

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION**

EDWARD BRAGGS, *et al.*,)
)
Plaintiffs,)
) **Case No. 2:14-cv-00601-MHT-GMB**
v.)
) **District Judge Myron H. Thompson**
JEFFERSON DUNN, *et al.*,)
)
Defendants.)

NOTICE AND MOTION TO ALTER, AMEND, OR VACATE
OCTOBER 29, 2018 ORDER ON MOTION
FOR CLARIFICATION REGARDING STAFFING

Defendants JEFFERSON DUNN (“Commissioner Dunn”) and RUTH NAGLICH (“Naglich” and, collectively with Commissioner Dunn, the “State”) hereby file this Notice of Inability to Comply And Motion to Alter or Amend pursuant to Federal Rule of Civil Procedure 59(e) and/or Motion for Relief from Order pursuant to Federal Rule of Civil Procedure 60(b). This Notice and Motion relate to the Court’s Phase 2A Opinion and Order on Defendants’ Oral Motion for Clarification (Doc. No. 2136, the “Modified Staffing Remedial Order”).

INTRODUCTION

Pursuant to the Court’s directive, the State believes it must notify the Court that it will be unable “to meet a deadline for reasons outside [the State’s] control or for other good cause.” (Doc. No. 1657 at 9). The State’s inability to comply arises

from the Court's Modified Staffing Remedial Order, which the court issued in response to a request from the State for clarification of the staffing mandates imposed by the Court. The Modified Staffing Remedial Order renders the staffing mandates in this matter inconsistent with the Healthcare Services Agreement (the "Agreement") between ADOC and its vendor, Wexford Health Sources, Inc. ("Wexford"). As discussed below, ADOC and Wexford contracted to measure Wexford's compliance with the Agreement's staffing requirements in terms of full-time equivalent ("FTE") hours of service. The Modified Staffing Remedial Order instead measures Wexford's staffing in terms of positions "filled." (Doc. No. 2136 at 2, 8). Second, the Agreement accounts for the realities of the marketplace by providing that Wexford will only incur staffing payback penalties if it fails to provide 85% of the FTEs for which the Agreement provides. Adopting a different measurement, the Modified Staffing Remedial Order requires 100% compliance. In short, the State cannot practically ensure staffing "consistent" with the Agreement while at the same time insisting that Wexford fulfill the different terms of the Court's Modified Staffing Remedial Order.

The State and Wexford remain committed to compliance with this Court's orders. Thus, the State asks this Court to alter or amend the Modified Staffing Remedial Order, and/or to grant the State relief from those portions of the Modified Staffing Order with which it cannot comply. The State requests the

following alterations to the Modified Staffing Remedial Order:

- (1) The Court should follow the Agreement and define compliance in terms of FTEs provided, not in terms of positions filled;
- (2) To the extent the Court declines to reconsider its definition of compliance in terms of “positions filled,” the Court should permit Wexford to count “hired not started” and “new vacancies in quarter” toward compliance; and
- (3) The Court should permit Wexford to measure compliance in terms of “covered FTEs” to the extent that measure provides a more accurate representation of Wexford’s services during a particular quarter than the “positions filled” measure.

The State respectfully requests that the Court alter or amend the Modified Staffing Remedial Order, and/or grant the State relief from the Order, as outlined herein and in the accompanying Supplemental Declaration of Elaine Gedman, dated November 26, 2018 (the “Supp. Gedman Decl.”).

BACKGROUND

On February 20, 2018, this Court entered its Phase 2A Understaffing Remedial Order (Doc. No. 1657, the “Staffing Remedial Order”). Among other things, the Staffing Remedial Order required ADOC’s mental-health vendor to “fill the mental-health staffing positions consistent with the contract” by July 1, 2018. (Doc. No. 1657 at 4). On July 2, 2018, Plaintiffs moved for an order to show cause why the State should not be held in contempt for allegedly failing to meet this deadline. (Doc. No. 1916). In response, the State argued that the phrase “consistent with the contract” in the Staffing Remedial Order meant that the

mental-health vendor was to provide 85% of the FTE hours. (Doc. No. 1936 at 30-34). Among other things, the State based this argument on the fact that the Agreement between ADOC and Wexford provides for staffing payback penalties if Wexford fails to reach an 85% staffing threshold. (Id.). Plaintiffs disagreed and argued that the Agreement requires Wexford to fill provide 100% of the FTEs listed in the Agreement. (Doc. No. 1945 at 11-14).

