UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

In re Cincinnati Policing	:	**Case No. C-1-99-3170**
	:	
	:	**Judge Dlott**
	:	
	:	**MOTION BY PLAINTIFFS FOR ORDER DIRECTING CITY AND FOP TO COMPLY WITH COLLABORATIVE AGREEMENT**
	:	
		(Expedited Proceedings Requested)

Pursuant to Fed. R. Civ. P. 53 and paragraphs 97 - 114 of the Collaborative Agreement (CA), the Plaintiff class respectfully moves that this court order the City of Cincinnati to comply with the Collaborative Agreement approved by this court as a class action settlement on August 5, 2002. (Doc. 91).

Specifically, Plaintiffs seek an order directing the City to comply with the Collaborative Agreement and the Memorandum of Agreement (MOA); end retaliation against Plaintiffs; end manipulation of the CA to gain advantage in private litigation; and permit Plaintiffs to attend police academy training classes as observers and permit Plaintiffs and the public to resume opportunities to participate in ride alongs with on duty Cincinnati police officers.

Plaintiffs respectfully request an expedited ruling on this matter by the Conciliator.

MEMORANDUM

This is a class action challenging race discrimination and excessive force by the City of Cincinnati Police Department. The matter was settled and approved by the Court through a detailed Collaborative Agreement and Memorandum of Agreement on August 5, 2002. (Doc. 91). The City of Cincinnati has substantially inhibited compliance in this case. The Court must act quickly to direct the City to comply with the agreement.

A. Noncompliance with Collaborative Agreement

1. Noncompliance with Community Problem Oriented Policing Requirements

a. The Duty Described

The City is violating its duty to implement community problem oriented policing (CPOP) as set out in the CA. Problem solving is the cornerstone of CPOP and the Collaborative Agreement: "The City of Cincinnati, the Plaintiffs and the FOP shall adopt problem solving as the principal strategy for addressing crime and disorder problems. Initiatives to address crime and disorder will be preceded by careful problem definition, analysis and an examination of a broad range of solutions."¶16. As detailed below, the City has failed in its duty to implement problem solving and CPOP.

The CA provides a very clear explanation of these principles:

> ¶20. Community problem oriented policing is one form of police work that seeks resolution of troublesome circumstances in the community. *These troublesome circumstances are framed as problems to solve.* They usually reveal themselves as a form of repeat pattern of offending, victimization, or locations. *First, problems need to be carefully defined*. A useable problem definition requires a description of harmful behaviors and the environments where these behaviors occur.
>
> ¶21. *The second principle guiding community problem oriented policing is that problems are carefully analyzed prior to developing a solution.* Community problem oriented policing is an information intensive strategy that places a premium on data, intelligence, community input, and analysis. The analysis is

designed to reveal critical aspects of the problem that can be altered to effect a reduction in the problem.

¶22. *The third principle is that the police and their partners engage in a broad search for solutions based on the analysis of information.* A law enforcement response is always a possibility, but may not be required. Rather, a range of options is explored, often drawing from the field of "situational crime prevention" that block opportunities to commit crimes and disorder. Effective solutions to problems may require the active participation of and partnership with other City agencies, community members, and the private sector. This implies that for a community problem oriented policing strategy to be effective there must be close police-community relations and the City must support this approach.

¶23. *The fourth principle is that problem-solving efforts are evaluated to determine if the problem has been reduced.* Here again, the use of information technology and analysis is critical to assure continuous improvement. If the problem has been successfully addressed, the police can move on to other problems. If it has not, then more work needs to be done, including a re-analysis of the problem or a search for alternative solutions.

The CA recites how important CPOP is to restructuring police community relations:

¶26. Citizens of Cincinnati have expressed a strong and uniform desire to see greater positive interaction between the police and the public. During the nine-month collaborative process in 2001, the public called for the City to "reinforce and expand community-oriented policing and practice." They have recommended that the City "establish and maintain greater understanding, positive interaction, and communications between the community and the police." They have asked the City to "promote a partnership of shared responsibility for community problem-solving." Citizens want to "develop more trust, respect and acceptance between the police and community." They want to "increase public's understanding of police policies, procedures, duties and roles." The public wants to "foster greater appreciation and support for police through professional and public recognition of outstanding service as well as awareness of the motivations of police officer and challenges they face." Citizens want to "improve communications and foster greater understanding, trust, respect and sensitivity between the community and the police." And the public wants to "increase community accountability and responsibility."

