UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Robert Simpson Ricci, et al.,	)	
	)	Civil Action Nos. 72-0469-T (Belchertown)
Plaintiffs,	)	74-2768-T (Fernald)
v.	)	75-3910-T (Monson)
	)	75-5023-T (Wrentham)
Deval Patrick., et al.,	)	75-5210-T (Dever)
	)	
Defendants.	)	
	)	

MEMORANDUM IN SUPPORT OF MOTION OF
SEIU LOCAL 509 TO INTERVENE

Introduction

Local 509, Service Employees International Union ("Union") submits this Memorandum in support of its Motion, filed pursuant to Fed. R. Civ. P 24(b), to intervene in the above-captioned case. The Union seeks intervention for the purpose of requesting that the Court restore Ricci v. Patrick to the active docket in order to compel the Defendants to comply with the 1993 Disengagement Order. More specifically, in a Complaint filed herewith as Exhibit 1, as required by Fed. R. Civ. P. 24(c), the Union alleges that the Defendant Commonwealth has engaged in a systemic violation of the 1993 Disengagement Order by proposing budget cuts that will result in layoffs of Human Service Coordinators in a number so massive that the ISP process which is so central to protecting class members under the Court's Order will be eviscerated. The Union therefore seeks to enforce compliance with the 1993 Order to prevent the Commonwealth from laying off Department of Developmental Services ("DDS") Human Service Coordinators and thereby threatening the ISP process and services to plaintiff class members.

On June 8, 2010, the DDS informed the Union that its plan for dealing with the Governor's and Senate's proposed budget cut of $5.4 million to the DDS budget account which funds Human Service Coordinators includes the elimination of sixty-three (63) Human Service Coordinator positions. The DDS further informed the Union that in the event the House version of the budget is adopted, which would require an $11.1 million reduction in this same line item, the DDS intends to lay off an additional sixty-one (61) Human service Coordinators. Under the "best case scenario," Human Service Coordinator caseloads would therefore increase from a statewide average of approximately fifty-five (55) in April, 2010 to an average of sixty-five (65). In the event the House budget is enacted, the Statewide average caseload would increase to a staggering seventy-eight (78). In 1990, when this Court intervened to prevent layoffs, the average caseload for a Human Service Coordinator was forty-two (42).

The current fiscal crisis of the Commonwealth does not and cannot justify such a blatant disregard for the interests of the class plaintiffs and this Court's Disengagement Order. Despite the concededly difficult fiscal situation of the Commonwealth, not one other agency within the Executive Office of Health and Human Services is planning to layoff its social workers and reduce services as has been planned by the Defendants. Nor did the Governor propose such drastic cuts to the budgets of other human service agencies.

Factual Background

On May 25, 1993, this Court issued a Disengagement Order and removed the matter of Ricci v Okin from the Court's active docket. Paragraph 7(a) provides: "If the defendants substantially fail to provide a state ISP process in compliance with this order,

or if there is a systemic failure to provide services to class members as described in this Order, the plaintiffs may seek enforcement of the Order pursuant to this paragraph. Individual ISP disputes shall be enforced solely through the State ISP process." In the event the defendants are not in substantial compliance with regard to "systemic issues," Plaintiffs may seek to reopen the case and restore it to the active docket to seek enforcement. Par. 7(c).

Most pertinent to the reasons the Union seeks to intervene at this juncture are the substantive requirements of the 1993 Disengagement Order that 1) "Sufficient adequately trained and experienced personnel, as reasonably determined by the Department of Mental Retardation based on professional judgment, shall be available to substantially meet the needs set forth in each class member's ISP, " ¶ 2(c); and 2) The ISP process remain the "substantial equivalent" of that which was in place in 1993, and remain one which "guarantee[s] that each class member be provided with the least restrictive, most normal, appropriate residential environment, together with the most appropriate treatment, training, and support services suited to that person's individual needs." ¶ 2(b) and footnote 2.

The Union is the collective bargaining representative of approximately 7500 human service professionals of the Commonwealth, including approximately 900 employees of the Massachusetts DDS. Affidavit of Stu Dickson, attached here as Exhibit 2 ("Dickson Aff."), ¶ 3. Approximately 410 of these DDS employees function as Adult Human Service Coordinators. Id. ¶ 3 Service Coordinators are responsible for developing, coordinating reviewing, evaluating and monitoring plaintiff class members' ISPs and case manage the implementation of necessary services. These essential

functions of the Service Coordinator position are therefore critical to the proper functioning of the ISP process and the Commonwealth's compliance with the requirements of the 1993 Disengagement Order. Id. ¶ 5 and Exhibit A. Currently, according to DDS' own calculations Adult Human Service Coordinators have a Statewide average caseload of about 55.4. This caseload has grown steadily since 1990, when the Court intervened to prevent layoffs, from an average service coordinator caseload of about 42. Id. ¶ 14. As has been formally acknowledged by DDS, the size of a Service Coordinator caseload has a direct impact on ability to perform core functions in a timely and thorough manner. Id. , ¶ 7.

