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

IN RE CINCINNATI POLICING, Case No. 1:99-cv-3170

: District Judge Susan J. Dlott
Chief Magistrate Judge Michael R. Merz

DECISION AND RECOMMENDATION

This case is before the Court on Plaintiffs' Motion for an Order Directing City and FOP[1] to Comply with Collaborative Agreement (Doc. No. 165) and the Monitor's Special Master Report to the Conciliator (Doc. No. 172). The City of Cincinnati filed responses to each (Doc. Nos. 168, 175) and the matter was set for evidentiary hearing on January 24, 2005. Prior to the hearing, Plaintiffs and the City entered into a Stipulation (Doc. No. 196)[2] which the Monitor approved.

The factual portions of the Stipulation are as follows:

> 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.
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> 3. The Monitor, in his Special Master Report to Conciliator, stated: "The City's non-compliance with the CA is a material breach of the Agreement…. Therefore, the Conciliator should forward his findings and conclusions to the Court, for a finding that the City has engaged

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[1]Plaintiffs have since made it clear they seek no relief against the Fraternal Order of Police.

[2]Although not a signatory of the Stipulation, the FOP indicated at the hearing that it had no objections to the Stipulation and its interests suffered no harm thereby.

in a material breach of the Agreement." See Doc. 172, p.9.

(Stipulation, Doc. No. 196, at 2.)

At the hearing, counsel for Plaintiffs and for the City limited their argument to the question whether the Court should find the City had committed a material breach of the Collaborative Agreement. Thus although the Plaintiffs asserted many additional breaches of the Collaborative Agreement in their Motion, the parties agreed to limit the question before the Court to the same events on which the Monitor focused. In the spirit of collaboration, they have deferred the other issues raised in their Motion – which are particularized as Compliance Issues (a) through (h) in the Remedial Measures portion of the Stipulation – to a series of facilitated meetings at which the Conciliator will preside; the first of such meetings has already been set for February 4, 2005. The sole question currently before the Court is whether the stipulated events constitute a material breach of the Collaborative Agreement.

The events stipulated to by the parties are as follows:

1. The City has denied Plaintiffs and their counsel access to "ride-alongs" with Cincinnati Police Officers although such access is still being allowed to other City residents (Doc. No. 165 at 9).

2. The City has denied Plaintiffs and their counsel access to Police Academy classes. *Id.*

3. On December 1, 2004, Police Chief Thomas Streicher excluded Nancy McPherson and Joseph Brann, members of the Monitoring Team, from a meeting in which he was to address Police Department management (Monitor's Special Master Report, Doc. No. 172, at 3).

4. On December 1, 2004, at a scheduled two-hour meeting intended to discuss Community Problem-Oriented Policing ("CPOP"), Lt. Col. Janke characterized a question by Mr. Brann as the "stupidest question he had ever heard," criticized the competence of the Monitoring Team, complained about the reporting requirements of the Collaborative Agreement, and eventually terminated the meeting

after one hour. *Id*. at 3-4.

5. On December 3, 2004, Chief Streicher excluded monitor Rana Sampson from a pre-scheduled ride-along, asked her to leave police headquarters, and then declined to respond to Mr. Green's email request for an explanation. *Id*. at 4-6.

The Collaborative Agreement, while designed to create extensive processes for reform of policing in Cincinnati, is at base a contract. All parties agree that it is to be analyzed, interpreted, and enforced in accordance with contract principles. Although the Collaborative Agreement has no choice of law provision, it was made in Ohio among Ohio parties and thus must be interpreted under Ohio law; no special body of federal law is applicable. 28 U.S.C. §1652; *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 2d 1188 (1938). In applying state law, the Sixth Circuit follows the law of the State as announced by that State's supreme court. *Ray Industries, Inc. v. Liberty Mut. Ins. Co.*, 974 F. 2d 754, 758 (6th Cir. 1992); *Miles v. Kohli & Kaliher Assocs.*, 917 F. 2d 235, 241 (6th Cir. 1990). "Where the state supreme court has not spoken, our task is to discern, from all available sources, how that court would respond if confronted with the issue." *Id.; In re Akron-Cleveland Auto Rental, Inc.*, 921 F. 2d 659, 662 (6th Cir. 1990); *Bailey v. V & O Press Co.*, 770 F. 2d 601 (6th Cir. 1985); *Angelotta v. American Broadcasting Corp.*, 820 F. 2d 806 (1987). The available data to be considered if the highest court has not spoken include relevant dicta from the state supreme court, decisional law of appellate courts, restatements of law, law review commentaries, and the "majority rule" among other States. *Bailey*, 770 F. 2d at 604.

