



1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE WESTERN DISTRICT OF PENNSYLVANIA
3 UNITED STATES OF AMERICA

4 Plaintiff
5 vs. Civil Action No. 97-354

6 CITY of PITTSBURGH, et al.

7 Defendants

8 ERNEST WILLIAMS, et al.

9 Plaintiffs
10 vs. Civil Action No. 97-560
11 CITY of PITTSBURGH, et al.

12 Defendants

13 PROCEEDINGS

14 Transcript of hearing commencing on THURSDAY, APRIL 16,
15 1997, United States District Court, Pittsburgh,
16 Pennsylvania, before Honorable ROBERT CINDRICH, District
17 Judge.

18 APPEARANCES:

19 For the Government: By: Steven H. Rosenbaum Esq.
20 Robert Moossy, Esq.

21 For the City of Pittsburgh:

22 By: John Shorall, Esq.
23 Susan Malie, Esq.
24 Jacqueline Morrow, Esq.
25 Kadisha Diggs, Esq.

 For the Fraternal Order of Police:

 By: Bryan Campbell, Esq.

 For Williams, et al. By: Vic Walczak, Esq.
 Tim O'Brien, Esq.

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1 WEDNESDAY MORNING, APRIL 16, 1997

2 THE COURT: Good morning. I appreciate having
3 received the various responses and submissions since the
4 last time we were here in open court and have found them
5 quite useful. There are a number of matters pending which
6 I'd like to dispose of today, and I'll go through them and
7 please let me know if I've missed something.

8 The first is the joint motion of the United States
9 and the City regarding the interpretation of the consent
10 decree.

11 Next is the motion for intervention as of right or
12 permissive intervention under Federal Rule of Civil
13 Procedure 24 filed on behalf of the Fraternal Order of
14 Police.

15 The United States' opposition and request for
16 approval of the consent decree has been filed in response to
17 that together with the attached affidavit of Lou Reiter,
18 R-E-I-T-E-R, and I may be pronouncing that name improperly,
19 who was a former law enforcement official and now a
20 consultant in police matters.

21 The City has also opposed the FOP's motion to
22 intervene and has joined in the brief of the United States.

23 The third matter is the motion of Williams versus
24 City of Pittsburgh, plaintiffs, to consolidate the civil
25 action at No. 96-560 with this case at No. 97-354.

1 To that, we have the response of the United States and the
2 response in opposition by the City.

3 And the last thing I have is the Williams
4 plaintiffs' response to the proposed consent decree together
5 with the affidavit of James J. Fyfe, F-Y-F-E. Dr. Fyfe is a
6 professor of criminal justice at Temple University and an
7 expert on police procedures. The Williams plaintiffs'
8 response is in support of the consent decree and urging the
9 Court to sign it.

10 Are there any other matters pending that I missed?

11 MR. O'BRIEN: If it please the Court, Attorney
12 Timothy O'Brien representing the plaintiffs in the Williams
13 case.

14 Just for the record, there are other motions that
15 are still pending, of course, including the motion for class
16 certification, my motion to amend the plaintiffs' amended
17 complaint.

18 THE COURT: In the Williams case?

19 MR. O'BRIEN: In the Williams case

20 THE COURT: That's 96-560. All right. Let's
21 deal with these in the same order I've listed them. And the
22 first would be the joint motion regarding the interpretation
23 of the consent decree which has been submitted by the City
24 and the United States.

25 Mr. Rosenbaum.

1 MR. ROSENBAUM: May it please the Court, my name
2 is Steve Rosenbaum and I represent the United States.

3 The United States and the City of Pittsburgh and
4 the other defendants in our action took heed of Your Honor's
5 remarks at the last hearing in this matter for us to look to
6 ways to clarify the proposed consent decree, try to address
7 some of the concerns that have been raised at the hearing,
8 particularly by the FOP, and some of the concerns that the
9 Court had identified.

10 The order regarding the interpretation of the
11 consent decree, that we seek to be entered along with the
12 consent decree, serves that purpose. It addresses three
13 issues that had been raised at the earlier hearing.

14 The first issue concerned the anonymous complaints
15 of police misconduct and what would happen with those
16 complaints.

17 The interpretation of the decree that the parties
18 propose would make clear that anonymous complaints that,
19 after investigation, are determined by the Office of
20 Municipal Investigations to be uncorroborated shall be
21 deemed unfounded and then will not -- no action will follow
22 from that determination in terms of discipline, retraining,
23 an assignment to a field training officer, counseling
24 reassignment or transfer. And that those particular
25 complaints and determinations will not factor into the

1 paragraph 21 counts.