On June 8th, 2010, at the Glavin Regional Center in Shrewsbury, the DDS and Union representatives met to discuss the plan of DDS to implement layoffs. Affidavit of Fred Trusten attached here as Exhibit 3 ("Trusten Aff."), ¶ 3. At this meeting, Jonathan Platt, Director of Labor Relations Office of Disability and Community Services and Larry Tummino, the Assistant Commissioner of DDS described potential budget scenarios for the fiscal year 2011 budget and provided the Union with a document setting forth the DDS plans with respect to Human Service Coordinator layoffs. This document is attached as Exhibit C to the Affidavit of Fred Trusten. Id. ¶ 7. Under the budget proposed by the Governor in House 2 and adopted by the Senate (Plan A), DDS would lose $5.4 million and therefore plans to eliminate 63 service coordinator positions, including 28 lay offs, 13 retirements and 22 vacant positions. Id. ¶¶ 5, 7, and 8. Based on the April, 2010 caseload statistics provided to the Union, under this "best case scenario," statewide, the average Adult Human Service Coordinator caseload would increase from 55.4 to 65.10. Dickson Aff. ¶ 9. The DDS sent layoff notices to affected

employees under this scenario on June 21, 2010, with the layoffs to take effect July 3, 2010. Trusten Aff. ¶ 12.

Under Plan B (the House of Representatives budget), DDS is required to make 11.1 million in cuts and plans to layoff an additional 61 service coordinators, for a total loss of Human Service Coordinator positions of 124.[1] Trusten Aff., ¶¶ 5 and 8. Based on the April, 2010 caseload statistics, the loss of 124 positions would result in an average caseload of 78.26.

These astronomical caseload numbers presume moreover, that the overall DDS population will stay constant. If the past is any prediction of the future, that presumption would be incorrect. The DDS Adult Census assigned to Service Coordination Services has risen each and every year and, according to DDS' own analysis, is projected to increase from 23,624 in 2010 to 24,354 in 2011. Dickson Aff., Exhibits C and D. The actual Human Service Coordinator caseload would therefore increase even further.[2] In the face of these patently untenable caseload numbers, and with an explicit recognition of the desirability of caseloads of 42, DDS representatives initiated a discussion with the Union about how to "streamline" the ISP process. Trusten Aff., ¶ 10.

These drastic cuts to the DDS budget and the DDS plan to eliminate either 63 or 124 Human Service Coordinator positions is unparalleled in any other human service agency of the Commonwealth. Social workers represented by SEIU, Local 509 work in virtually every agency under the Executive Office of Health and Human Services and not

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[1] DDS representatives Platt and Tummino made clear to the Union that other non-bargaining unit staff, such as managers and retirees, were also being laid off and that there was no possibility of further cuts in other non-Human Service Coordinator staff in order to reduce the number of Human Service Coordinator lay offs. Trusten Affidavit. ¶ 9.

[2] Exhibit C to the Trusten Affidavit also shows the number of layoffs by Region. However, it is not known at this time how the vacancies and retirements will be distributed. Nor is it known how involuntary transfers and bumping will ultimately affect the staffing in each region. It is therefore only possible to calculate Statewide averages at this time.

one other agency's budget has had cuts proposed to the point where layoffs of social work staff is planned. Trusten Aff. ¶ 11. The massive 5.4 million reduction in the DDS budget requested by the Administration as well as the even more devastating $11.1 reduction proposed in the House Budget are without apparent reason or justification. Regardless of any rationale, however, reductions of this magnitude and the resulting caseload numbers are alleged by Local 509 to constitute a serious systemic failure within the meaning of this Court's 1993 Disengagement Order. Because Human Service Coordinator caseloads are the canary in the mine and can foretell impending systemic failure of the ISP process and the ability to ensure the provision of services, SEIU Local 509 has, for the first time in the long history of this litigation, moved to intervene.

Argument

I. THE COURT SHOULD EXERCISE ITS DISCRETION TO GRANT THE UNION'S MOTION TO INTERVENE

Fed. R. Civ. P 24(b) allows the Court, in its discretion, to grant permissive intervention of an applicant party when the motion is timely, the party has a claim or defense that shares a common issue of law or fact with the original action, and the intervention would not unduly delay or prejudice the adjudicatory rights of the original parties. Once an intervenor-applicant meets the threshold requirement of having a claim that shares a common question of law or fact with an original party, the Court may consider almost any factor which can be considered rationally relevant as a basis for allowing intervention. Daggett v. Commission on Governmental Ethics and Election Practices, 172 F.3d 104 (1st Cir. 1999). In this case, the Union's motion for permissive intervention is timely, the Union has a claim that shares common issues of law and fact with the original plaintiffs, and allowing the Union to intervene would not unduly delay

or prejudice any of the adjudicatory rights of the original parties. For these reasons, the court should grant the Union's motion for permissive intervention pursuant to Fed. R. Civ. P. 24(b).