At the contempt hearing held on September 18, 2018, the State orally moved for clarification as to the meaning of the phrase “consistent with the contract” in the Staffing Remedial Order. (See Doc. No. 2136 at 2). In response to that motion, the Court issued the Modified Staffing Remedial Order, in which it held that the State was “to ensure that all of the mental-health staffing positions listed in the contract’s ‘minimum staffing requirements’ were filled by July 1, 2018.” (Doc. No. 2136 at 2). The State files this Notice and Motion to (1) inform the Court of its inability to comply with the Modified Staffing Remedial Order; and (2) ask the Court to alter or amend the Modified Staffing Remedial Order under Federal Rule of Civil Procedure 59(e) and/or provide relief from the Modified Staffing Remedial Order under Federal Rule of Civil Procedure 60(b).

I. NOTICE OF INABILITY TO COMPLY.

The Staffing Remedial Order indicated that the State should inform the Court if it is unable “to meet a deadline for reasons outside the party’s control or

for other good cause.” (Doc. No. 1657 at 9). The Staffing Remedial Order indicates that, in such a circumstance, the State should “file a motion to extend the deadline.” (Id.). The State, however, simply cannot comply with the Modified Staffing Remedial Order as written. A motion for an extension of the deadline is therefore inapplicable in this circumstance. Thus, the State is, as the Court requested, informing the Court of its inability to comply with the Modified Staffing Remedial Order as written.

In the Modified Staffing Remedial Order, the Court held that the State “had to ensure that all 263.2 mental-health FTEs, by position types and locations as set forth in Appendix F, were filled by July 1, 2018.” (Doc. No. 2136 at 8). As explained in detail below and in the Supplemental Gedman Declaration, the Modified Staffing Remedial Order deviates from the method of measuring staffing set forth in the Agreement. The State and Wexford are therefore unable to comply with the requirements of the Modified Staffing Remedial Order, because ADOC and Wexford did not contemplate or consent to the requirements imposed by the Court when they entered into the Agreement.

The Modified Staffing Remedial Order measures compliance in terms of contracted FTEs, while the Agreement measures compliance in terms of FTEs actually provided. (Supp. Gedman Decl. at ¶¶ 5-6). Thus, it is not clear that the Modified Staffing Remedial Order would permit the State and Wexford to receive

credit for hours provided by (1) individuals working overtime; (2) individuals working on a locums (temporary) basis or an as-needed (PRN) basis; or (3) FTEs related to employees taking paid and unpaid leave, including but not limited to holidays, PTO, and medical leave pursuant to the Family Medical Leave Act. (Id. at ¶ 17). The realities of staffing a correctional facility with mental-health personnel require the use of overtime, locums, and PRN employees, and the Agreement counts these hours toward fulfillment of Wexford's staffing obligations. (Id.). The Agreement also recognizes the fact that individuals take time off for a variety of reasons. In light of these staffing realities, the Agreement does not require Wexford to pay staffing payback penalties unless the actual FTEs provided fall below 85% of the contracted FTEs. (Doc. No. 1936-1, Ex. B, at 101). These fundamental inconsistencies between the Court's Modified Staffing Remedial Order and the Agreement render the State and Wexford unable to comply with the Modified Staffing Remedial Order.

II. MOTION TO ALTER OR AMEND AND/OR FOR RELIEF FROM MODIFIED STAFFING REMEDIAL ORDER.

As set forth above, the State and Wexford are unable to comply with the Modified Staffing Remedial Order as it is currently written. The State and Wexford, however, remain committed to complying with this Court's orders and fulfilling their constitutional obligations to provide adequate mental-health services to inmates in ADOC's custody. The State therefore requests the following

alterations or amendments to the Modified Staffing Remedial Order to enable the State and Wexford to achieve substantial compliance.

Under Rule 59(e), a court may “alter or amend a judgment” based on, among other things, “manifest errors of law or fact.” Fed. R. Civ. P. 59(e); Arthur v. King, 500 F.3d 1335, 1343 (11th Cir. 2007) (quoting In re Kellogg, 197 F.3d 1116, 1119 (11th Cir. 1999)). Under Rule 60(b), a court may relieve a party from an order if, among other things, “applying it prospectively is no longer equitable” or “any other reason that justifies relief.” Fed. R. Civ. P. 60(b)(5), (6). The Modified Staffing Remedial Order is based on “manifest errors of . . . fact,” in that it is inconsistent with the Agreement. Arthur, 500 F.3d at 1343; Fed. R. Civ. P. 59(e). Thus, applying the Order is not “equitable” to the State or Wexford. Fed. R. Civ. P. 60(b)(5). The State’s and Wexford’s demonstrated inability to comply further justifies relief from the Order. Fed. R. Civ. P. 60(b)(6). Thus, the State meets both the requirements of Rule 59(e) and the requirements of Rule 60(b).