¶27. The Parties, and especially the CPD, understand that fully engaging the community is a fundamental key to effective law enforcement…

> ¶29. It is abundantly clear that the citizens of Cincinnati and their police officials want a two way dialogue about effective and fair policing. Taking a proactive and preventative approach toward informing the public about police operations will go a long way toward improving police-citizen relations and preventing information vacuums that increase friction between the community and the police. The ultimate goal of this Agreement is to reduce that friction and foster a safer community where mutual trust and respect is enhanced among citizens and police.

b. History of City Reluctance on CPOP

The CA imposes duties on the City, the plaintiffs and the FOP to implement CPOP. The first duty was to implement the Community Partnering Program to engage the community in this new initiative. See Amended Plan, Doc. 108. Central to the plan was the establishment of a base, the Community Police Partnering Center, from which to lead the community in problem solving. The City refused to provide any funds to establish the Community Police Partnering Center. The plaintiffs, the FOP, the Greater Cincinnati Foundation, the Andrus Family Fund, and several citizens who had been active with Cincinnati CAN came together and formed the Center. Over five million dollars has been raised from private sources to establish the Center as a non-profit agency headquartered at the Urban League. The Center commenced operations this year and now has eleven outreach workers, an able executive director in former assistant chief Rick Biehl, an engaged and active Board of Directors. The plaintiffs and FOP have representation on the Partnering Center Board. They are actively helping guide the community engagement effort. It is critical, however, that problem solving efforts be pursued as described in the CA in order for the Center to achieve success. The City has failed to do so.

c. Monitor Has Found City in Noncompliance

The CA is monitored by a team selected by the parties and appointed pursuant to Rule 53 by the Court. Saul Green is the Monitor. The Monitor has issued seven quarterly reports since the CA was approved by the court. The City has been under the duties described in this motion for more than two years. The City remains in noncompliance regarding CPOP on these material terms as set out in the Seventh Quarterly Report.

(1) Noncompliance on terms that must be met to provide Problem Solving Capacity.

What follows are excerpts from the last monitor report demonstrating a number of areas in which the city is failing to build problem solving capacity. That is, while the community has created a true capacity for problem solving through the Center, the police department has failed to accomplish reorganization necessary to CPOP. There ahs been no restructuring of the staff, no adequate implementation of technology that supports problem solving and no redefinition of the duties when officers are deployed every day: they must

> p. 66 - Requirement 29(n)
>
> The City shall periodically review **staffing** in light of CPOP. The CA requires ongoing review of staffing rather than a review by a certain deadline. The Monitor will review the CPD's submitted material and report back in the following quarter.
>
> *The City is not yet in compliance with this section of the CA*.
>
> p. 68 - Requirement 29(p)
>
> The City shall **design and implement a system to easily retrieve and routinely search (consistent with Ohio law) information on repeat victims, repeat locations, and repeat offenders**. The system shall also include information necessary to comply with nondiscrimination in policing and early warning requirements.

Assessment

The City is not yet in compliance with this CA provision.

p. 67 - Requirement 29(o)

The City shall review, and where appropriate, **revise police department policies, procedures, organizational plans, job descriptions, and performance evaluation standards consistent with CPOP.**

We suggest that the Parties meet again to discuss these issues using the text of the CA as guidance although we realize the document does not explain every aspect of CPOP. If the Parties remain in disagreement it will be important for each to document their position in writing and submit it to the Monitor for review.

The Parties are not in compliance with this section of the CA.