A) The Motion is Timely

The most important inquiry in determining whether a motion for intervention is untimely is "whether the delay in moving for intervention will prejudice the existing parties…" Wright, Miller & Kane, Federal Practice and Procedure, Vol. 7C, page 541 Furthermore, a finding of lack of prejudice will generally support a finding of timeliness. John Doe No. 1 v. Glickman, 256 F.3d 371 (5th Cir. 2001). Though this matter is no longer on the active docket, the Disengagement Order presents parties to the suit with the unique ability, in the event of a systemic violation, to compel compliance with the Order. See, ¶ 7, 1993 Disengagement Order. The original plaintiffs are not limited by time to seek to restore the case to the active docket pursuant to paragraphs 7(a) and 7(c). A motion for intervention with the purpose of restoring the case should therefore not be considered untimely, regardless of how much time has passed since the court issued the order. Because the Disengagement Order provides the plaintiffs with the opportunity to re-open the case regardless of the passage of time, none of the original parties would be unduly prejudiced by the Union's intervention. Therefore, the Union's motion for intervention is not untimely and the court should allow the Union to intervene.

B) The Union's Claims Share Common Issues of Law and Fact

The intervenor-applicant's claims must share a common issue of law or fact with the main action in order for the Court to grant permissive intervention. Fed. R. Civ. P. 24(b)(1)(b). Typically, courts will require that the intervenor have more than a general

interest in the outcome of a case, and courts will permit intervention when the intervenor-applicant has an economic interest represented in the litigation. Textile Workers Union of America, CIO v. Allendale Co., 226 F.2d 765 (D.C. Cir. 1955). Here, the Union's interests in preserving the jobs of Human Service Coordinators and preserving the integrity of the ISP process that is at the heart of their professional life work as well as the safety net of the class member plaintiffs could not be more intertwined.

As set forth above, the current worst case scenario for those receiving services from DDS service coordinators is $11.1 million in budget cuts and a reduction in force of 124 service coordinator positions resulting in an average caseload of 78.26.[3] At best under current circumstances, under the Governor's and the Senate's proposed budgets, a reduction in force of 63 human service coordinator positions and an increase of the average caseload from 55.4 to 65.1 will occur. These indisputable facts are of critical relevance to assessing whether there exist violations of this Court's Disengagement Order It would be ludicrous for the Commonwealth to suggest that these factual and legal issues have no bearing on their compliance with the Disengagement Order and that there do not exist common issues of law or fact. The Union is, moreover, in a unique position in its ability to monitor staffing and caseloads. This alone is a compelling reason for the Court to grant this Motion to Intervene.

As set forth in the proposed Complaint filed in conjunction with this Motion, the Defendants' conduct with respect to both the Governor's inadequate initial budget request in House 2 and the subsequent planned layoff of huge numbers of Human Service Coordinators constitute violations of paragraphs 2(a)-2(c). In so far as the Disengagement Order is concerned with preserving the ISP process, the Union's claims

[3] The Union is by no means suggesting that an average caseload of 55.4 is acceptable.

could not be more central and are in no way dealing with individualized ISP disputes. Compare Ricci v. Patrick, 544 F.3d 8, 20 (1st Cir. 2008). There could not be a more appropriate and indeed critical time for this Court to exercise its discretion to permit the Union to intervene to introduce facts and claims which are central to compliance with the 1993 Disengagement Order.

C) The Union's Intervention Would Not Unduly Prejudice the Original Parties' Adjudicatory Rights

In determining whether to allow a request for permissive intervention, the Court must consider whether intervention of the applicant party will unduly prejudice the rights of any of the original parties. Fed. R. Civ. P. 24(b)(3). The purpose of this rule is to ensure that the original claims will not be hampered or vexed by intervention. Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 207 F.Supp. 252, 257 affirmed 315 F.2d 564 (7th Cir. 1963). In this case, the Union's role as a party to the lawsuit would not prejudice any of the original parties. The Union seeks simply to compel the Commonwealth to comply with the 1993 Disengagement Order, a goal consistent with that sought by the original plaintiffs during this litigation. Requiring the Defendants to answer to the Union's claims does not constitute prejudice.

Conclusion

For all the foregoing reasons, this Court should exercise its discretion to grant the Union's motion to intervene in the matter of Ricci v. Patrick so that the Union may seek to restore the case to the active docket and to compel compliance with the 1993 Disengagement Order. The Union's Motion to Intervene is timely, the Union shares common issues of law and fact with the original plaintiffs, and the Union's intervention would not unduly prejudice the original parties' adjudicatory rights. Indeed, the

participation of the Union in this matter at this particular time would bring to light impending grave harm to plaintiff class members and the viability of the ISP process.

Respectively submitted,

LOCAL 509, SERVICE EMPLOYEES INTERNATIONAL UNION,

By its attorneys,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served upon the Court and all counsel of record via the Court's ECF filing system on June 24, 2010.

s/Katherine D. Shea_________
Katherine D. Shea