The State requests the following alterations, amendments, and/or relief from the Modified Staffing Remedial Order:

(1) The State requests that the Court define compliance with the Staffing Remedial Order in a manner that is consistent with the Agreement. The Agreement does not define Wexford’s compliance with staffing levels in terms of persons hired to fill positions, but instead defines compliance in terms of hours of

services provided by Wexford. (Gedman Decl. ¶¶ 5-6). Thus, instead of defining compliance in terms of “contracted” FTEs, the State requests that the Court define compliance in terms of hours of services provided. This revision would permit Wexford to cover the hours of “unfilled positions” with locums, PRN, or overtime work and still be in compliance with the Agreement and the Court’s order. (Id. at ¶ 17).

(2) To the extent the Court declines to reconsider its definition of compliance as “filling positions,” the State requests that the Court evaluate compliance with the Modified Staffing Remedial Order in a manner that takes into account the realities of staffing correctional facilities with mental-health personnel. The State requests the following three (3) modifications. Wexford developed a mental health staffing report, attached to the Supplemental Gedman Declaration as Exhibit A, to illustrate these necessary revisions to accounting for “filled” positions:

- First, the State requests that employees who Wexford hired, but who have not yet begun working, count toward “filled” positions in the quarter in which Wexford hires them. (Supp. Gedman Decl. at ¶¶ 10-12). Employers routinely experience delays between hiring individuals and those individuals beginning work. (Id. at ¶ 12). The individuals may need to provide notice to former employers, obtain Alabama licensure, and receive clearance from ADOC to work in ADOC facilities. (Id.). Wexford successfully recruited these individuals, and they are committed to providing mental-health services in ADOC. (Id.). Exhibit A to the Supplemental Gedman Declaration identifies these individuals as “hired not started.”

Permitting ADOC and Wexford to count these “hired not started” individuals as “filling” positions for the quarters in which they were hired will reflect the realities of the marketplace. (Id.).

- Second, the State requests that the Court permit the State and Wexford to count individuals whose employment terminated during a quarter as “filling” positions. (Id. at ¶¶ 13-16). Exhibit A to the Supplemental Gedman Declaration identifies these individuals as “new vacancies in quarter.” As the Modified Staffing Remedial Order currently reads, hours of service provided by an employee whose employment terminates on the last day of the quarter would not count toward compliance because the employee’s position would not be “filled” at the end of the quarter. (Id. at ¶ 14). Including the “new vacancies during the quarter” as “filled” positions would permit Wexford to account for hours of service provided by individuals who are no longer employed at the end of a quarter, for various reasons such as voluntary departure, death, or termination by Wexford. (Id.).
- Third, the State requests that the Court permit the State and Wexford to count “covered FTEs” toward compliance. (Id. at ¶¶ 17-18). The “covered FTEs” listed on Exhibit A to the Supplemental Gedman Declaration include all FTEs actually provided plus hours accounted for through employees’ leave. (Id. at ¶ 17). This measure would include FTEs furnished through overtime; FTEs furnished by individuals working on a PRN or locums basis; and FTEs related to employees taking paid and unpaid leave. (Id.). Thus, each position would receive credit based on the higher of (a) a combination of “filled positions,” “hired not started,” and “new vacancies in quarter,” or (b) “covered FTEs.” This approach is consistent with the Court’s recognition in the Modified Staffing Remedial Order that employees “will miss work for legitimate reasons.” (Doc. No. 2136 at 18 n. 6).

CONCLUSION

For the foregoing reasons, the State respectfully requests that the Court

grant its Motion to Alter or Amend the Modified Staffing Remedial Order under Rule 59(e) or grant the State relief from the Order under Rule 60(b). The State requests that the Court define compliance with the Agreement in terms of FTEs provided, rather than in terms of positions filled. In the alternative, the State requests that the Court permit the State and Wexford to count individuals in the “hired not started” and “new vacancies in quarter” categories toward compliance with the Agreement and the Staffing Remedial Order, and permit the State and Wexford to measure compliance in terms of “covered FTEs.” These modifications will permit the State and Wexford to continue to progress toward their goals of substantial compliance with the Staffing Remedial Order as they continue to improve mental-health services for inmates in ADOC’s custody.

Dated: November 26, 2018.