2 Your Honor may recall that in paragraph 21, there
3 is a system for identifying officers for review by police
4 bureau supervisors if they had received a certain number of
5 similar complaints over a two-year period or a different
6 number of any kind of complaints over a two-year period.
7 And what the proposed interpretation does is say that the
8 complaints, anonymous complaints determined to be unfounded
9 after investigation, will not serve to reach a count of
10 three similar counts or a count of five unrelated complaints
11 over a two-year period --

12 THE COURT: So that we're clear, if there is an
13 anonymous complaint and it's responded to and corroboration
14 is found, so that the complaint turns into something more
15 than an anonymous complaint by virtue of the corroboration,
16 then it would figure into paragraph 21A and other
17 provisions.

18 MR. ROSENBAUM: That's right.

19 THE COURT: So it's only when the anonymous
20 complaint, after investigation, is found to be unfounded
21 that it will take no part in the disciplinary mechanism
22 envisioned by the consent decree.

23 MR. ROSENBAUM: The disciplinary mechanism or the
24 non-disciplinary mechanism. That's also part of that
25 paragraph.

1 THE COURT: All right. I think I understand that
2 one.

3 MR. ROSENBAUM: The next paragraph of the proposed
4 order addresses the term counsel or counseling that was used
5 in various places throughout the proposed consent decree.
6 And there was, candidly, looking back at the -- some
7 confusion that could have been created because counseling,
8 as the proposed order reflects, can mean different things in
9 different circumstances.

10 What paragraph two of the supplemental order does
11 is identify the circumstances when counseling means a
12 meeting or meetings between an officer and a senior
13 supervisor or supervisor in which the officer's conduct is
14 discussed.

15 And the other circumstance, the other definition
16 of counsel or counseling is a meeting or meetings between an
17 officer and an Employee Assistance Program Substance Abuse
18 or Psychological counselor. And what the subparts of that
19 paragraph do is identify the points in the decree when the
20 term counselor or counsel or counseling refers to the
21 Employee Assistance Program Substance Abuse or Psychological
22 Counseling only. And then the other places in the decree,
23 the term counsel or counseling means either the supervisory
24 meeting, the meeting between an officer and a supervisor, or
25 one of the other kinds of the EAP Substance Abuse or

1 Psychological Counseling as the circumstances warrant.

2 What this said from just clarifying this, what
3 this is responsive to is that there are places in the decree
4 where the police bureau will have to make determinations
5 about whether non-disciplinary action of some type is
6 warranted. And that can include training or counseling and
7 what this paragraph does is say, by counseling in that
8 circumstance, we didn't mean only Employee Assistance
9 Program Substance Abuse or Psychological Counseling. We
10 meant the kind of counseling that occurs between a
11 supervisor and his or her subordinate.

12 THE COURT: Give me an example. Would it be --
13 let's suppose there was an incident involving a citizen in
14 which there was a complaint that the officer was rude.

15 Would counseling include a talk with a superior
16 officer about -- with the officer who was accused about
17 demeanor and behavior on the street?

18 MR. ROSENBAUM: Yes.

19 THE COURT: That would constitute counseling?

20 MR. ROSENBAUM: Right. And satisfy the
21 requirements of the decree. If an officer had three
22 complaints of rude behavior, maybe none of which were
23 sustained, but over a two-year period, that would pop up and
24 the consent decree would require the supervisor to look at
25 those circumstances and do something.

1 One of the things the supervisor could do is to
2 decide that this is most appropriately addressed by me
3 calling in the officer and talking to the officer about how
4 to interact with citizens and in certain kinds of
5 circumstances.

6 THE COURT: Let me ask if there is a necessity in
7 the agreement to record or otherwise memorialize this
8 counseling session?

9 MR. ROSENBAUM: I believe there is at least an
10 implicit sense that that needs to be done. The City is
11 required to maintain all records necessary to monitor and
12 determine compliance with the decree. That's explicit and I
13 would view the hypothetical the Judge identified as one of
14 those circumstance where records should be kept.

15 THE COURT: All right.

16 MR. ROSENBAUM: The third clarification of the
17 decree addresses paragraph 27 of the decree which concerns
18 -- which concerns criminal proceedings containing
19 allegations of false arrest or improper searches or seizures
20 by police bureau officers.

21 This was -- this is in this paragraph one of the
22 events that prompted supervisor review and that is when
23 officers are determined by a court to have falsely arrested
24 an individual or conducted an improper search or seizure.

25 Then the decree goes on to list in the disjunctive

1 several options that are available to the police bureau --
2 discipline, retraining, counseling, transfer, reassignment.
3 And then it says significantly as the circumstances
4 warranted.

