned the Supreme Court for certiorari from the decision in this case by the Court of Appeals. Attempts to obtain stays of the Court's orders, including halt to the operations of the masters, failed at several levels. Argument was had in the Supreme Court on December 8, 1980 but not before the Commonwealth defendants joined in a mandamus petition against this Court which sought restrictions on the masters' activities; that petition was denied. After the April 20, 1981 decision of the Supreme Court in this case, the Court of Appeals on May 26, 1981 denied a motion for stay of this Court's order of March 2, 1981 calling for provision of services to certain members of plaintiff class within a specified time frame in accordance with defendants' past promises to the Court.

26. The support given by Secretary O'Bannon to the new line-item request was begrudging at best. Her testimony to the two legislative appropriation committees invited their assistance in circumventing the Court's orders and, in haec verba, expressed the hope that the masters' budgets be reduced to the neighborhood of \$32,000; she got her wish. Her testimony is an affront to the Court and to respect for the judiciary and evidences serious bad faith. The fact that O'Bannon did not appear before the Court at the July 24, 1981 hearing (or at any other hearing) and submitted no evidence whatsoever

in mitigation or explanation of her open defiance further highlights the depth of her contempt. That testimony will now be reviewed in brief -- although the full testimony, read in context, supports even greater condemnation.

27. The Secretary's Briefing Book on the 1981-1982 budget, prepared in advance of her testimony, gives halting and critical "support" for the \$900,000 request. It complains that the Master's Office "Duplicates the authority and responsibility of either DPW/OMR or the counties", complains of confusion, the size of the Master's staff, the requirements that services be provided, and it belittles the Court's orders by stating that the funds are requested "[a]lthough the dollars will not provide for the maintenance or expansion of client services in the community or Pennhurst itself." Exhibit P-19.

28. Secretary O'Bannon testified March 4, 1981 before the House of Representatives Committee on Appropriations. The discussion on the masters begins at page 188 of Exhibit P-30:

THE CHAIRMAN: We will press forward to the Office of the Special Master at Pennhurst. Page 39. My first request is if we could have a copy of his budget, if you would.

SECRETARY O'BANNON: I'd be happy to.

THE CHAIRMAN: And for a moment I thought the budget request was for 32,000 and my eyes, I guess I didn't read quite right.

SECRETARY O'BANNON: Would that it were.

THE CHAIRMAN: Maybe we will make it that way. I gather that if Broderick's decision on Pennhurst is upheld by the Supreme Court that a number of other institutions such as Polk could follow very easily. Is that true?

SECRETARY O'BANNON: Yes.

THE CHAIRMAN: That would be true, yes.

SECRETARY O'BANNON: I fear.

At page 189, the Secretary stated "we also have a presence at every hearing that the hearing master holds". That is not the case. At pages 189-190, the Secretary is asked, "Did you have any say in who the special master was or how did Judge Broderick have him picked?" Secretary O'Bannon replies that Carla Morgan was made special master (after being acting special master) "without consultation with me." To the contrary, all parties were permitted and encouraged to suggest candidates for the mastership.

A discussion then ensured, beginning at page 191 in which the Secretary, defendant in this case, explained to the legislators, who are not defendants, how the masters' costs could be eliminated; in that discussion, she pointedly refused to support her own budget request, insulted the Court and the Court's Special Master, and was untruthful about the staffing of the Special Master's office and her communications with the Court:

REPRESENTATIVE COHEN: I'm just curious as to what power we have, if any. Suppose we cut it to 450,000? What would happen? We would be ordered to increase it to \$900,000?

SECRETARY O'BANNON: No. Because you're not defendants on the suit.

REPRESENTATIVE COHEN: You as the Department?

SECRETARY O'BANNON: I have no authority to increase it. I do not appropriate money.

REPRESENTATIVE COHEN: So therefore, you are saying we do have the authority to cut or increase?

SECRETARY O'BANNON: Yes. And you always have that authority. Judge Broderick cannot take that away from you.

REPRESENTATIVE COHEN: And Judge Broderick has no reasonable means of recourse?

SECRETARY O'BANNON: Judge Broderick is a very clever jurist. I would not like to guess his means of recourse.

REPRESENTATIVE COHEN: I am curious as to who would go to jail.

REPRESENTATIVE ARTY: I will take you in to protective custody.

REPRESENTATIVE COHEN: To what degree is the \$900,000 justified? In terms --

SECRETARY O'BANNON: I can't answer that. I think the whole masters office is a redundant, ridiculous piece of bureaucracy.

