UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

– X

DAVID FLOYD, *et al.*,

08 Civ. 1034 (AT)

Plaintiffs,

-against-

THE CITY OF NEW YORK,

Defendant

– X

JAENEAN LIGON, *et al.*,

12 Civ. 2274 (AT)

Plaintiffs,

MEMORANDUM OF LAW IN OPPOSITION TO MOTIONS TO INTERVENE

-against-

THE CITY OF NEW YORK, *et al.*,

Defendants

– X

PRELIMINARY STATEMENT

Defendants City of New York, et al. ("the City") submit this memorandum of law in opposition to the supplemental submissions filed by proposed intervenors Patrolmen's Benevolent Association, Detectives Endowment Association, Lieutenants Benevolent Association, Captains Endowment Association, and Sergeants Benevolent Association (collectively, "the Police Unions").

To avoid unnecessary repetition, the City adopts the arguments regarding intervention set forth in *Floyd* and *Ligon* Plaintiffs' memoranda of law in opposition and adds only the following points.

ARGUMENT

The Police Unions have not shown that they have a legally protectable interest in this action to establish their entitlement to intervention as of right. Nor should the Court grant permissive intervention at this juncture, because granting intervention would be severely prejudicial to the parties and would frustrate the compelling public interest in allowing this litigation to be finally resolved. To the extent the Police Unions argue that their exclusion from ongoing settlement discussions would unlawfully bind them to the product of settlement discussions and impair their ability to negotiate collectively for their members' legally protectable interests, the Police Unions' argument is unfounded as no such settlement discussions are underway or contemplated. As stated in the parties' status letter to the Court dated March 4, 2014, the full scope of the Agreement between the City and the plaintiffs is that the parties will seek modification of the District Judge's order providing that the monitor will be limited to three years upon a showing of substantial compliance with all Court-ordered injunctive relief. *See* Letter to the Court, dated March 4, 2014, Docket Entry Nos. 440 (*Floyd*), 169 (*Ligon*). Upon modification, the consultative process for developing substantive injunctive remedies will begin. The process provides that stakeholders, including the Police Unions, will have meaningful input into the remedies and the opportunity to address their members' concerns before the Monitor. *See Floyd v. City of New York*, 08 Civ. 2274 (SAS); *Ligon v. City of New York*, 12 Civ. 2274 (SAS), 2013 U.S. Dist. LEXIS 113205, *47-48 (S.D.N.Y. Aug. 12, 2013) ("It is important that a wide array of stakeholders be offered the opportunity to be heard in the reform process: [including] NYPD personnel and representatives of police organizations; representatives of the parties, such as the Mayor's office, the NYPD, and the lawyers in this case..."). Therefore, the Police Unions' motions to intervene should be denied.

I. The Police Unions Are Not Entitled To Intervention As Of Right Pursuant to Rule 24(a).

To intervene as of right, a movant must have a "direct, substantial, and legally protectable" interest in the litigation. *E.g., Person v. N.Y. State Bd. of Elec.*, 467 F.3d 141, 144 (2d Cir. 2006). "An interest that is remote from the subject matter of the proceeding, or that is contingent upon the occurrence of a sequence of events before it becomes colorable, will not satisfy the rule." *Washington Electric Coop. v. Mass. Mun. Wholesale Elec. Co.*, 922 F.2d 92, 97 (2d Cir. 1990).

The Police Unions first assert that they have a legally protectable interest in this action on the theory that their collective bargaining rights are implicated by the district court's decisions. PBA Supp. Mem. at 13-20; SBA Supp. Mem. at 11-21. However, it is quite clear that the matters described in the Remedies Opinion are not mandatory subjects of collective bargaining, but rather managerial prerogatives under the New York City Collective Bargaining Law.

