

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

IN RE CINCINNATI POLICING :
: Case No. C-1-99-3170
:
: District Judge Susan J. Dlott
:
: ORDER ADOPTING REPORT
: AND RECOMMENDATION OF
: MAGISTRATE JUDGE MERZ
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This matter comes before the Court on Plaintiffs’ Motion for an Order Directing City and FOP to Comply with Collaborative Agreement (doc. #165) and the Monitor’s Special Master Report to the Conciliator (doc. #172). The matter was set for an evidentiary hearing before Magistrate Judge Michael R. Merz on January 24, 2005. Before the hearing, Plaintiffs and the City of Cincinnati (“the City”) entered into Stipulations (doc. #196), which Monitor Saul Green approved. Because the Plaintiffs and the City entered into Stipulations agreeing to the relevant facts regarding the City’s conduct, the only questions left for argument at the January 24, 2005 hearing were whether the City’s stipulated conduct amounted to a material breach of the Collaborative Agreement, and, if so, what remedy the Court should adopt. On January 26, 2005 Judge Merz issued a Decision and Recommendation (doc. #200). Judge Merz found that the City had materially breached the Collaborative Agreement and recommended that this Court adopt the Agreement as an order of the Court. The Court agrees with Judge Merz and therefore

ADOPTS his Decision and Recommendation.

I. BACKGROUND

To fully understand the background and context of this case and its current posture, the Court briefly recounts the prior proceedings that have taken place up until this point, also recounted in its earlier order of August 5, 2002. See *In Re Cincinnati Policing*, 209 F.R.D. 395, 397 (S.D. Ohio 2002). Plaintiff Bomani Tyehimba filed suit in this Court on April 30, 1999 against the City and two police officers, in both their individual and official capacities. On December 13, 2000, he moved the Court for leave to file an amended complaint. The Court granted him leave, but instead of filing an amended complaint, on March 14, 2001, the Plaintiff again moved to file an amended complaint. The amended complaint attached to that motion alleged racially discriminatory police practices by the Cincinnati Police Department in violation of the federal and state constitutions and other federal law. Also on March 14, 2001, the Plaintiff moved to certify a plaintiff class and for a preliminary injunction. The motion for class certification sought the appointment of the Cincinnati Black United Front (“CBUF”) and the American Civil Liberties Union of Ohio Foundation, Inc. (“ACLU”) as class representatives; the motion also sought the appointment of Kenneth L. Lawson, Scott T. Greenwood, and Alphonse A. Gerhardstein as class counsel.

Three parties expressed interest in a collaborative procedure to address the issues raised by the proposed amended complaint: the City, proposed counsel for the putative plaintiff class, and the Fraternal Order of Police (“FOP”), whose counsel was representing the two police officers sued in their individual capacity. The City agreed to the participation of the CBUF and the ACLU for purposes of such a collaborative procedure, and these three parties also agreed to

the participation of the FOP. By order of May 3, 2001, the Court established the collaborative procedure contemplated by these parties. The Court also retained the services of Dr. Jay Rothman to manage the collaborative procedure as a special master. On March 25, 2002, the Court referred this action to Magistrate Judge Michael Merz as the special master to complete the negotiations referenced in the Order Establishing Collaborative Procedure and a scheduling order of February 8, 2002.

On April 3, 2002, counsel for the putative plaintiff class, the City, and the FOP reached an agreement to resolve the issues raised by the proposed amended complaint (the “Collaborative Agreement”). This Collaborative Agreement called for certification of a plaintiff class and settled the class claims for injunctive and declaratory relief in the amended complaint attached to the March 14, 2001 motion for leave. Subsequently, the CBUF, the City, the FOP, and the ACLU ratified the Collaborative Agreement.