This noncompliance has dragged on for two years and seriously undermines CPOP implementation. The city is in breach of the agreement. The budget process now underway shows no movement in this area. The City, on information and belief, does not include in the police department budget any provision for substantially increasing the crime analysis capacity of the CPD. Community Problem Oriented Policing (CPOP) is by definition data driven. Problems need thorough analysis in order to be properly framed and properly analyzed under the SARA model that the parties have committed to use. The City has commenced a useful pilot program with the University of Cincinnati to improve its problem solving capacities but a pilot program does not address the obvious staffing deficiencies in the CPD in this area. See AAG Declaration, letter of August 26, 2004 re CPOP implementation and proposal re eliminating hotspots. The City must be ordered to comply in these areas.

(2) Mislabeling Arbitrary Enforcement Efforts as CPOP

The City has engaged in "drug sweeps" and mislabeled these mass enforcement efforts as CPOP. These actions violate the agreement and have been highlighted as inappropriate by the monitor. See pp 59 – 64, 7th Monitor Report:

> "…addressed the [city] views regarding whether the use of sweeps (or police crackdowns) should be the principal remedy to community-identified drug markets. The CPD states that police sweeps are problem-solving, rather than a traditional and oftentimes ineffective tool in closing drug markets, as the monitor suggests."

The Monitor spends considerable effort reminding the City in the report of the basic principles underlying CPOP. The monitor report demonstrates that the City simply does not apply CPOP as defined in the agreement – even now – two years into the agreement!

The City supports CPOP when it uses the label to pursue strategies that result in offenders being arrested and incarcerated. Indeed, some problems are best resolved through arrests. But CPOP also challenges the parties to use community assets – including the citizens that may be viewed as causing some of the problems – as we seek short and long term solutions. Addressing drug sales at a corner without talking to the alleged sellers; addressing annoying youth behavior without talking to the youth; and promoting solutions that emphasize arrest over other solutions that address the causes and roots of problems is not consistent with the CA.

3. Noncompliance with Terms re Citizen Complaint Authority

The Monitor enforces Citizens Complaint Authority (CCA) terms through the MOA and the CA. A professional, competent CCA is central to community acceptance of the CA. At a minimum citizens need to know that the CCA determinations have appropriate weight on discipline. The City has failed to establish whether it has waited

on discipline until the CCA has acted and whether the CCA determinations are given due wait. The City must report to the public on what it has done regarding each of the cases in which the CCA has rendered decisions recommending discipline.

The monitor has noted that even these simple and obvious requirements are not in place at the City. See Seventh Quarterly Monitor Report, p. 30, 78.

The problem with the CCA is deeper. All of the parties need to make it work, not make it fail. City and FOP officials have been publicly critical of the CCA as an organization. This is an organization that the City helped design. Just because it makes findings that occasionally disagree with the findings of the CPD, it should not be attacked as an institution. The CCA is a critical element of the CA and MOA that assures independent review of alleged police misconduct. The CCA must be bolstered by all of the parties and not attacked. To the extent several of the parties have, from time to time, concerns with the workings of this agency; plenty of opportunities exist to collaboratively address such concerns without undermining the reputation of the agency and its director.

4. Noncompliance with Terms re Bias Free Policing

The City has failed to properly evaluate the racial impact of pedestrian and traffic stops. See monitor report pp. 71-75. Some of these issues are addressed through the hiring of Rand. But the parties should be working now to address the problems rather than hide from them. The CA requires bias free policing. The first report on bias in policing was issued last year by independent researchers at the University of Cincinnati. Because it showed disparities of treatment between African American and White Citizens, the City attacked the report. No attempt was made to understand the issue and address it across racial lines with the CA parties. This cannot go on.

B. Ride Alongs and Academy Classes

During the course of this agreement, Plaintiffs or their representatives have participated in ride alongs and attended Police Academy classes as part of their collaborative work. Moreover, members of the public unconnected with the Plaintiffs have had similar access to ride alongs and Academy classes. There are no privileges that apply to ride alongs and Academy classes. The Cincinnati City Manager has now stopped providing access to Plaintiffs in retaliation for Plaintiffs' counsel's participating in civil rights litigation against the City. As a result the plaintiff class has been excluded from MHRT training recently provided to the force. The denial of access to these public sources of information about CA compliance violates the First Amendment and the CA itself. The City should be promptly ordered to resume providing access to members of the Plaintiffs' team.