Specifically, New York City Administrative Code § 12-307(b) provides that the City has the right to:

> determine the standards of services to be offered by its agencies; determine the standards of selection for employment; direct its employees; take disciplinary action; relieve its employees from duty because of lack of work or for other legitimate reasons; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; determine the content of job classifications; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work. Decisions of the city or any other public employer on those matters are not within the scope of collective bargaining, but, notwithstanding the above, questions concerning the practical impact that decisions on the above matters have on terms and conditions of employment, including, but not limited to, questions of workload,

> staffing and employee safety, are within the scope of collective bargaining.

The City's authority in such matters is particularly broad in the context of police work. As the New York State Court of Appeals has observed, "[w]hile the Taylor Law policy favoring collective bargaining is a strong one, so is the policy favoring the authority of public officials over the police." *Patrolmen's Benevolent Association ("PBA") v. New York State Public Employment Relations Board ("PERB")*, 6 N.Y.3d 563, 575-76 (2006). The Second Circuit has also consistently recognized the important interests in the "NYPD's ability both to manage its personnel effectively and to assure the public that it is doing so." *Lynch v. City of New York*, 737 F.3d 150, 163 (2d Cir. 2013). Thus, the establishment and revision of policing policy are generally not mandatory subjects of collective bargaining. *PBA*, 6 N.Y.3d at 571-72 (collecting cases and holding that police discipline is not a subject of collective bargaining).

Because the matters covered in the Remedies Order are part of the City's managerial prerogative, the mere possibility that part of the Remedies Order may one day touch on a matter subject to collective bargaining is wholly insufficient to justify intervention, especially at this late stage of the litigation process. *Sheppard v. Phoenix*, 1998 U.S. Dist. LEXIS 10576 (S.D.N.Y. 1998), is highly instructive in this regard. In *Sheppard*, the City of New York had entered into a consent decree which made significant alterations to the policy regarding use of force against inmates in the custody of the New York City Department of Correction. *Id.* Among the practices altered by the consent decree were "investigation of use of force incidents, employee discipline, disciplinary penalty schedules, assignment/transfer of staff, [and] use of chemical agents." *Id.* at *17.

The unions in *Sheppard* sought intervention in the district court to challenge the ordered relief, citing their alleged interest in collective bargaining. *Id.* at *1-3. Rejecting this argument, the Court denied the unions' motion to intervene. *Id.* at *30. The Court found the unions relied on a general interest in collective bargaining, but failed to identify any collective bargaining provision or rule or regulation regarding collective bargaining. *Id.* at *17. The Court

further noted that the reforms contemplated "concern[ed] the Department of Correction's operations" and were "essentially covered by the management rights provision of § 12-307(b)." *Id.* at *22.

Here, the Police Unions' argument is similarly flawed. The Unions have not cited any specific provisions of the collective bargaining agreement that would be altered by the Remedies Order, nor have they alleged any specific rule or regulation regarding collective bargaining that will not be honored.

The Police Unions' reliance on *City of New York*, 40 PERB ¶ 3017, Case No. DR-119, 2007 WL 7565480 (PERB Aug. 29, 2007), is misplaced. In that case, PERB found that the NYPD's decision to issue new bullet-resistant vests was a mandatory subject of collective bargaining, but only because of its fact-specific determination that the "paramount purpose" of the vests was officer safety. The Remedies Order, in contrast, affects the management and supervision of police officers and the provision of police services to the public, which are core matters for the NYPD's management and a managerial prerogative under the New York City Collective Bargaining Law. As the Second Circuit found in *Lynch*, and as the New York Court of Appeals held in *PBA*, the NYPD must be allowed latitude to manage, organize, and discipline its own officers as it sees fit. The Remedies Order addresses those very processes, and nothing more.

