

THE HONORABLE JAMES L. ROBERT

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UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA,

Plaintiff,

v.

CITY OF SEATTLE,

Defendant.

No. 2:17-cv-01282-JLR

**UNITED STATES' RESPONSE TO THE
COURT'S ORDER REGARDING THE
TENTATIVE AGREEMENT BETWEEN
SPOG AND THE CITY OF SEATTLE**

Plaintiff United States of America ("DOJ") hereby responds to the Court's request for the Parties' positions on four questions related to the tentative agreement (the "TA") between the Seattle Police Officers Guild ("SPOG") and the City of Seattle. Dkt. 485. With respect to the Court's procedural questions: "(1) the process and timeline by which the TA will be finalized; (2) next steps in the event the TA is not finalized," DOJ defers to the City of Seattle, which is in a better position to answer these questions.

With respect to the Court's request for the Parties' "preliminary positions on whether the TA complies with the terms and purpose of the Consent Decree," DOJ responds that, based on our preliminary review, we believe that the TA is generally consistent with the Consent Decree,

1 and in many instances solidifies measures required under the Consent Decree. However, DOJ
2 needs additional information about the significance of TA Paragraph 3.1's changes to the burden
3 of proof in arbitration. Accordingly, if the City Council approves the TA, DOJ will conduct
4 further due diligence with respect to that term before briefing the Court on its final position.
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6 With respect to the Court's question regarding "the point at which the Court should
7 review any agreement between the City and SPOG to ensure compliance with the Consent
8 Decree, and the process for such a review," DOJ believes that the Court should wait until the
9 City Council completes its review of the TA and decides whether or not to approve it as the new
10 collective bargaining agreement ("CBA") with SPOG. At that time, if DOJ or the Court believes
11 that a term or terms of the CBA conflict with the Consent Decree, DOJ believes the Court should
12 act pursuant to ¶ 227 of the Consent Decree. In particular, the Court should order the City of
13 Seattle and DOJ to consider whether there are "alternate means" to achieve the purposes of the
14 Consent Decree other than through the mechanism in conflict with the collective bargaining
15 agreement. The Court should further order the Parties to report back on the results of that
16 consultation, providing the Court with the final word on any resulting agreement.
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19 I. BACKGROUND

20 A. Scope of DOJ Review

21 The Consent Decree requires reforms to the Seattle Police Department ("SPD")'s policies
22 and practices to correct an alleged pattern or practice of unconstitutional policing. *Id.* (calling
23 for reforms relating to use of force, crisis intervention, stops and detentions, bias-free policing,
24 supervision, and the Office of Professional Accountability (now the Office of Police
25 Accountability ("OPA")). These reforms were successfully implemented and SPD was found to
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1 | be in full and effective compliance with the Consent Decree in January 2018. Dkt. 439. The
2 | City of Seattle is now required to demonstrate that it can sustain compliance with the terms of
3 | the Consent Decree through audits taking place through February 2020, with verification of these
4 | audits by DOJ and the Monitor. *See* Dkt. 444 (“Sustainment Plan”) and Dkt. 448 (Order
5 | approving Sustainment Plan). To sustain compliance and achieve eventual termination of the
6 | Consent Decree, the City must ensure that changes to SPD policies or procedures, including
7 | through City of Seattle legislation, are consistent with the terms and purposes of the Consent
8 | Decree.
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11 | **B. History of the City’s Accountability Legislation Vis-à-Vis the Consent Decree**