(Applause)

SECRETARY O'BANNON: I think what is needed is probably a five person staff to monitor the Commonwealth's and the county's compliance with Judge Broderick's orders.

REPRESENTATIVE SIRIANNI: Did you tell him that?

SECRETARY O'BANNON: I tell him that every day. Judge Broderick has created a bureaucracy of 24 or 25 people and a consulting budget which probably equals all of the consulting budgets of the Commonwealth, given the scale of number of employees. Astronomical.

REPRESENTATIVE COHEN: Judge Broderick has ordered the 24 or 25 people?

SECRETARY O'BANNON: Judge Broderick has said you staff for whatever you need and the Commonwealth will pay.

REPRESENTATIVE COHEN: So he has given the special master the authority?

SECRETARY O'BANNON: A free hand.

Pp. 191-193. Several errors in the above may be noted: the Secretary has not complained "every day" about the master's staff, the estimated and documented budgets have not been challenged by the Secretary although the Court's orders require such advance notice of expenses as to permit any

party to challenge them, the staff is not "24 or 25 people" as the Secretary had reason to know (see Ex. P-26 (staff of eight), and the Court has not given the Special Master "a free hand." It is noteworthy that there is not a single word in the testimony thus far (and to follow) suggesting that the Secretary wishes to comply with the Court's orders or that she requests the legislature's assistance in complying.

After an interchange on salaries, the discussion continues on page 194 with the Secretary stating that she is willing to risk jail for non-compliance:

THE CHAIRMAN: We also have to pay the court costs for all these yo-yoes.

REPRESENTATIVE COHEN: We have no recourse other than to slash the budget from \$900,000? If we don't want you to go to jail?

SECRETARY O'BANNON: You have all the recourse and power at your command and we will see what we will see. I am a risk taker. I wouldn't be in this job if I weren't.

REPRESENTATIVE COHEN: Okay. I have no further questions.

In a later discussion on implementation of the March 2, 1981 Order of this Court, ¶1 thereof, Secretary O'Bannon -- with her Department having promised services for the very same number of people the Court ordered -- complained that "with no resources" the Court wanted people dumped from Pennhurst; she agreed with a representatives characterization of the Court's order as "dumping" and stated her determination to be in contempt:

SECRETARY O'BANNON: We will not comply and we will be in contempt. I will not dump patients out of Pennhurst for any court order.

Page 198.

29. O'Bannon's words were publicized. P-49, P-50.

30. Six days after her appearance in the House, O'Bannon testified before the Senate Appropriations Committee. She again testified in words inviting the legislature to refuse to fund the masters and she again declined to justify or explain the need for compliance with the Court's orders:

SECRETARY O'BANNON: It's when - compliments of Judge Broderick's machinery, namely the Master - that we can't move anyone. Ah, and we have set up a decision-making, and a professional evaluation process outside the state system, and outside the state and county's responsibility, named the Master. And nothing is good enough for the Master. And enough, and redundant enough, is never enough. In other words, we have got to do more and more. So I think that, absent Judge Broderick's Order, you would see a much more orderly flow of lower cost programs, in the sense that we would be able to serve more clients through Wood-Haven.

Q. Okay. This is a third, and unfair question, but what do you think would happen if this legislature refused to fund the Master's Office of Judge Broderick? Would that go out of existence? Or, what would happen?

A. No, I think I would be held in contempt.

Q. You have already announced that you are going to, ah, ah, oppose the implementation of this latest Order.

A. Ah, I don't believe everything I read in the newspapers. Fortunately. What I did say was, I would not move people into the community before the community and the person was ready. I will not dump clients.

SENATOR HOWARD: Thank you both, Senator Early and Chairman Tilghman.

THE CHAIRMAN: Just a second, I didn't hear it. Would would be held in contempt if we didn't fund it?

SECRETARY O'BANNON: I would. For not paying their bills.

(Discussion turns to other topics)

PP. 59-60, Exhibit P-31.

31. Secretary O'Bannon has attacked the Court and blamed the Court in the past for defendants' own failure or inability to comply with the requirement that plaintiffs' rights be protected. Ex. P-9 at July 16, 1979 ("However our own efforts have been slowed and we've been unable to take the initiative because we've been preoccupied with court proceedings."), Ex. P-9 at July 31, 1979 (The Special Master's factual affidavit to the Court of Appeals is "unprofessional, injudicious and a blatant attempt to insure that the court does not do away with her job"), Ex. P-9 at May 8, 1981 ("There is no reason whatsoever for the continued oversight by the Court or the Office of the Special Master...."). [These are quotations from the Secretary from her own press releases.]