On April 19, 2002, the Court provisionally certified the proposed class and preliminarily approved the reasonableness of the Collaborative Agreement. In so doing, the Court found that the Collaborative Agreement was not illegal or tainted with collusion and that the negotiations preceding it had been conducted at arms length. The Court also ordered the City to give notice of the proposed settlement to the class. The Court granted for settlement purposes only the motion for leave to amend complaint filed on March 14, 2001. See In Re Cincinnati Policing, 209 F.R.D. 397 (S.D. Ohio 2002).

On August 5, 2002, finding the Collaborative Agreement to be a fair, adequate, and reasonable settlement of the class claims for injunctive and declaratory relief in the amended

complaint, the Court granted the joint motion of all parties¹ for class certification² and approval of the Collaborative Agreement as settlement of the class claims asserted in the lawsuit. The Court described in some detail the principal forms of relief embodied in the Collaborative Agreement and the process by which the Agreement was achieved. The Court reincorporates the following from its August 5, 2002 order:

“The Collaborative Agreement addresses policing in a comprehensive and nuanced manner. It provides five principal forms of relief. First, it commits to the implementation of community problem-oriented policing as the organizing philosophy of Cincinnati policing. This philosophy treats crime and disorder as problems to be solved by government in cooperation with citizens, rather than merely as matters of law enforcement. Among the ways the Collaborative Agreement implements this philosophy are training, research into best policing practices across the country, new commendations, a community relations office, and a protocol for securing appropriate information technology systems. In addition, one paragraph describes

¹The CBUF was originally appointed as a class representative but was subsequently permitted to withdraw from acting as a class representative. The Court determined that given the representations of the CBUF to the Court, the Court could not be assured that the CBUF would represent the class with sufficient zeal. The Court also found that having previously determined that the ACLU would adequately and fairly protect the interests of unnamed class members it could adequately serve by itself as the class representative. In Re Cincinnati Policing, 214 F.R.D. 221, 222 (S.D. Ohio 2003). The Court emphasized that although it allowed the CBUF to withdraw as class representative, such withdrawal did not mean that the CBUF was no longer subject to the Collaborative Agreement since the Collaborative Agreement binds equally all members of the plaintiff class, including the CBUF and its members. Id. at 224-25.

²The class certified consists of:
All African-American or Black persons and people perceived as such who reside, work in and/or travel on public thoroughfares in the City of Cincinnati, Ohio either now or in the future and who are stopped, detained, or arrested by Cincinnati Police Officers or their agents, and citizens of any race who have been or will be subjected to a use of force by Cincinnati police officers and their agents.

specifically the manner in which police officers shall conduct detentions of persons (whom they then release) in the course of investigations. . . .

“Second, the Collaborative Agreement requires the development of extensive data collection systems to enable the empirical measurement of crime, disorder, police officer activity, relationships between the police and the communities they serve, as well as perceptions of these. This data will permit long-term evaluation of the extent to which police practices are working with reference to multiple considerations and criteria. Third, the Collaborative Agreement incorporates by reference an April 12, 2002 Memorandum of Agreement between the City of Cincinnati and the United States Department of Justice. This Memorandum of Agreement sets forth many specific requirements about police use of force, chemical spray, canines, and beanbags, as well as police training and risk management systems. Fourth, the Collaborative Agreement requires the City to create an organization to receive, investigate, and process citizen complaints of police misconduct (the “Citizen Complaint Authority”). This organization will have a paid staff and substantial powers at its disposal to aid investigations.

“Finally, the Collaborative Agreement provides for a system to resolve disputes arising under it and ensure all parties’ compliance with its terms, a system terminating ultimately with this Court. . . .

“. . . The ultimate interest of the plaintiff class is truly the same as that of police officers: assuring efficient and effective policing for all citizens, regardless of race, in an atmosphere of mutual respect [footnote omitted]. A constitutional command prohibiting the use of race in routine policing is at best a very blunt tool with which to bludgeon the problems described in the amended complaint. The Collaborative Agreement, in contrast, is more like a surgical

instrument, designed by persons who intimately know the specific circumstances of Cincinnati to remedy the particular problems confronting it by using the best available science in a spirit of collaborative construction.” In Re Cincinnati Policing, 209 F.R.D. at 401-03.