12 | As an initial matter, it is worth noting that the Consent Decree does not mandate changes
13 | to the accountability structure for policing in Seattle. At the time the Court approved the
14 | Consent Decree, the City of Seattle’s police accountability structure was comprised of OPA, an
15 | OPA Auditor, and the OPA Review Board (“OPARB”). The Consent Decree was silent with
16 | respect to the roles of the OPA Auditor and OPARB entirely. With respect to OPA, the Consent
17 | Decree states: “DOJ found that the OPA system is sound and that investigations of police
18 | misconduct complaints are generally thorough, well-organized, well-documented, and
19 | thoughtful.” *See* Dkt. 3-1 at ¶ 164. However, the Consent Decree did require revisions to SPD’s
20 | policies on reporting misconduct and retaliation and required updating of the OPA Manual. *Id.*
21 | at ¶¶ 165-167. Further, the Parties agreed that SPD should strive to ensure that all complaints
22 | against officers are fully and fairly dealt with and, to that end, agreed to related terms in the
23 | Memorandum of Understanding (“MOU”) (available at
24 | https://www.justice.gov/sites/default/files/crt/legacy/2012/07/27/spd_mou_7-27-12.pdf)
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1 By its terms, the MOU created a Community Police Commission (“CPC”) and instructed
 2 the CPC to “review Seattle’s current three-prong civilian oversight structure to determine if there
 3 are changes it would recommend for improving SPD accountability and transparency.” *Id.* at
 4 ¶ 15. Thus, the results of the CPC’s review, its recommendations, and the City’s resulting efforts
 5 to legislate changes to police accountability systems were all actions contemplated by the
 6 Consent Decree, but not required by it. This was intentional – the Parties intended to defer
 7 judgments around these issues to the people of Seattle and their elected representatives. As DOJ
 8 stated when the draft accountability legislation was first before it and this Court for review:
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11 DOJ’s review does not reflect prescriptive dictates that apply to police
 12 accountability systems across the board, nor should DOJ’s review be seen as a
 13 blanket approval of the approach that Seattle has decided to take in the Draft
 14 Legislation. There simply is no “best way” to structure an accountability system.
 15 Thus, DOJ has conducted its review with deference to the elected representatives
 16 of the citizens of Seattle to craft a system that works best for this community. The
 17 fundamental limits to that deference are the Constitution and the Consent Decree.

18 Dkt. 331 at 7. With both that deference and the limits on that deference in mind, DOJ reviewed
 19 the City’s draft accountability legislation. Dkt. 320-1 (“Draft Accountability Legislation”).

20 At that time, both DOJ and the Court agreed that the Draft Accountability Legislation
 21 contained a provision that potentially conflicted with the terms or purpose of the Consent
 22 Decree;¹ namely, the inclusion of three options for the OPA’s standard of review for complaint
 23 dispositions related to officer dishonesty. *See* Dkt. 331 and 357. DOJ and the Court concluded
 24 that two of those options, which required OPA to impose a higher burden of proof for allegations

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 26 ¹ DOJ and the Court also identified two other potential conflicts with the Consent Decree, however, the
 27 subsequently passed Accountability Ordinance resolved those concerns and nothing in the TA appears to
 28 alter them. *See* Dkt. 357 at 8-11.

1 of dishonesty, would undermine public confidence in the disciplinary system and were,
2 therefore, contrary to the purpose of the Consent Decree. *Id.*² The final legislation passed by the
3 City Council resolved this concern by adopting the following language in the OPA Section:
4 “Termination is the presumed discipline for a finding of material dishonesty based on the same
5 evidentiary standard used for any other allegation of misconduct.” *See* Dkt. 396-1 at 36
6 (Accountability Ordinance). Accordingly, DOJ advised the Court that no conflict between the
7 Consent Decree and the Accountability Ordinance existed. The Court reserved its own judgment
8 until after the provisions of the Accountability Ordinance that were subject to collective
9 bargaining had been bargained. At this time, a collective bargaining agreement with the Seattle
10 Police Management Association has been approved by City Council and a tentative collective
11 agreement with SPOG is before the City Council for review.

12 **II. RESPONSE**

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16 With that background in mind, DOJ offers the following response to the Court’s specific
17 questions for the November 1, 2018 hearing.