During oral argument, the parties cited no purportedly controlling Ohio case law, but, implicitly following the choice of law analysis stated here, argued instead that the Restatement of Contracts supplied the appropriate rule of law and why, under that rule, the breaches were either material or not. That is consistent with the decision of this Court in *Waste Management, Inc., v. Rice Danis Industries*, 257 F. Supp. 2d 1076 (S. D. Ohio 2003), where then-Chief Judge Rice found

§ 241of the Restatement of Contracts had been applied by Ohio courts. *Id*. at 1085, *citing Russell v. Ohio Outdoor Advertising Corp.*, 122 Ohio App. 3d 154, 157-58, 701 N. E. 2d 417, 419 (1997), and cases cited therein.

There is essentially no contest over whether the events stipulated to constituted breaches of the Collaborative Agreement. Mr. Stackpole, counsel for the City, admitted as much during oral argument when he conceded they were "defects" in performance which he said the City was now prepared to correct.

The usual reason in law for distinguishing between a "material" breach and a lesser defect in performance is that a material breach by one party excuses the other party from any continuing obligation to perform its part of the agreement. *See*, *e.g.*, *Midwest Payment Systems, Inc., v. Citibank Federal Savings Bank,* 801 F. Supp. 9 (S. D. Ohio 1992)(Spiegel, J., applying Ohio law); *Livi Steel, Inc., v. Bank One, Youngstown,* 65 Ohio App. 3d 581, 585-86, 584 N.E. 2d 1267, 1269 (1989), citing 5 Corbin, The Law of Contracts 920, 922 , § 977 (1951).

This case is different. Here the parties agreed that the remedy for material breach would not be that the other parties could walk away from the Collaborative Agreement. Rather, § 114 provides:

> Pursuant to the dispute resolution process set out in this Agreement, in the event the Court finds that any Party has engaged in a material breach of the Agreement, the Parties hereby stipulate that the Court may enter the Agreement and any modifications pursuant to paragraph 124 as an order of the Court and to retain jurisdiction over the Agreement to resolve any and all disputes arising out of the Agreement.

In the final negotiations which resulted in the Collaborative Agreement, the Plaintiffs were particularly concerned that the Agreement be enforceable by the Court. The traditional method for achieving that result would have been to enter into a consent decree which would have been an order

of the Court but also interpretable under contract principles. *See United States v. ITT Continental Baking Co.*, 420 U.S. 223, 235-37 (1975), cited by the City at Doc. No. 175, p. 6. The Plaintiffs would have preferred a consent decree, but that was not acceptable to the City of Cincinnati at the time of the negotiations. The Parties compromised on the dispute resolution provisions set out in the Collaborative Agreement in Section VI, ¶¶'s 90-114. That process provides that if there is a material breach, the terms of the Collaborative Agreement can then be made binding on all the Parties by court order.

Under our American system of freedom of contract, parties to an agreement are at liberty to bargain about and agree on the remedies in the event of breach. In that sense, Restatement §241 is suppletive law,[3] available for deciding the appropriate remedy if the parties themselves have not agreed on a remedy for breach. The term "material breach" as used in ¶ 114 must therefore be interpreted in the context of this Collaborative Agreement, and not with respect to an abstract standard of what might constitute a material breach in a different context or when the parties to a contract have not agreed in advance on a remedy for breach. Given the Parties' understanding at the time of its negotiation, a material breach of the Collaborative Agreement would be a substantial failure to perform some obligation which is of the essence of the Agreement, a breach which requires a court-directed remedy to enforce the Agreement. Non-material breaches might be, for example, a short delay in filing a required report or failure to acquire necessary equipment by a deadline when vendors have delayed in their performance. These are the kind of "breaches" of a contract which, when the underlying relationship is intact, all parties expect and overlook.

The Monitor, in his Special Master Report, has recommended that the Court find a material breach and Plaintiffs argued orally that this recommendation was entitled to considerable deference.

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[3]For a general discussion of the concept of suppletive law, see Hart & Sacks, The Legal Process (1994 edition by Eskridge & Frickey) at 31.