The Collaborative Agreement provides for the appointment of a Monitor with law enforcement experience to review, report on, and assist with the parties’ implementation of and compliance with the Collaborative Agreement. Monitor Saul Green is an officer of this Court by virtue of his appointment as special master in this case (doc. #104). The Collaborative also provides for the Monitor to employ additional people to help him perform his duties under the Collaborative Agreement. The members of the Monitor Team have been appointed special masters in this case and are therefore also officers of this Court. (Id.). The Collaborative Agreement requires the City and the Cincinnati Police Department (“CPD”) to provide the Monitor with full and unrestricted access to all CPD and City staff, facilities, and documents (except for privileged materials) necessary to carry out the duties assigned to him under the Agreement. (Collaborative Agreement, ¶ 100.)

On November 11, 2004, Plaintiffs filed a Motion for Order Directing City and FOP to Comply with Collaborative Agreement, alleging that, among other things, the City had denied them access to ride alongs and training sessions to which members of the public are routinely given access. Monitor Saul Green also filed a special master’s report to the Conciliator, Magistrate Judge Merz, in which he described a denial of access to the Monitor Team by the City and recommended that the City be found in material breach of the Collaborative Agreement. The matter was set for an evidentiary hearing on January 24, 2005. Before the hearing, Plaintiffs and the City entered into Stipulations (doc. #196), which the Monitor approved.

The Plaintiffs and the City stipulated that, among other things,

- 1) During the Fourth Quarter 2004, the City of Cincinnati denied full access to staff, documents and facilities after receiving reasonable requests from plaintiffs, DOJ and members of the Monitor Team.
- 2) The events alleged in the Plaintiffs' Motion and Reply (Doc. 165, 184) and in the Monitor's Special Master Report (Doc. 172) regarding access to staff, documents and facilities did in fact occur.

(Doc. #196). The Monitor's Special Master Report recounts in detail the way that the City hampered the Monitor Team's effort to fulfill its monitoring obligations. In December of 2003, Monitor Team members met with police officials to review Community Problem Oriented Policing ("CPOP") activities by the Cincinnati Police Department ("CPD"). Chief Streicher requested that the Monitor Team not be present at management training for police supervisors. At a later meeting, Lt. Col. Janke was nonresponsive to the Monitor Team's questions and then went on the offensive, calling a Monitor Team member's question the stupidest question he had ever heard. He also complained about the monitoring itself by challenging the Team's competence, their practices, and the reporting requirements imposed by the Collaborative Agreement. (Doc. #172 at 3-4.)

After these episodes, Monitor Team member Rana Sampson returned to CPD for a previously scheduled ride along in connection with police department activities concerning drug markets. CPD had previously commended the Monitor Team for their on-site visits and encouraged such visits in order for the Team to see the progress being made. (Id. at 7.) As the City has admitted, however, when Sampson arrived for her pre-arranged ride along, Chief Streicher and Lt. Col. Janke proceeded to interrogate her and forbid her from attending the ride along or a meeting at police headquarters. (Id. at 5-6.) Streicher asked Sampson "what are you doing here?" numerous times, followed by heated questioning as to what she thought a drug

market was and what she hoped to accomplish. (Id.) After this repeated badgering, Streicher stated that he did not understand what Sampson was doing in Cincinnati (id.) and instructed her that she could leave the building. When Monitor Saul Green questioned Streicher about this behavior through written correspondence and phone calls, Streicher failed to reply. These facts are admitted by the City through the Stipulations entered into by it and the Plaintiffs (doc. #196). The City has also agreed that it denied Plaintiffs and their counsel access to ride alongs with police officers and denied them access to police academy classes. (Doc. #165 at 9.)

