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United States District Court,
S.D. New York.

Barbara HANDSCHU, Ralph Digia, Alex McKeiver, Shaba OM, Curtis M. Powell, Abbie Hoffman, Mark A. Segal, Michael Zumoff, Kenneth Thomas, Robert Rusch, Anette T. Rubenstein, Michey Sheridan, Joe Sucher, Steven Fischler, Howard Blatt and Ellie Benzzone, on behalf of themselves and all others similarly situated, Plaintiffs,

v.

SPECIAL SERVICES DIVISION, a/k/a Bureau of Special Services, William H.T. Smith, Arthur Grubert, Michael Willis, William Knapp, Patrick Murphy, Police Department of the City of New York, John V. Lindsay and various unknown employees of the Police Department acting as under-cover operators and informers, Defendants.

No. 71 Civ. 2203(CSH). | June 21, 2006.

Opinion

MEMORANDUM AND ORDER

HAIGHT, Senior J.

*1 The plaintiff class has moved the Court for an order “enjoining enforcement of New York Police Department Interim Order 47.” Notice of Motion at 2. The relief sought is cast in the broadest terms possible. The class’s motion papers make no effort to distinguish between which aspects of Interim Order 47 (“Order 47” or “the Order”) may be subject to injunction and which may not.

Having considered the written submissions of class counsel in support of this motion, and those of the Corporation Counsel on behalf of the NYPD in opposition, as well as the oral arguments of counsel, the Court concludes that before it is in a position to decide the motion, additional submissions by counsel are required with respect to one particular aspect of the case. This Memorandum explains why that is so and sets forth further scheduling directions.

Order 47 was issued on September 10, 2004 “by direction of the Police Commissioner,” Raymond Kelly. Presumably the NYPD has been acting in accordance with Order 47’s directions since that time, that is to say, for

about 19 months.

Class counsel make three principal claims in support of their motion to enjoin enforcement of Order 47:(1) the use of photographic and video equipment authorized by the Order cannot be reconciled with and consequently violates the Modified Handschu Guidelines; (2) the Order violates rights secured to class members by the First Amendment to the United States Constitution; and (3) Order 47’s procedures for the retention of video tapes and films violate the Guidelines. The further submissions directed by this Memorandum relate solely to the first of these three claims. To the extent that the other two claims may be regarded as separate from the first, I regard the submissions on them as complete.

I begin with necessary clarifications of two preliminary questions. First, what precisely are the “Modified Handschu Guidelines?” Second, to which NYPD activities do those Guidelines apply, and to which do they not apply? I answer those questions in that order.

First, the Modified Handschu Guidelines are comprised of two elements: (i) the modified guidelines initially proposed by then NYPD, reproduced as Appendix A to *Handschu v. Special Services Division*, 273 F.Supp.2d 327, 349-51 (S.D.N.Y.2003) (*Handschu IV*); and (ii) the NYPD’s adoption of the FBI post-9/11 guidelines for inclusion in the NYPD Patrol Guide, reproduced as Appendix A to *Handschu v. Special Services Division*, 288 F.Supp.2d 405, 420-431 (*Handschu V*). The guidelines set forth in Appendix A to *Handschu V* necessarily form a part of the Modified Handschu Guidelines as I will use that phrase in this Memorandum, since *Handschu IV* made it clear that without the inclusion in the NYPD Patrol Guide of those adopted FBI guidelines, the Court would reject the NYPD’s motion to modify the original Handschu Guidelines. This clarification is necessary because, in the briefs of counsel and their oral arguments, references are occasionally made to “rules” and “guidelines” without specifying which texts counsel are talking about. To reiterate: for the purpose of this Memorandum and the dispositive Opinion to follow, the “Modified Handschu Guidelines” consist of the appendices to *Handschu IV* and *Handschu V*, read together. I will refer to that combined document as the Modified Handschu Guidelines, or simply the Guidelines.

*2 Second, the Guidelines apply to political activity, and to political activity only. Section IV.A. of the original Handschu guidelines provided that the NYPD “shall not engage in any investigation of political activity” except through its designated intelligence unit, and that “such investigations shall be conducted as set forth in these guidelines.” See *Handschu IV*, 273 F.Supp.2d at 331. Section II.A. defined “political activity” as: “The exercise

of a right of expression or association for the purpose of maintaining or changing governmental policies or social conditions.” The modifications initially proposed by the NYPD left this definition of “political activity” unchanged. Accordingly the application of the Modified Handschu Guidelines is limited to the investigation of “political activity,” thus defined. This clarification is necessary because the representatives of one side or the other are sometimes tempted, in an effort to beef up a particular contention, to overstate the application of the guidelines in effect at the moment. That temptation is illustrated by an affidavit Deputy Commissioner Cohen submitted in support of the NYPD’s motion to modify the original Handschu Guidelines. In order to dramatize the necessity of those modifications, Commissioner Cohen suggested that the guidelines inhibited legitimate police investigative techniques with which the guidelines had precisely nothing to do and upon which they had no limiting effect. See *Handschu IV*, 273 F.Supp.2d at 339.

I turn now to Order 47. It is captioned:

REVISION TO PATROL GUIDE 212-71,
“GUIDELINES FOR THE USE OF
PHOTOGRAPHIC/VIDEO EQUIPMENT OF
OPERATIONAL PERSONNEL AT
DEMONSTRATIONS.”

