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United States District Court, S.D. Ohio, Western
Division.

Bomani TYEHIMBA, Plaintiff
v.
CITY OF CINCINNATI et al. Defendants

No. C-1-99-317. | May 3, 2001.

Attorneys and Law Firms

Kenneth L. Lawson, for Plaintiffs.

Scott Greenwood, for Plaintiffs.

Alphonse A. Gerhardstein, for Plaintiffs.

Fay D. Dupuis, City Solicitor, for Defendants’.

Michael Harmon, Richard Ganulin, Assistant City
Solicitor, City of Cincinnati, for Defendants.

Donald Hardin, and the Fraternal Order of Police, for
Individual Defendants.

Opinion

ORDER ESTABLISHING COLLABORATIVE PROCEDURE

DLOTT, J.

*1 The Plaintiff’s motions to amend the complaint, to certify a class, and for a preliminary injunction are all pending. The motion to amend the complaint seeks to join two proposed plaintiff organizations and alleges racially discriminatory police practices in the City of Cincinnati. The parties have expressed an interest in collaborating to investigate, analyze, and address the alleged social conflicts expressed by the proposed amended complaint.

This Order, agreed to by the parties and entered pursuant to Fed R. Civ. P. 16(c)(9), Local Civ. Rule 16.3, Fed.R.Evid. 408, and additional terms as set out below, establishes a special collaborative procedure to be utilized by the parties to address the social conflicts alleged in the pleadings before the Court.

The City of Cincinnati and the other Defendants have expressed their opposition to the motion to amend the complaint, their opposition to the Court’s jurisdiction over the amended complaint, their intent to move to dismiss the amended complaint if the motion for leave to amend is granted, and their opposition to the motion for class certification. The Court acknowledges the Defendants’ opposition and finds that the Defendants have not waived any of their objections to the motion to amend the complaint or any other motion pending before this Court. The Court finds, however, that the City has agreed to the participation of the two proposed plaintiff organizations solely for purposes of this Order and the collaborative procedure described below. If at any time during this proceeding the Plaintiff or proposed Plaintiffs move to be declared prevailing parties under 42 U.S.C. § 1988, the parties agree that the entry of this Order will be neutral on that issue. The parties do not waive any argument they may have concerning prevailing party status and claims for attorney fees based on other developments in this case.

The Court recognizes that the City enacted Ordinance No. 88-2001 on April 4, 2001, for the purpose of requiring the preparation of reports for stops and arrests in order to compile data for analyzing the City’s law enforcement practices, and the City now has pending before it a proposal for the Mayor’s Community/Public Safety Forum to address issues of public safety and community relations and a proposal for a vendor to perform a cultural audit of the Police Division and Fire Division in the Safety Department. On April 16, 2001, the Mayor of the City chartered a high-level commission to address the broader issues of racism and economic inclusion in the community.

1. The Court orders a pretrial collaborative of the social conflicts alleged in the proposed amended complaint.
2. The Court shall retain the services of Jay Rothman, and the ARIA Group, Inc., to manage the collaborative procedure.
3. The collaborative shall proceed as follows:
 - a. The proposed amended complaint alleges social conflicts of great public interest to the community. To the extent possible, the collaborative will include an opportunity to receive the viewpoints of all persons in the Cincinnati community regarding their goals for police-community relations. The participants will state their goals for police-community relations; why these goals are important; and how they would achieve these goals (What, Why, and How data). The collaborative

will include an opportunity for dialogue about these responses in structured group sessions. As described below, the collaborative will also include a process for expert analysis of the current practices of the Cincinnati Police Division (CPD) and practices in other communities.

*2 b. What, Why, and How data will be collected from all segments of the Cincinnati community. The data will be collected through various modalities. As set out below, the identity of the participants will remain confidential and will be possessed only by the ARIA Group. The remaining data will be available to the public and be the basis for structured dialogue among members of the Cincinnati community in group sessions. The following group sessions are anticipated but may be altered by the ARIA Group as it deems necessary: (1) minority groups; (2) city officials and police administration; (3) line officers and families; (4) business community; (5) religious, social services, and education; (6) print and electronic media; (7) community councils; and (8) youth. Each group will in public session produce a summary of its dialogue explaining its shared goals, values and proposals, which will be made public and considered by the parties. All group, and structured dialogue sessions will be open to the press. The ARIA Group will endeavor to work closely with the press before such sessions to fully inform it about the collaborative, the goals of the dialogue sessions, and the value of coverage consistent with those goals.

c. The parties, with the approval of the Court, will develop a protocol for the collaborative operation of an expert panel of police experts by May 25, 2001. Nothing herein shall preclude the use of experts that have been used by the Civil Rights Division of the United States Department of Justice. Under the management of the ARIA Group, the expert panel shall collaboratively review current practices of the Cincinnati Police Division and similar practices in other communities and make public recommendations for addressing police-community relations in Cincinnati. The expert panel shall make available to the parties and the public information about the best practices from any and all sources as deemed appropriate by the ARIA Group. The expert panel will be provided with (1) the ARIA Group summary of responses by those contributing data; (2) prearranged access to all personnel and physical work sites; Cincinnati Civilian Police Review Panel, OMI and Internal Investigation Section reports; public records, including nonconfidential discipline and personnel files; and policies and procedures related to the Cincinnati Police Division and other records that are

public records under the Ohio public records statute; (3) copies of all previous reports and studies of police-community relations from 1967 to the present; and any other public material they may deem important to the accomplishment of their task. The lawyers for the parties will not have any *ex parte* communications with the experts. The ARIA Group shall be free to pose questions and solicit responses from the expert panel as the need arises. If the expert panel requires access to nonpublic records, a protocol for accommodating that request that preserves the nonpublic status of those records will be developed by the parties and approved by the Court.