1. Manipulation of the CA for Advantage in Other Litigation Is Prohibited

Last year the City attempted to prohibit Plaintiffs from referring to the CA in other litigation. That manipulation of the CA to gain advantage in private litigation against the City was prohibited by this court.

> The City next suggests that class counsel must refrain from "referring" to the Collaborative Agreement, or to any part of the collaborative process, in other litigation matters. Class counsel are prominent civil rights attorneys in Cincinnati. As such, they represent clients whose rights have been violated by the police. Unfortunately, such violations continue to occur despite the existence of the Collaborative Agreement. Inevitably, they will continue in the future. The provisions of the Collaborative Agreement go to the heart of how the Cincinnati Police Division conducts law enforcement activities. Because of this, any civil rights actions brought to remedy future civil rights violations will almost certainly "refer" to the collaborative process in some way. Thus, it is ludicrous for the City to suggest that class counsel must forego <u>any</u> reference to the Collaborative Agreement in future litigation. In fact, the City's suggestion is mean-spirited. On one hand, the City has fought vigorously to keep class counsel's legal fees from being paid out of City funds. *On the other, it now wants class counsel to*

> *significantly curtail their legal practices. The Court will not order class counsel to do so.* Class counsel have taken on the overwhelming, and not lucrative, task of implementing the Collaborative Agreement. For this, class counsel should be commended, not punished. *Of course, if the City has a concern about a conflict of interest in a specific lawsuit, it may bring that concern before the Court at the proper time.* Nevertheless, the Court is confident that class counsel's high ethical standards will prevent them from becoming involved in any litigation that might present such a conflict.

Order, 4/7/03, Doc. 120, p. 7 (emphasis added). By denying access to ride alongs and access to training courses, the City is attempting once again to get class counsel to curtail their legal practices. The City is saying, "We will not let you do your job as class counsel correctly unless you stop all litigation against the Cincinnati Police." That is wrong. It is wrong to punish the class; it is wrong to punish the attorneys and it is wrong to punish the civil rights plaintiffs who have damage actions against the City. Moreover, the ploy involves matters to which the public has access, not some secret material that is only available to class counsel because of the CA. The City, therefore, is seeking to use the CA to gain advantage in other litigation. The City must be stopped.

2. Not Allowing Plaintiffs to Review Academy Training Courses is a Violation of Paragraph 29(l) of the Agreement.

Paragraph 29(l) of the CA requires the parties to "review existing courses and recommend any new ones that may be appropriate for the Police Training Academy". This requirement cannot be satisfied if Plaintiffs are not allowed to review CPD training courses. It has been the practice of the CPD to allow members of the Plaintiffs' team to visit their academy training courses. George Ellis, an attorney working with the Plaintiffs' team, has attended such training courses as averred in his declaration. CPD has altered this policy for the express purpose of inhibiting Plaintiffs' ability to enforce the Collaborative Agreement on behalf of their clients. CPD's change of policy with

respect to Plaintiffs' review of training academy classes represents a direct violation of the City of Cincinnati's commitment under Paragraph 29 of the Collaborative Agreement. This Court, therefore, should require the City of Cincinnati to allow Plaintiffs', through their counsel, access to these training courses.

3. Not Allowing Plaintiffs and Their Clients to Go on Ride alongs is a Violation of the Collaborative Agreement

Clearly, it has been the long-standing policy of the CPD to allow citizens to ride along with officers. This policy is expressed in procedure 18.105 of the Procedure Manual of the Cincinnati Police Department. (Declaration of A.A. Gerhardstein, attached). Upon information and belief, a policy allowing civilians to ride along with officers was first implemented by the CPD at least 25 years ago. Paragraph 10 of the Collaborative Agreement states, in pertinent part, the purpose of the Collaborative Agreement as being, among other things, "to resolve social conflict, to improve community-police relationships". Additionally, it states the purpose of the Agreement as being "to foster an atmosphere throughout the community of mutual respect and trust among community members including the police" with the ultimate goal being "to reduce that friction and foster a safer community where mutual trust and respect is enhanced among citizens and police." The City of Cincinnati has violated this commitment by denying access to Plaintiffs' counsel and their clients to go on ride alongs. It is the obligation of the Plaintiffs' counsel to communicate with their clients re the progress made under this agreement and such reporting is comprehensively undermined to the extent Plaintiffs' counsel and their clients are not allowed to review, first hand, the operations of the CPD.