32. There has been a failure by defendant O'Bannon to take necessary steps in good faith to ensure compliance with the Court's orders. The mischaracterization of the facts and, of great importance, of this Court's orders, which permeates the above testimony and statements is illustrated most forcefully by O'Bannon's statement on the national news the night before the Supreme Court argument in this case where she stated that the plaintiffs (plaintiffs who defended this Court's decree) "would have us do" the following:

dump these people into unaccepting, hostile environments where they can't get services and where they will be shoved to the back rooms and the attics that replace the back wards of these institutions of yesteryear.

Exhibit 46 (ABC Nightly News, December 7, 1980). She expressed similar views four months later on CBS Evening News, April 20, 1981. Exhibit P-47.

33. O'Bannon being absent, and no request having been made by defendants to present her testimony, the Court inquired of defendants' counsel whether he had advised her in the past that the nature of the Court's orders in this case

require adequate services and forbid dumping of Pennhurst residents. Counsel did not describe his advice to his client or explain her comments other than to say that she was expressing her view to "angry" legislators. The transcript of her legislative testimony does not reveal any anger on the part of the legislators; it does reveal O'Bannon's encouragement of attempts to evade the Court's mandate.

34. The costs of the masters have been regularly paid until the orders entered June 5, 1981 became an issue. On June 9, 1981, defendant Jennifer Howse, Deputy Secretary for Mental Retardation prepared two memoranda requesting the Comptroller to pay the costs pursuant to those orders. These memoranda were never signed or sent. Exhibits P-32, P-33.

35. Two weeks later, the Department's general counsel sent a memorandum to the Comptroller advising him that, although the June orders had arrived in June and the legislative "intent" expression applied beginning July 1, the June bills should not be paid. Exhibit P-34 (memorandum of June 23, 1981).

36. Two days later -- in the first step by O'Bannon which, at least on its face, looks toward eventual compliance -- Secretary O'Bannon wrote to the Budget Secretary asking for a supplemental appropriation when the legislature returns for payment of the masters. Exhibit P-35 (dated June 25, 1981).

37. On July 1, 1981, defendant Howse sent a memorandum to the Comptroller asking for payment of the June orders, Exhibit P-36, but on July 2, 1981, O'Bannon, Howse and others met and O'Bannon decided not to comply with the payment orders. Exhibit P-11, ¶7-9. That same day, July 2, O'Bannon's

general counsel instructed the Comptroller (who had been at the meeting) to ignore Howse's memo of the previous day and to refuse to pay. Exhibit P-37.

38. On June 22, 1981, from 4:30 to 5:30 P.M., the suggestion that the Governor veto the legislative provision was discussed by O'Bannon, Howse and others; the defendants took no steps toward seeking a veto. Exhibit P-11, Ex. P-54.

39. Defendants have produced all documents in the Secretary's office relating to this payment issue and the budget process. No documents showing any letters, phone calls or other attempts to secure different action from the legislature have been submitted. No factual defense has been offered by the defendants. No factual dispute is presented.

The Procedural Posture

40. The so-called legislative inhibition did not arise until mid- to late June, 1981, well within the time for appeal of the June 5, 1981 orders. No appeal was filed.

41. The defendants' appeal to the Court of Appeals did not question their obligation to pay for the Special Master (only the necessity of a master was challenged). In other respects not affecting the Master, Eleventh Amendment issues were raised and rejected by the Court of Appeals.

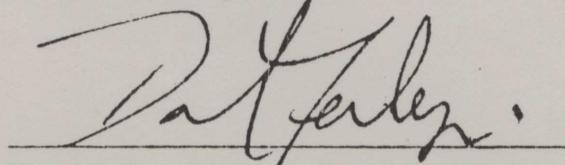
42. The defendants' certiorari petition to the Supreme Court did not raise any question regarding payment to the masters or the Eleventh Amendment.

43. In this Court on this motion, the propriety and validity of the payment orders are not challenged.

44. The applicable law is set forth in the memorandum filed on July 24, 1981 and the motion and brief filed on July 1, 1981.

45. Plaintiffs will shortly file, although on a contempt matter such as this they are not required to do so, a statement of their hours so that the Court may consider them in awarding attorney fees for this contempt matter. As set forth in the memorandum, a fee award (without regard to hours) is properly a part of the relief on contempt aimed at "inclining the Department" to respect for the Court's orders.

Respectfully submitted,



David Ferleger, Esquire
37 S. 20th Street, Suite 601
Philadelphia, Pa. 19103
215-567-2828

Penelope A. Boyd, Esquire
1700 Walnut Street, Suite 525
Philadelphia, Pa. 19103

Attorneys for Plaintiffs