*3 d. Under the management of the ARIA group, the parties intend to negotiate a written agreement including a plan for action, ongoing collaboration, and reconciliation regarding the alleged social conflicts that are the subject of the collaborative. Further, any negotiated agreement must address the goals and values that are identified in the dialogue sessions.

e. If the parties are able to negotiate a proposed agreement regarding the alleged social conflicts that are the subject of the collaborative, the proposed agreement will be presented to the public, to City Council and to the Court, which will receive testimony, if appropriate, from the parties, participants in the dialogue sessions, court experts, and other national experts as to the fairness of the agreement. The staff of the ARIA Group shall not be asked to testify about matters that are protected as confidential. The ARIA staff may be asked to testify generally about the collaborative process. It is anticipated that the openness of this collaborative process and the combination of expert and broad based community input will provide an opportunity for the parties and the Court to create a national and international model for other communities. The parties reserve the right to take any action they deem necessary should the matter return to litigation.

f. Nothing in this order prohibits the ARIA group from concurrently assisting the commission announced by the Mayor of the City of Cincinnati on April 16, 2001.

4. The names and identifiers of all individuals (parties and nonparties) who provide What, Why, and How data to the ARIA Group shall be confidential and kept under seal. The disclosure of this identity data is prohibited by federal law and is not a public record under ORC § 149.43(A). The preservation of the confidentiality of this data is necessary both for the effective implementation of the collaborative in this case as well as to protect the safety and rights of the participants in the process. *See generally Kallstrom v. City of Columbus*, 136 F.3d 1055

(6th Cir.1998) (releasing personal information about law enforcement officers and their families can create security risk and violate their privacy); *Smith v. City of Dayton*, 68 F.Supp.2d 911, 917–19 (S.D.Ohio 1999) (acknowledging the validity of security as a reason to deny access to information). On motion to this Court and for good cause shown, the redacted identity data may be released only to counsel for the parties. These materials shall be produced to counsel FOR ATTORNEYS' EYES ONLY. As used in this Order, "nonparties" includes all persons who are not named in the lawsuit or the proposed amended complaint and all those persons who participate in the collaborative as authorized by this Court. See *Knoll v. AT & T*, 176 F.3d 359 (6th Cir.1999).

5. Pursuant to orders of this Court, the Plaintiff and proposed Plaintiffs (hereinafter "Plaintiffs") and the City shall pay the fees and expenses of the ARIA Group, the expert panel, and any other substantial expenses incurred in this collaborative. An escrow account shall be established at Firststar Bank with the approval of the court for that purpose. The Plaintiffs and the City have each reserved \$100,000 to cover the initial cost of the collaborative. No costs in excess of \$200,000 will be approved until further order of the Court. By May 11, 2001, the ARIA Group will submit a work plan to the Court for approval with service on the parties, including budget, schedule and work products. Neither the City nor the Plaintiffs will be required to pay more than their designated shares of \$100,000 toward the cost of this collaborative unless the City and/or the Plaintiffs consent to pay additional amounts. The ARIA Group will submit a progress report to the Court and the parties on May 25, 2001, and then every thirty days thereafter.

*4 6. The parties agree that all of the statements whether oral or written that are made by participants in this collaborative or in the possession of the ARIA Group will not be used as evidence by any party and that the entire collaborative is subject to the provisions of Fed.R.Evid. 408 and further limited as described in this Order. The parties agree that data or other information collected by

ARIA or received by the parties, by whatever modality and in whatever form, summary or otherwise, is not relevant, competent, material or otherwise admissible for any purpose in any judicial proceeding including the case at bar.

7. All litigation matters in the case at bar and the following cases are tolled until further order of the Court:

Antonio Johnson v. City of Cincinnati, Case No. C-1-99-1063* Matthew Shaw v. City of Cincinnati, Case No. C-1-99-1064 * Mark A. Ward v. City of Cincinnati, Case No. C-1-99-494 Charles A. Wiley v. City of Cincinnati, Case No. C-1-00-267 Lisa Youngblood-Smith v. City of Cincinnati, Case No. C-1-00-434 Elsie Carpenter v. City of Cincinnati, Case No. C-1-99-227 Nathaniel Livingston v. Thomas Streicher, Case No. C-1-01-233 Lasha Simpson v. Thomas Streicher, (re force on 4/14/01)(to be refiled federal court)

* Subject to agreement by Cincinnati Metropolitan Housing Authority ("CMHA") counsel. CMHA counsel shall notify the Court in thirty days whether CMHA will make a good faith effort to mediate this case.

Concurrent with the collaborative procedure and subject to a protocol that will permit limited discovery necessary to the individual claims, the parties agree to make a good faith effort to confidentially mediate the disputes in these cases. All settlements achieved shall be available to the public. If a settlement is not achieved the parties may move to return the case to the litigation docket. Additional cases may be added to this list by further order of the Court.

IT IS SO ORDERED