The text of the Order begins with this introductory explanatory paragraph:

Recent modifications to the *Handschu* Consent Decree, along with advancements in and the availability of technology to aid in police operations, necessitates that the procedures governing the use of video and photography by members of the service be updated.

Those procedures are “updated” by the five-page, single-spaced Order 47, whose text is organized under the headings of “Purpose,” “Scope,” and “Procedure.”

On their present motion, class counsel take particular exception to the following provision in the “Scope” section of Order 47:

The use of photographic or video equipment by operational personnel to accurately record police operations and other public activity is appropriate if a permissible operational objective exists. Permissible operational objectives include accurately documenting events, actions, conditions or statements made:

a. during special events, disorder events, arrests, public assemblages or any other critical incident in which such accurate documentation is deemed potentially beneficial

or useful; ...

Class counsel contend that this authorized use by NYPD officers of photographic or video equipment during their attendance at public events cannot be reconciled with Section VIII.A.2. of the Guidelines, a subsection captioned “Visiting Public Places and Events,” which provides in pertinent part:

*3 For the purpose of detecting or preventing terrorist activities, the NYPD is authorized to visit any place and attend any event that is open to the public, on the same terms and conditions of members of the public generally.

Specifically, class counsel read the Guidelines phrase “[f]or the purpose of detecting or preventing terrorist activities” as a limitation upon the Guidelines’ grants of authority to the police to attend and engage in activities at public events in public places. Plaintiff Class’s Main Brief at 10. Order 47 omits that phrase. It authorizes the police, while attending public events in public places, to use photographic or video equipment when the “accurate documentation” of “events, actions, conditions or statements made” is “deemed potentially beneficial or useful.” Class counsel argue that this “far broader assertion of authority” by the NYPD in Order 47 is “clearly inconsistent with Section VIII” of the Guidelines. *Id.*

The NYPD makes a number of arguments in response, including the contention that on a proper reading of the Guidelines and this Court’s prior opinions and orders, “in order to have a violation of the Guidelines, there has to be a violation of the Constitution,” Oral Argument Tr. 37, and Order 47 does not violate the Constitution. Class counsel do not accept that proposition. I intimate no present view on that question and require no further submissions with respect to it. But the Corporation Counsel also argues that police photographing and video taping at public events are consistent with and accordingly do not violate Section VIII.A.2. of the Guidelines:

Section VIII.A.2. thus contemplates police attendance at public events, on the same condition as the public-which would include videotaping the public demonstration-when the NYPD’s purpose is to detect or prevent terrorism. There can be little doubt that the use of video at public events can serve as a deterrent as well as a means of preserving evidence in the

event of an act of terror.

Defendants' Brief at 22. These latter assertions are based solely upon the *ipse dixit* of counsel. They are not supported by affidavits or other evidentiary submissions by responsible officers.

However one may view these contentions, what is startling, and prompts this direction for further submissions, is the total failure of both sides to comment upon a Note in Order 47 which immediately follows the paragraph containing the language from the Order I have quoted. That Note says this:

Pursuant to Modified Handschu Guidelines, the investigation of political activity may only be initiated by and conducted under the supervision of the Intelligence Division. Therefore, members of the service not assigned to the Intelligence Division may not use video recording or photography for the purpose of investigating political activity, without the express written approval of the Deputy Commissioner, Intelligence.

This Note, in short, squarely and specifically addresses the use of photographic and video equipment during the investigation of *political activity*, which is the only police conduct to which the Guidelines apply and with which they are concerned. One would have expected class counsel or the Corporation Counsel or both to say something about this Note. Presumably it was included in Order 47 because Commissioner Kelly or some ranking NYPD officer thought it meant something. But the Court has received no guidance from counsel for either side about why the Note was included in the Order, what it means or does not mean, and what effect it has had or not had on police conduct during the 19 months after the Commissioner issued Order 47. While the Note is directly addressed only to police officers who are "not assigned to the Intelligence Division," the questions that arise are not limited to them. In addition to the more general questions just summarized, the following specific questions are illustrative:

*4 1. Since Order 47 was issued, how many requests has

the Deputy Commissioner, Intelligence, received from "members of the service not assigned to the Intelligence Division" for his "express written approval" of video recording or photographing political activity?

2. How many of those requests has the Deputy Commissioner granted and how many has he refused?

3. What criteria does the Deputy Commissioner apply in granting or refusing such requests?

4. Given the fact that the Order 47 Note refers to the Modified Handschu Guidelines and their application to the investigation of political activity, what criteria do members of the service who *are* assigned to the Intelligence Division apply in deciding whether or not to video record or photograph political activity?

5. What meaning should be ascribed to the phrase "investigation of political activity" as that phrase appears in the Note to Order 47?

This list of questions is not intended to be all-inclusive. But what both parties must do is make further submissions with respect to this Note, which would appear to go to the heart of the matter and concerning which counsel have been strangely silent.

Further factual expositions must presumably come in affidavit form from Deputy Commissioner Cohen or someone else with knowledge of the facts. Defendants are directed to file and serve such evidentiary material and a further memorandum of law on or before July 12, 2006. The plaintiff class is directed to file and serve responsive papers on or before July 26, 2006. These submissions are not to be filed with the Clerk. They are to be filed (together with courtesy copies) directly with Chambers, where the Court will place them under seal. If the Court desires further filings or oral argument, counsel will be advised. I do not exclude the possibility of further expanding the record by discovery or a hearing, but these directions will suffice for the present.

In the interim, decision on the underlying motion is deferred.

It is SO ORDERED.