18 **A. Based Upon Preliminary Review, DOJ Believes the TA is Generally Consistent with** 19 **the Consent Decree but Will Need Additional Information for Final Review**

20 1. General Review

21 Based on DOJ’s preliminary review, we believe that the TA appears to be consistent with
22 the terms of the Consent Decree and promotes its purposes. In conducting this preliminary
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25 ² *See* Dkt. 3-1 (Consent Decree) (stating that the United States and City of Seattle enter into the
26 agreement “with the goal of ensuring that police services are delivered to the people of Seattle in a
27 manner that fully complies with the Constitution and the laws of the United States, effectively ensures
28 public and officer safety, and promotes public confidence in the Seattle Police Department (‘SPD’) and its
officers.”).

1 review, it has been our understanding that the TA does not replace the Ordinance, which remains
2 in effect. However, some of the TA's individual terms may supersede those of the Ordinance
3 with respect to SPOG members. Accordingly, because the TA varies in some respects from the
4 Ordinance, the TA has the potential to conflict with the terms of the Consent Decree, and DOJ
5 and Court review is proper, although final review is premature at this time.
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7 At this time, DOJ has conducted a preliminary review of the terms of the TA and
8 received a briefing on its content and legal implications from the City. From that review, it is
9 our understanding that the TA codifies a number of aspects of the Accountability Ordinance (*e.g.*
10 the removal of the Disciplinary Review Board, the civilianization of OPA, extended deadlines
11 for OPA investigations, the attendance of the Office of the Inspector General ("OIG") at Force
12 Review Boards and OPA interviews) and resolves SPOG's unfair labor practices complaints
13 ("ULPs") with respect to the same (*e.g.*, Accountability Legislation ULP; Body Worn Video
14 ULP). Notably, none of the aforementioned provisions were mandated by the Consent Decree.
15 Indeed, the only provisions mandated by the Consent Decree were already implemented under
16 the Ordinance without the need for collective bargaining. *See* Dkt. 331 at 5 (authorizing the
17 OPA Director to respond to the scene of all SPD officer-involved shootings and other serious use
18 of force;³ ensuring civilian participation in the OIG;⁴ and continuing community participation in
19 SPD policies and practices of significance to the public⁵).
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26 ³ Dkt. 204-1 (Use of Force Policy Revisions) at 45.

27 ⁴ Dkt. 204-1 at 54.

28 ⁵ Dkt. 3-1 at ¶ 146

1 Accordingly, the only remaining issue for DOJ's review is whether any of the TA's
2 modifications to the Ordinance actually cause a conflict with the Consent Decree. While we
3 understand that the TA alters some terms of the Ordinance with respect to SPOG members (*e.g.*
4 providing arbitration rights in disciplinary appeals, modifying the amount of the OPA Director's
5 discretion in civilianizing OPA), with one exception noted below, our preliminary review
6 suggests that none of the modifications conflict with the Consent Decree. Accordingly, we defer
7 to the people of the City of Seattle and their elected officials to assess the TA and to determine
8 whether to approve it. If the City of Seattle does agree to the TA, DOJ advocates, for the reasons
9 stated in Section B., *infra*, that DOJ and the Court then conduct a final review for any conflict
10 with the Consent Decree.
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13 2. TA Article 3 – Disciplinary, Complaint Hearing, and Internal Advisory
14 Procedures

15 One provision of the TA bears particular analysis at this juncture because of the prior
16 positions DOJ has taken with respect to the standard of proof in disciplinary decisions. *See* Dkt.
17 331 and 357. The relevant provision is found at Article 3, Paragraph 3.1 of the TA and states:
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19 The standard of review and burden of proof in labor arbitration will be consistent
20 with established principles of labor arbitration. For example, and without limitation
21 on other examples or applications, the parties agree that these principles include an
22 elevated standard of review (*i.e.* more than preponderance of the evidence) for
23 termination cases where the alleged offense is stigmatizing to a law enforcement
24 officer, making it difficult for the employee to get other law enforcement
25 employment.

26 TA at page 9. At first blush, this provision appears to be in conflict with DOJ's objection and
27 the Court's Order related to similar provisions setting a higher burden of proof for termination
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1 for dishonesty in the Draft Accountability Legislation. *See* Dkt. 331 and 357. However, DOJ’s
2 2016 objection was based upon a misunderstanding regarding the City’s legislative proposal.

