

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

CHAMBERS OF
JAMES K. BREDAR
UNITED STATES DISTRICT JUDGE
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January 18, 2016

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RE: *U.S. v. Police Department of Baltimore City, et al.*
Civil No. JKB-17-0099

Dear Counsel:

The parties have filed a JOINT MOTION FOR ENTRY OF CONSENT DECREE (ECF No. 2). An initial hearing will be held on this Motion on Tuesday, January 24, 2017, at 10:00 a.m. in Courtroom 1A of the United States Courthouse in Baltimore, Maryland. Counsel for the parties are required to be present. The Mayor of the City of Baltimore is asked to be present.¹

In determining whether to accept the terms of the proposed Consent Decree (the "Decree") (ECF No. 2-2), the Court must "satisfy itself that the agreement is fair, adequate, and reasonable, and is not illegal, the product of a collusion, or against the public interest." *U.S. v. North Carolina*, 180 F.3d 574, 581 (4th Cir. 1999). Accordingly, during the hearing on January 24, 2017, and during possible subsequent hearings, the Court will ask counsel and the parties to address multiple issues including but not limited to the following:

GENERAL ISSUES

1. Cost. One element that the Court must consider when assessing the "reasonableness" of the proposed Decree is cost. After careful review of the proposed Decree, the Court infers that at present there is no reliable projection as to the total cost associated with compliance. The Court, therefore, must determine whether the proposed Decree language is

¹ This is not the "public hearing" that the parties request be convened in the final sentence of their Motion. One of the questions to be addressed during the hearing on January 24 is whether and when such a "public hearing," during which the public would be heard by the Court, will be convened.

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“adequate and reasonable” absent a firm projection as to total cost. The Court acknowledges the content of Paragraph 500 of the proposed Decree:

500. The City will be responsible for providing necessary and reasonable financial resources to BPD [Police Department of Baltimore City] to enable BPD to fulfill its obligations under the Agreement. (emphasis supplied)

In considering whether to accept that open-ended language, without a more precise projection as to the total cost and how it will be paid, the Court wishes to confer with the Mayor, on the record, as to the implications of what is being undertaken.²

2. The Collective Bargaining Agreement with sworn officers of the BPD. When does the current agreement expire? To the extent that there are conflicts between the requirements of the CBA and the requirements of the Decree, and if those conflicts are irreconcilable through negotiations, do the parties confirm on the record that a CBA requirement would trump a conflicting Decree requirement?

3. Public input and public hearing before the Court decides whether to enter the Consent Decree. Under what authority would the Court entertain the input of non-parties, e.g., citizens, interested groups, the police union, etc.? What process and format do the parties recommend the Court follow in conducting any such proceedings? Would public input and statements be taken under oath and treated as evidence in relation to the Court’s consideration of the proposed Decree, or are the input and statements simply *commentary* for the Court to consider as it decides whether to enter the Decree?

4. Timelines for performance. The proposed Decree contains some deadlines and specified time periods. However, with respect to many initiatives and studies (e.g., Paragraph 219, Comprehensive Assessment of City’s Efforts to Decrease Youth Involvement with Juvenile and Criminal Justice System; Paragraph 428, Comprehensive Staffing Study) no deadlines are set. How is the requirement to be enforced if there is no deadline? In the period before a Monitoring Plan is set out, is the only standing deadline that the particular initiative or study be completed before the Court will release the City from the Decree?³

5. Material Requirement. What is a “material requirement?” The definition in Paragraph aaa. reads as follows:

² This is the only issue which the Court wishes to address with the Mayor in person at this initial hearing.

³ It would be useful to the Court if the parties prepared a timeline, starting with the date that the Decree is entered, and projecting into the future, noting all dates and deadlines specified in the Decree. The parties are directed to prepare and submit to the Court such a timeline. Additional dates and deadlines agreed in any upcoming hearings should be added to the timeline as they are established.

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“Material Requirement.” A requirement of the Agreement that has a significant relationship to achieving the purpose of this Agreement.

If there is a dispute, apparently it will be for the Court to simply make its best judgment as to whether a particular requirement of the Decree is “material.” Do the parties accept this analysis?

6. Compliance. Measuring compliance with a decree in which many requirements are aspirational, general, and lacking in deadlines, and where resources are unidentified, and where costs are not specified or known is a daunting prospect. In the Decree, these details largely have been deferred until the Monitoring Plan is established. The Court understands that the parties have every expectation that negotiation and establishment of the Monitoring Plan will resolve most if not all of these issues. But do the parties also agree that should those negotiations be unsuccessful, or partially so, very large issues in determining compliance, including even the standards to be applied, are explicitly and implicitly left to the Court to resolve, with the parties ultimately compelled to live and comply with the Court’s determinations?

MORE SPECIFIC QUESTIONS RAISED BY THE CONTENT OF PARTICULAR PARAGRAPHS OF THE PROPOSED DECREE

7. Paragraph 19a. The Agreement requires that “all sworn representatives of BPD who interact with the public” participate in neighborhood meetings and community events. Must an agreement provision such as this one be reconciled with the Collective Bargaining Agreement?

8. Paragraphs 36, 38, 43(e). Does the Agreement intend to impose a standard on the BPD different from that set out in *Illinois v. Wardlow*, 528 U.S. 119 (2000)?