The Police Unions additionally cite *United States v. City of Los Angeles*, 288 F.3d 391 (9th Cir. 2002), for the proposition that "[c]ourts have permitted intervention by unions for the purpose of challenging consent decrees that could undermine the unions' collective bargaining rights." SBA Supp. Mem. at 15. *See also* PBA Supp. Mem. at 10. However, *City of Los Angeles* is inapposite in several respects. In that case, which never proceeded to trial and in which no liability finding had been made, the Ninth Circuit found that the unions could intervene as of right before approval of the proposed consent decree because they had a protectable interest in the merits of the action where "the complaint [sought] injunctive relief against its member

officers." 288 F.3d at 399. Here, in contrast, the Remedies Order imposes injunctive relief solely against the City of New York and not against any individual union member after a trial on the merits and a liability finding. Further, as set forth above, all of the relief granted by the immediate reforms are matters not subject to collective bargaining because they fall wholly within management prerogative.

Although additional remedies may be ordered at the conclusion of the joint remedial process, it is entirely speculative for the Police Unions to claim that any such future provisions will violate their collective bargaining rights under state law. Such remote speculation does not justify intervention. To the extent that *City of Los Angeles* may be read broadly to support union intervention based on speculative future harm, we respectfully submit that the case was wrongly decided. Rather, the well-reasoned decision of the District Court for the Southern District of New York in *Sheppard* is far more persuasive.[1]

The Police Unions also err in their reliance on *United States v. City of Detroit*, 712 F.3d 925 (6th Cir. 2013). That case is clearly distinguishable because the district court's order directly abrogated some provisions in the collective bargaining agreements. *Id.* at 926. Indeed, the Sixth Circuit emphasized that "collective bargaining rights have been impaired, *not just practically, but directly*, by the decision of the district court." *Id.* at 931 (emphasis added).

[1] The Police Unions also rely upon *United States v City of Portland*, No. 12-cv-02265 (D. Or. Feb. 19, 2013), in further support of intervention, which is misplaced. In that case, with no mechanism to collectively bargain upon entering into a consent decree, the Portland Police Unions their sought intervention for remedy and liability purposes. The City of Portland supported limited intervention for remedy purposes only, which the United States opposed. The court granted limited remedy intervention to the Portland Police Unions and deferred decision on liability intervention. Here, unlike City of Portland, there is no need for intervention because the Remedial Order specifically provides for the Police Unions to participate in the remedial process. *Floyd v. City of New York*, 08 Civ. 2274 (SAS); *Ligon v. City of New York*, 12 Civ. 2274 (SAS), 2013 U.S. Dist. LEXIS 113205, *47-48 (S.D.N.Y. Aug. 12, 2013) ("It is important that a wide array of stakeholders be offered the opportunity to be heard in the reform process: [including] NYPD personnel and representatives of police organizations; representatives of the parties, such as the Mayor's office, the NYPD, and the lawyers in this case...").

In contrast, here, the Police Unions fail to support their contention that the immediate reforms in the Remedies Order directly infringe upon collective bargaining rights.

The Police Unions further argue that they have a concrete interest in this action based on reputational harm, because the "Orders finding widespread constitutional violations, including intentional racial discrimination, impose upon them serious reputational harm." PBA Supp. Mem. at 22. The Police Unions, however, cite no authority recognizing such reputational harm as a protectable interest under Rule 24(a). Moreover, this assertion is purely speculative because the District Court imposed liability on the City, not the unions which bear no responsibility for setting the NYPD's policies and practices.

II. The Police Unions Should Not Be Granted Permissive Intervention Pursuant To Rule 24(b).

Finally, the circumstances disfavor permissive intervention for the Police Unions because it would "unduly delay or prejudice the adjudication of the rights of the existing parties." *In re Holocaust Victim Assets Litig.*, 225 F.3d 191, 202 (2d Cir. 2000) (internal quotation marks and citations omitted). Indeed, granting permissive intervention to the Police Unions, and then permitting a potential appeal to move forward, would frustrate the City's efforts with Plaintiffs to bring this litigation to an end.

CONCLUSION

For the foregoing reasons, the Police Unions' motions to intervene should be denied.

Dated: March 10, 2014
New York, New York

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