Paragraph 28 admonishes the Parties to take a "proactive and preventative approach toward informing the public about police operations." This requirement cannot be achieved under circumstances in which Plaintiffs' attorneys and their clients are not allowed to ride with CPD officers. Additionally, Paragraph 6 of the Agreement requires the parties to "promote and foster" ongoing cooperation between the Parties and members of the community. This requirement too shall be significantly inhibited if Plaintiffs and their clients are prohibited from going on ride alongs with CPD officers. This is especially true given the fact that no written policy exists supporting the ban on ride alongs. Indeed, it is clear that the City will permit other civilians continued access to ride alongs and that only the Plaintiffs and their clients will be denied such access. Surely this uneven application of a new and unwritten policy will not serve to promote and foster any cooperation between members of the community and the CPD.

Finally, Paragraph 29(f) requires the Parties to "coordinate…and establish an ongoing community dialogue and interaction" between the CPD and members of the community. This requirement too shall be substantially inhibited in the absence of the ability of Plaintiffs and community members to go on ride alongs.

4. The Bans on Access to Ride Alongs and Academy Classes Violate the CA and the MOA

Clearly, these bans have been wantonly and hastily conceived by the CPD for the single purpose of frustrating efforts by the Plaintiffs to fulfill their mandate to their clients as memorialized in the CA and Memorandum of Agreement between the Department of Justice and City of Cincinnati (MOA). The Mayor's recent letter to the Attorney General of the United States (AAG declaration, attached) and the exclusion hereof complained represent the manifest efforts of the City of Cincinnati to

systematically extricate itself from the obligations they have undertaken under both the Collaborative Agreement and the Memorandum of Agreement. This new policy of exclusion clearly represents a step backward in the collaborative process. Moreover, the refusal to allow citizens to ride along with police represents a hasty retreat from a policy of openness that has endured for at least 25 years. Both the new "policy" with respect to ride alongs and that prohibiting Plaintiffs from reviewing CPD training courses, represent specific violations of the aforementioned paragraphs of the Collaborative Agreement. However, they represent much more than just this. These new policies, motivated as they are by animus toward Plaintiffs' counsel, completely violate the spirit of cooperation between the Parties, the Community, and CPD, articulated in the Agreement and so desperately needed in our City today.

It is important to note that no efforts have been made by the City of Cincinnati or the CPD to cooperate with Plaintiffs regarding any concerns they have that may have given rise to these new policies. The position of the City and the CPD has been that this issue should be handled by dispute resolution and they have, therefore, rebuffed Plaintiffs' efforts to address this matter informally. This is unfortunate as it demonstrates the City's growing unwillingness to abide by the terms of the Agreement.

C. The City Is in Noncompliance with the MOA and Improperly Seeks to Abandon the Agreement

1. The City Efforts to Abandon the MOA

On October 5, 2004, the Mayor of the City of Cincinnati wrote to John Ashcroft and requested that the United States Department of Justice release the City form its obligations under the MOA. See letter attached to AAG Declaration. In fact there are

numerous areas where the City is not in compliance with the MOA. These include but are not limited to the Risk Management System (paras 57-66) which has been promised since 1998 (See Gilligan Report) and has yet to be implemented; full implementation of the video camera use at traffic stops; full implementation of the foot pursuit policy; full implementation of use of force policy; Proper implementation of par 46 re IIS and CCA/CCRP jurisdiction; and Proper implementation of par 52 re CCA and 55 and 56 and 82 re CCA recommendations and discipline. The City should not abandon this agreement, it should be ordered to comply.