Fed. R. Civ. P. 53(g) provides that the court must decide de novo all objections to findings of fact or conclusions of law made or recommended by a master. Thus whether a determination that the breaches is material is a question of fact, law, or application of law to fact, this Court must review de novo the City's objection to the Monitor's materiality conclusion and it has done so.

The Court concludes that, within the context of this Agreement, the stipulated events are clearly material breaches of the City of Cincinnati's obligations. Excluding the Plaintiffs and their counsel from ride-alongs and Academy classes are inconsistent with the City's obligations to collaborate with the other Parties in evaluating police practices.

Much more serious are the incidents between the command staff and the Monitor Team members in early December. At one point in its motion papers, the City characterized Lt. Col. Janke's comment to Mr. Brann that he had just asked the stupidest question Col. Janke had ever heard as "candid expression of frustration." The Court would, on the contrary, characterize it as rude and obstructive. Then on December 3, 2004, Chief Streicher revoked permission for a ride-along by Rana Sampson and literally ejected her from police headquarters.

The members of the monitoring team are all officers of this Court, appointed as special masters by Judge Dlott. Their treatment by the two top officers of the Police Department in the manner just described – which the City has agreed actually happened – cannot be taken lightly. Those incidents alone would make it clear the monitoring team needs the support of this Court which entering the Collaborative Agreement as a court order will give.

Since these incidents occurred, and particularly in preparation for the hearing on January 24th, the Parties have made good progress in getting the collaborative process back on track. In the Stipulation the City has agreed to "immediately restore full access" in accordance with the Collaborative Agreement for its duration. The Parties have agreed to a series of court-facilitated meetings over the next sixty days with an agreed agenda of Collaborative issues needing quick

attention. They have also agreed to "maintain respectful, professional collaborative relations with the monitoring team" (Stipulation at 5), which should prevent a repeat of the events of December 1-3, 2004. The City's concerns about clarification of the Agreement will be part of those meetings, so that the misunderstandings which have reportedly led to Police Department frustration can be addressed. Indeed, it appears that the Stipulation was negotiated in the same good faith and collaborative spirit which led to the Collaborative Agreement in 2002.

When the Collaborative Agreement was approved by the Court, Mayor Luken was asked his opinion of the document. He answered:

> I think it is as previously described a wonderful document. And I believe it might be titled "hope" in the sense that it represents a great deal of hope for me, for our citizens, that we can get to a better day, get to a better level of respect, and accountability and trust in one another. So I think that's a wonderful document. I would only add that I think that the hard part is ahead of us. That is the implementation.

Implementation is indeed the hard part, but it is not impossible if the Parties have in fact recommitted themselves to the collaborative process.

Conclusion

The events stipulated to by the Parties constituted a material breach of the Collaborative Agreement. The Court should adopt the remedy the parties agreed to in the event of a material breach. That is, the Collaborative Agreement should be entered as an order of this Court to prevent any further breaches.

The Court has not addressed any alleged violations of the MOA because the Collaborative Agreement specifies a different process for its enforcement by the Parties. See ¶ 113. This Order does not address the City's Motion to Clarify (Doc. No. 177) because the Parties have agreed those

concerns will be addressed in the court-facilitated meetings.

January 26, 2005.

s/ **Michael R. Merz**
Chief United States Magistrate Judge

NOTICE REGARDING OBJECTIONS

Pursuant to Fed. R. Civ. P. 72(b), any party may serve and file specific, written objections to the proposed findings and recommendations within ten days after being served with this Report and Recommendations. Pursuant to Fed. R. Civ. P. 6(e), this period is automatically extended to thirteen days (excluding intervening Saturdays, Sundays, and legal holidays) because this Report is being served by one of the methods of service listed in Fed. R. Civ. P. 5(b)(2)(B), (C), or (D) and may be extended further by the Court on timely motion for an extension. Such objections shall specify the portions of the Report objected to and shall be accompanied by a memorandum of law in support of the objections. If the Report and Recommendations are based in whole or in part upon matters occurring of record at an oral hearing, the objecting party shall promptly arrange for the transcription of the record, or such portions of it as all parties may agree upon or the Magistrate Judge deems sufficient, unless the assigned District Judge otherwise directs. A party may respond to another party's objections within ten days after being served with a copy thereof. Failure to make objections in accordance with this procedure may forfeit rights on appeal. *See United States v. Walters*, 638 F. 2d 947 (6th Cir., 1981); *Thomas v. Arn*, 474 U.S. 140, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985).