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4 At that time, it was our belief that two of the options presented by the City for the burden
5 of proof for dishonesty terminations (both using clear and convincing evidence) were introducing
6 a new, higher burden of proof to OPA’s review.⁶ We believed that creating a higher standard
7 “without any basis” would not be an appropriate part of reform efforts and would, therefore,
8 potentially undermine the Consent Decree’s purpose of promoting public confidence in policing
9 and the reform process more generally. *See* Dkt. 331 at 9-10.

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11 However, based on our preliminary review, it appears that our understanding of the
12 applicable facts was incorrect. Recently, the City has demonstrated to us that the clear and
13 convincing standard of proof has long been the applicable burden for reviewing officer
14 misconduct involving dishonesty. This standard was contained in both the 2008 SPOG CBA
15 (“For purposes of this presumption of termination the Department must prove dishonesty by
16 clear and convincing evidence”) and the 2013 SPOG CBA (same). Further, that standard was
17 included in versions of the OPA Manual reviewed by the Parties and approved by the Court. *See*
18 Dkt. 156 at 40 (“the OPA Director . . . issues to the Chief of Police a recommended finding on
19 each allegation using the preponderance of the evidence standard, except where the allegation is
20 one of dishonesty, in which case the CBA requires the application of a clear and convincing
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25 ⁶ Notably, while 3.29.135F of Accountability Ordinance relates to the burden of proof applied by OPA,
26 the TA’s Paragraph 3.1 relates to burden of proof applied in arbitration. This is likely a distinction
27 without a difference, however, because OPA will necessarily have to apply a similar standard as that
28 applied in arbitration, if it seeks to have its disciplinary recommendations upheld. As such, the OPA
standard and arbitration standard are discussed herein without distinction between the two.

1 standard of proof”); Dkt. 256-1 at 41 (same). Thus, the Draft Legislation was not, in fact,
2 seeking to create a new, higher burden of proof, but rather was proposing to enshrine into City
3 Ordinance the agreement set forth in prior CBAs.
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5 With this context in mind, DOJ has revised its position. It is now clear that when DOJ
6 entered the Consent Decree, the burden of proof for terminations related to dishonesty was clear
7 and convincing. The Consent Decree did not mandate that it be changed to a lesser standard.
8 Accordingly, DOJ would no longer view the codification of a clear and convincing burden of
9 proof standard for dishonesty terminations as contrary to the purposes of the Consent Decree.
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11 However, the TA does not simply codify the prior “clear and convincing” standard for
12 dishonesty terminations that pre-dated the Consent Decree. Rather, the TA states that the
13 “parties agree” that an “elevated standard of review” is appropriate in circumstances where the
14 “alleged offense is stigmatizing to a law enforcement officer.” TA at Paragraph 3.1. In order to
15 determine whether this presents a conflict with the Consent Decree, DOJ will require more
16 information regarding the scope of this provision’s application (*i.e.* what offenses are considered
17 stigmatizing to officers) and how such cases have been historically reviewed at arbitration and by
18 OPA (*i.e.* is this setting a higher standard of review for some offenses). Accordingly, DOJ
19 intends to further review this provision and engage in further consultation with the City if the TA
20 is passed and comes before the Court for final review.
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23 **B. The Court Should Consider Whether the TA Conflicts with the Consent Decree**
24 **After Approval By City Council**

25 DOJ believes that it would be premature for DOJ or the Court to make a final
26 determination on whether the TA conflicts with the terms and purposes of the Consent Decree
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1 City notify DOJ and the Court of its passage so that its terms can be reviewed for any conflict
2 with the Consent Decree.

3 DATED this 29th day of October, 2018.
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7

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CERTIFICATE OF SERVICE

I certify that on the 29th day of October, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following attorneys of record:

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DATED this 29th day of October, 2018.

/s/ Christina Fogg

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