As described above, the City and CPD are required under the Collaborative Agreement to provide the Monitor with full and unrestricted access to all CPD and City staff, facilities, and documents (except for privileged materials) necessary to carry out the duties assigned to them under the Agreement. (Collaborative Agreement, ¶ 100.) As stated previously, because the Plaintiffs and the City entered into Stipulations agreeing to the relevant facts regarding the City's conduct, the only questions left for argument at the January 24, 2005 hearing were whether the City's stipulated conduct amounted to a material breach of the Collaborative Agreement, and, if so, what the remedy for such a breach should be.

II. ANALYSIS

On January 26, 2005 Magistrate Judge Merz issued a Decision and Recommendation (doc. #200).³ Judge Merz explained that the law of contract typically distinguishes a material breach from a lesser defect in performance because a material breach excuses a party from

³The City filed objections to Judge Merz's Decision and Recommendation (doc. #206), and Plaintiffs responded to the City's objections asking for a supplemental evidentiary hearing (doc. #215). The City opposes Plaintiffs' request for submission of additional evidence (doc. #217). The Court agrees with the City that a further evidentiary hearing would not aid consideration of this matter and therefore denies Plaintiffs' request for a hearing.

continuing obligations to perform under an agreement. Judge Merz found that the term “material breach” must be interpreted in the context of the Collaborative Agreement since the parties had agreed that the remedy for a material breach would be that “the Court may enter the Agreement . . . as an order of the Court” (Collaborative Agreement, ¶ 114) rather than the discharge of contractual obligations. Judge Merz explained that given the parties’ understanding of the Collaborative Agreement at the time of its writing, a material breach of the Agreement would be a substantial failure to perform an obligation which is the essence of the Agreement. Judge Merz pointed out that a minor breach such as a delay in the filing of a required report or a failure to acquire required equipment by a particular deadline would not, without more, constitute a material breach of the Collaborative Agreement. Judge Merz found far more serious, however, the incidents between the command staff of CPD and the Monitor Team described above.

The Court finds Judge Merz’s reasoning to be thorough, cogent, and persuasive. The members of the Monitor Team are officers of the United States District Court, appointed by this Court’s order to serve as special masters in this case. (Doc. #104.) The improper conduct of top police officials toward these Court officers is a serious problem deserving careful attention. There may be a genuine difference of opinion as to the efficacy of the procedures in place under the Collaborative Agreement, and miscommunication occurs even between the most well meaning of people, but differences of opinion and miscommunications are very different from the obstructive behavior described above.

The monitoring process is not a minor or tangential part of the Collaborative Agreement. The Monitor and his team serve to review and report on the parties’ implementation of and compliance with the Collaborative Agreement and also to assist the parties in complying with the

Collaborative Agreement. (Collaborative Agreement, ¶ 91.) The Monitor is responsible for regularly conducting compliance reviews to ensure that the parties are implementing and continuing to implement all measures required by the Collaborative Agreement. (Id. ¶ 103.) Conduct that impedes this process is not a minor defect in performance. In the context of the Collaborative Agreement and the duties of the parties and Monitor, denial of access to the Monitor Team of training and facilities by top police staff constitutes a material breach.

In its objections to Judge Merz’s Decision and Recommendation, the City urges the Court to find that the denial of access to the Monitor Team does not constitute a material breach because the City is in “substantial compliance” with the Collaborative Agreement. The City points to paragraph 126 of the Collaborative Agreement for this proposition, which states that “[n]oncompliance with mere technicalities, or temporary failure to comply during a period of otherwise sustained compliance, shall not constitute failure to maintain substantial compliance.” This paragraph of the Collaborative Agreement and its definition of substantial compliance, however, are not related to the issue at hand. The earlier part of paragraph 126 makes clear that this definition of substantial compliance is “[f]or the purposes of this paragraph,” and paragraph 126 deals only with Court-approved early termination of the Collaborative Agreement. Court-approved early termination of the Collaborative Agreement is not before the Court and is entirely irrelevant to the matter at hand.