2. The City is Blocking the DOJ from Monitoring City Compliance with the MOA

For two years, pursuant to the MOA, the DOJ has had full access to those police staff members and records which the DOJ deems necessary for determining compliance with the MOA. The City is now denying that access in violation of both the MOA and the CA.

At the All Parties Meeting of November 18, 2004, representatives of the City informed the Parties that the DOJ would, similar to the Plaintiffs, be excluded from attending any training conducted by the CPD. Additionally, City representatives stated that members of the DOJ team would no longer receive copies of use of force reports that are routinely filed with the Monitoring team (see attached Declaration of George Ellis).

Plaintiffs view this latest posturing towards the DOJ team as yet additional evidence of the City's growing unwillingness to abide by the terms of both the CA as well as the MOA. Moreover, the City's rescission of its cooperation with the DOJ represents yet example retaliation against a party that has challenged its compliance with regard to various terms of these agreements. Through these actions against the Plaintiffs

and DOJ, the City seeks a hollow agreement that has no enforcement. This action by the City represents another material breach of the agreements. .

D. The City Must Recommit to True Collaboration

The CA shall be nothing more than mere words unless the parties work collaboratively to bring these words, and the ideals contained therein, to life. In addition to the inappropriate letter to John Ashcroft seeking termination of the MOA, the City has failed to respond in the spirit of collaboration to other challenges under the agreement. For example:

These are tough issues. They require a City partner that is willing to lead the City in responsible dialogue, not attack those who would challenge the status quo. Such leadership is missing.

Not everything is gloomy. The Plaintiffs and the City agreed on the deployment of tasers in Cincinnati in the hope that this would reduce serious citizen and officer injuries when use of force is necessary. That is good. On the other hand, Plaintiffs want proof that deescalating dialogue is seriously pursued as the first option with citizen interaction and that police officers are not moving to a use of force too quickly. Dialogue between the CA parties related to this issue is also difficult to pursue given the City's penchant for responding to such questions defensively. Such posturing does not assist with this important discussion.

The violations of the CA and MOA, the ban on ride alongs and academy class attendance, and the attempt to abandon the MOA are simply extreme manifestations of the City resistance to the CA and MOA. All of this must stop. Finding that the City is in material breach and ordering compliance is a necessary step.

CONCLUSION

Plaintiffs seek the following order:

The City is in material breach of the terms of the Collaborative Agreement and is ordered to abide by the terms of terms of the Collaborative Agreement;

The City is in material breach of the terms of the Memorandum of Agreement and is ordered to abide by the terms of the Memorandum of Agreement;

The City is ordered to permit Plaintiffs' counsel and members of the Plaintiff class to engage in ride alongs and attend police academy courses;

Respectfully Submitted,

s/ Scott T. Greenwood

Scott T. Greenwood (0042558)
Trial Attorney for Plaintiffs
1 Liberty House
P.O. Box 54400
Cincinnati, OH 45254
(513) 943-2400
(513) 943-4800 fax
law@scottgreenwood.com

s/ Alphonse A. Gerhardstein

Alphonse A. Gerhardstein (0032053)
Trial Attorney for Plaintiffs
1409 Enquirer Building
617 Vine Street
Cincinnati, OH 45202
(513) 621-9100
(513) 345-5543 fax
agerhardstein@laufgerhard.com

s/ Kenneth L. Lawson

Kenneth L. Lawson (0042468)
Kenneth L. Lawson & Associates
Trial Attorney for Plaintiffs
808 Elm Street Suite 100
Cincinnati, Ohio 45202
(513) 345-5000
(513) 345-5005 fax

CERTIFICATE OF SERVICE

I here by certify that on November 18, 2004, a copy of the foregoing pleading was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I further certify that a copy of the foregoing pleading and the Notice of Electronic Filing has been served by ordinary U.S. mail upon all parties for whom counsel has not yet entered an appearance electronically.

s/ Alphonse A. Gerhardstein

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Attorney for Plaintiff