/s/ William R. Lunsford

William R. Lunsford

*Attorney for the Commissioner and
Associate Commissioner*

William R. Lunsford
Matthew B. Reeves
Melissa K. Marler
Stephen C. Rogers
Alyson L. Smith
Melissa C. Neri
MAYNARD, COOPER & GALE, PC
655 Gallatin Street
Huntsville, AL 35801
Telephone: (256) 512-5710
Facsimile: (256) 512-0119

blunsford@maynardcooper.com
mreeves@maynardcooper.com
mmarler@maynardcooper.com
srogers@maynardcooper.com
asmith@maynardcooper.com
mneri@maynardcooper.com

Luther M. Dorr, Jr.

Mitesh B. Shah

MAYNARD, COOPER & GALE, PC

1901 Sixth Avenue North

2400 Regions Harbert Plaza

Birmingham, AL 35203

Telephone: (205) 254-1178

Facsimile: (205) 714-6438

rdorr@maynardcooper.com

mshah@maynardcooper.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon all attorneys of record in this matter, including without limitation the following, by the Court's CM/ECF system on this the 26th day of November, 2018:

Maria V. Morris
Rhonda C. Brownstein
J. Richard Cohen
Caitlin J. Sandley
Grace Graham
Jonathan Blocker
David C. Washington
SOUTHERN POVERTY LAW CENTER
400 Washington Avenue
Montgomery, Alabama 36104
Telephone: (334) 956-8200
Facsimile: (334) 956-8481
maria.morris@splcenter.org
rhonda.brownstein@splcenter.org
richard.cohen@splcenter.org
cj.sandley@splcenter.org
grace.graham@splcenter.org
jonathan.blocker@splcenter.org
david.washington@splcenter.org

Gregory M. Zarzaur
Anil A. Mujumdar
Diandra S. Debrosse
Denise Wiginton
ZARZAUR MUJUMDAR & DEBROSSE
2332 2nd Avenue North
Birmingham, AL 35203
Telephone: (205) 983-7985
Facsimile: (888) 505-0523
gregory@zarzaur.com
anil@zarzaur.com
fuli@zarzaur.com
denise@zarzaur.com

William Van Der Pol, Jr.
Glenn N. Baxter
Barbara A. Lawrence
Andrea J. Mixson
Ashley N. Austin
ALABAMA DISABILITIES ADVOCACY PROGRAM
University of Alabama
500 Martha Parham West
Box 870395
Tuscaloosa, Alabama 35487-0395
Telephone: (205) 348-6894
Facsimile: (205) 348-3909
wvanderpoljr@adap.ua.edu
gnbaxter@bama.ua.edu
blawrence@adap.ua.edu
amixson@adap.ua.edu
aaustin@adap.ua.edu

Andrew P. Walsh
William G. Somerville III
Patricia Clotfelter
Lisa W. Borden
BAKER DONELSON BEARMAN CALDWELL & BERKOWITZ, PC
420 20th Street North
Suite 1400
Birmingham, Alabama 35203
Telephone: (205) 244-3863
Facsimile: (205) 488-3863
awalsh@bakerdonelson.com
wsomerville@bakerdonelson.com
pclotfelter@bakerdonelson.com

lborden@bakerdonelson.com

John G. Smith
David R. Boyd
BALCH & BINGHAM LLP
Post Office Box 78
Montgomery, AL 36101-0078
Telephone: (334) 834-6500
Facsimile: (866) 316-9461
jgsmith@balch.com
dboyd@balch.com

Deana Johnson
Brett T. Lane
MHM SERVICES, INC.
1447 Peachtree Street NE
Suite 500
Atlanta, GA 30309
Telephone: (404) 347-4134
Facsimile: (404) 347-4138
djohnson@mhm-services.com
btlane@mhm-services.com

Steven C. Corhern
BALCH & BINGHAM LLP
Post Office Box 306
Birmingham, AL 35201-0306
Telephone: (205) 251-8100
Facsimile: (205) 488-5708
scorhern@balch.com

Lonnie J. Williams
**ALABAMA DISABILITIES ADVOCACY
PROGRAM**
P. O. Box 870395
Tuscaloosa, AL 35487
Telephone: (205) 348-4928
Facsimile: (205) 348-3909
lwilliams@adap.ua.edu

Gary L. Willford, Jr.
Joseph G. Stewart
**ALABAMA DEPARTMENT OF
CORRECTIONS**
Legal Division
301 South Ripley Street
Montgomery, Alabama 36130
Telephone (334) 353-3884
Facsimile (334) 353-3891
gary.willford@doc.alabama.gov
joseph.stewart@doc.alabama.gov

/s/ William R. Lunsford

Of Counsel