Likewise, the City points to paragraph 112 of the Agreement, under which a party found by the Conciliator not to be in substantial compliance has sixty days to cure the defect. Again, this paragraph of the Collaborative Agreement and its reference to substantial compliance are not related to the issue at hand. No one moved the Court to find that any party was not in substantial

compliance under paragraph 112. What the Plaintiffs moved for and the Monitor asserted was a material breach under paragraph 114. The latter paragraph does not provide for a period of cure if a breach is found.

The City also argues that Section 241 of the Second Restatement of Contracts should control in determining whether its breach is material. As Judge Merz noted in his Decision and Recommendation, however, the Collaborative Agreement is in essence a contract, and parties to an agreement are free to decide the terms of their agreement and the appropriate remedy in the event of a breach. Because the parties have, in fact, decided on the appropriate remedy should a material breach occur, the severity of the breach of the Collaborative Agreement should be judged with regard to the terms and remedies embodied in the Agreement.

III. REMEDY

The parties to the Collaborative Agreement agreed that should the Court find that any party has engaged in a material breach of the Agreement, the Court may enter the Agreement as an order of the Court and retain jurisdiction to resolve any and all disputes arising out of the Agreement. (Collaborative Agreement, ¶ 114.) It is therefore within this Court's discretion to determine whether the type of material breach of the Collaborative Agreement caused by the City's denial of access to the Monitor Team should lead the Court to adopt the Agreement as an order of this Court.

The Court determines that the conduct described above does indeed warrant this Court's adoption of the Collaborative Agreement as an order of the Court. Not all material breaches would require entering the Collaborative Agreement as an order. This is not the kind of material breach involving a failure to perform a required action that can be remedied by then performing

that action. For instance, the parties have not failed to file a critical document, a violation that could be remedied by a subsequent filing of the required papers. As noted above, the monitoring process is essential to the continued implementation and success of the Collaborative Agreement. Because the kind of material breach that occurred as a result of the City's actions has served to effectively short-circuit the process of monitoring necessary to maintain accountability and compliance, merely granting access again does not serve to fully remedy the breach. The damage to the monitoring process caused by the denial of access must be prevented from occurring again. The Court therefore **ADOPTS** Judge Merz's Decision and Recommendation and **ENTERS** the Collaborative Agreement as an Order of the Court.⁴

IV. CONCLUSION

The parties have made tremendous strides in communication, progress, and understanding during the course of the Collaborative Agreement. Since the January 24, 2005 hearing, the City has agreed to restore full access in accordance with the Collaborative Agreement for its duration, and the parties have agreed to and begun a series of court-facilitated meetings⁵ over the course of sixty days. With the Collaborative Agreement in place as an Order of this Court and the monitoring process thereby secured, policing functions should be helped rather than impeded as the parties may move forward to accomplish the goals set forth in the Collaborative Agreement, assuring efficient and effective policing for all citizens in an

⁴As with the Decision and Recommendation, this order does not address any alleged violations of the Memorandum of Agreement because the Collaborative Agreement specifies a different process for its enforcement by the parties. (See Collaborative Agreement, ¶ 113.)

⁵As with the Decision and Recommendation, this order does not address the City's Motion to Clarify (doc. #177) because the parties have agreed that those concerns will be addressed at the court-facilitated meetings.

atmosphere of mutual respect. The requirements of the Collaborative Agreement as an Order should be no more demanding than they were in the Agreement's prior form because the parties were always under the obligation to work together from the moment they signed the Agreement. The status of the Collaborative Agreement as an Order matters only if a party again violates the Agreement. Future violations and their consequences are entirely within the control of the parties. Needless to say, should any such violations occur, the Court will take all appropriate actions necessary to enforce the Collaborative Agreement. The Court therefore **ADOPTS** Magistrate Judge Michael Merz's Decision and Recommendation and **ENTERS** the Collaborative Agreement as an Order of this Court.

IT IS SO ORDERED.

s/Susan J. Dlott
Susan J. Dlott
United States District Judge