9. Paragraph 43(a). During the hearing I will ask the parties to provide the Court with an example of a pretext stop that would be legal under *Whren v. U.S.*, 517 U.S. 806 (1996), but that is nonetheless illegal under the 14th Amendment, Title VI, or the Safe Streets Act, if this paragraph is meant to imply that there could be pretext stops that fall into such a category.

10. Paragraph 61. What is a “Permanent Rank Supervisor”? Please add to the definitions section.

11. Paragraphs 172, 206(h), 360, 361, and 362. Issues arising under *Garrity v. New Jersey*, 385 U.S. 493 (1967) are inherently complex. Determining whether a particular officer statement is “compelled” or “non-compelled” for *Garrity* purposes involves subtle distinctions. During the hearing, the Court will seek assurance that these subtleties have been weighed carefully by the parties and considered in the context of relevant case law as these various paragraphs have been drafted.

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12. Paragraph 267. The provision of technology as described in the first sentence of the paragraph is mandatory. But acquisition and deployment of the technology necessary to accomplish the objective set out in the second sentence is not mandatory and instead dependent upon there being sufficient resources. Do the parties agree with this interpretation? Clarification will be sought during the hearing.

13. Paragraph 278. By what standard would the Court resolve a disagreement arising under this Paragraph? Do the parties anticipate that the Court would apply a constitutional standard relating to privacy or simply resolve the dispute applying its general equitable authority otherwise invoked in this lawsuit?

14. Paragraph 380. Does the current Collective Bargaining Agreement permit the participation of civilian voting members in disciplinary hearings? If not, what is the parties' general plan for complying with this provision of the Agreement?

15. Paragraphs 389, 390. Clarify statements such as "the City will support this program *when it is involved*" and "the City, *to the extent it is involved.*" How would the City not be involved?

16. Paragraph 443. How soon after entry of the Decree would the parties publish their Request For Application ("RFA")? How much time would pass between publication and the deadline for submissions in response to the RFA? If these dates and deadlines are not specified in the Agreement, should they be?

17. Paragraph 444(e), 446. Must the Court select one of the two Monitors proposed? May the Court reject the slate and direct the parties to submit two new candidates? Even if the parties agree on a single choice, may the Court reject that choice and require further submissions? Given that the Monitor will be the Court's "agent" (*see* Paragraph 445), must not the Court have the authority to reject a proposed candidate? The Court notes that the Monitor may be removed for good cause (*see* Paragraph 446). Would the Court's mere "lack of confidence" in the Monitor be a sufficient basis for removing a Monitor? Accordingly, would the Court's "lack of confidence" in the parties' *proposed* Monitor be a basis for rejecting that choice and requiring the parties to submit another candidate or candidates? Should the Agreement be clarified in this regard?

18. Paragraph 447. If the Court determines that the Monitor should be retained after the expiration of five years, does the City commit to continuing to pay the Monitor? Where is that commitment in the Agreement?

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19. Paragraph 448. How was the total sum of \$1,475,000 derived?⁴

20. Paragraph 463. The Agreement provides that the Monitoring Plan, once agreed by the parties, shall be submitted to the Court for approval. In the event that the Court does not approve the Monitoring Plan after it has been jointly agreed and submitted by the parties, what procedure then follows? Is it to be revised by the parties until it is acceptable to the Court? The Agreement should be clarified and made more specific on this point.

21. Paragraphs 473-75. The heading for this section of the Decree is "Communication Between the Monitor, the Parties, the Court, and the Public." In the paragraphs within that section (473-75) there is no reference to communication with the Court. Is there an omission?

22. Paragraph 477. If the Court enters the Decree as drafted, the Decree will purport to preclude the Monitor from testifying in any other litigation or proceeding with regard to any policy or practice, etc., of the City or the Police Department. What is the legal authority for a consent decree having that sort of preclusive effect? Do the parties suggest that the Monitor, by virtue of being an "agent" of the Court is immune from process requiring his/her testimony before other tribunals? Clarification is required.

23. Paragraph 485. What law might prohibit disclosure to DOJ?

24. Paragraphs 498, 499. The parties are not required to comply with provisions of the Agreement that conflict with laws, ordinances, or provisions of a relevant Collective Bargaining Agreement, according to Paragraph 498. However, in Paragraph 499, officers of the BPD are required by their leadership to comply with the Agreement. Should the exception language of Paragraph 498 be added to Paragraph 499?

As the Court considers whether to enter the proposed Consent Decree, it looks forward to a thorough hearing on these issues. The Court does not seek or expect written responses in relation to this letter order. Instead, the Court's purpose is to give counsel and the parties an advance indication of the issues and concerns it intends to raise during the first hearing. (That said, the Court has provided a few specific directions, *e.g.*, preparation of the timeline, which should be complied with when reasonably possible.) Issues beyond those noted herein may also be addressed by the Court and counsel during the initial hearing.

⁴ The Agreement should specifically note that this is only the maximum annual sum to be paid to the Monitor, not an approximation of the total cost of compliance with the Agreement.

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Although informal, this letter constitutes an Order of the Court and shall be docketed accordingly.

Very truly yours,

/s/

James K. Bredar
United States District Judge

JKB/vc