5 Meaning that the intent is that a supervisor will
6 look at a situation where a search has been determined by a
7 court to be unreasonable, analyze those facts and determine
8 what needs to be done with regard to the officer. And for
9 example, if the officer lied in order to obtain a search
10 warrant and that's the reason that the evidence was thrown
11 out, that would be a disciplinable event. If there are
12 circumstances where the evidence was thrown out because of
13 problems with the way the testimony was presented, that
14 wouldn't be a disciplinable event, but it might be a
15 circumstance where the supervisor would counsel the officer
16 about how to present testimony in court, what is the most
17 effective way to do that.

18 That was the original intent of paragraph 27. And
19 the interpretation that we're proposing is our effort to
20 make that intent explicit or even more explicit than it was
21 in the original decree.

22 By saying that the phrase as the circumstances
23 warrant includes circumstances of -- circumstances beyond
24 the control of the officer.

25 THE COURT: Let me give you an example and I'll

1 tell you why that did give me pause.

2 I had a case recently where it was a Terry stop.
3 It was my judgment that there was not the reasonably
4 articulated suspicion that is necessary under the law to do
5 the pat down and to retrieve the weapon. I didn't think the
6 officers were morally or any other way wrong. As a matter
7 of fact, they did what I used to teach officers. When in
8 doubt, do whatever is necessary to protect yourself, and let
9 the court worry about the officers who felt they had to
10 protect themselves and they did a pat down.

11 Even though I suppressed in that case, and then
12 the record would show that evidence was suppressed, it
13 didn't seem to me that the officers were culpable in anyway.
14 I mean, we're talking about a very fine distinction in the
15 law where we have the civil law governing conduct and then
16 we have the necessities and the exigencies of a police
17 officer on the street. And it seemed to me that those
18 officers did exactly what I would have taught them to do
19 when I was teaching police officers about how to respond.

20 So, how would this consent decree deal with that
21 kind of a situation? I should point out there was no
22 excessive force or anything. There was officers thinking
23 they had to do a pat down in order to protect themselves.

24 MR. ROSENBAUM: The decree would identify it as an
25 event that or transaction, a decision by the court, that

1 needed to be reviewed at the supervisory level in the police
2 bureau.

3 And in the circumstances you describe, it would be
4 sufficient for the police bureau supervisor to meet with the
5 employee, the officer, and counsel the officer as the term
6 counseling is now or would now be defined and the
7 interaction could be just the interaction, just repeating
8 what Your Honor just described which is we've reviewed the
9 record. It looks to us like you exercised the judgment that
10 you need to have discretion to exercise in determining to do
11 the pat down, and the fact that the court found that there
12 wasn't a proper basis for doing that, you should alter the
13 behavior or you know, maybe there is something that can be
14 identified from the court's ruling that, you know, maybe if
15 you, next time if you do this a little bit differently, the
16 evidence wouldn't have been thrown out.

17 So, it's really just, in that circumstance, a good
18 management technique of giving some direct feedbacks so that
19 the officer doesn't walk away from the event, just knowing
20 that there is a court ruling but maybe not understanding
21 what that means in terms of what's expected of the officer
22 the next time a similar situation arose.

23 THE COURT: All right. So, the consent decree
24 then definitely leaves room for the kind of split second
25 decision-making that an officer has to do on the street and

1 that's my concern. I think it's been a concern expressed by
2 the Fraternal Order of Police and Sergeant Hines.

3 I guess I'm trying to get a sense of this. That
4 when this thing gets implemented, that there is a balance
5 here so that, for example, if we had a search of someone's
6 house or personal belongings with no search warrant and no
7 probable cause, that might result in one action. But if we
8 had a situation, such as I've described, that might result
9 in another type of action.

10 MR. ROSENBAUM: What the decree -- what paragraph
11 27 is intended to do is identify the event or transaction
12 that requires supervisor review. Then leave it to the
13 police bureau supervisors, in the first instance, to
14 determine what the appropriate response is. And then list
15 an array of options, discipline, retraining, counseling,
16 transfer or reassignment as the circumstances warrant.

17 So, it posits with the supervisors and the police
18 bureau the authority to choose which of those -- to review
19 the decision by the court and then determine which of those
20 options is appropriate in the circumstance. Recognizing
21 that counseling may mean simply a meeting between the
22 supervisor and the officer.

23 So, this paragraph is not intended to change the
24 law, the Fourth Amendment law, on search and seizure of
25 false arrests in anyway. It just requires the police bureau

1 supervisors to look at a situation where evidence has been
2 thrown out by a court because the search was unreasonable,
3 seizure was unreasonable, and then determine what that means
4 in terms of that officer's conduct or future actions in the
5 police department.

6 And as I would point out, as identified in the
7 affidavit submitted by James Fyfe, actually, this system we
8 have in paragraph 27 actually provides a mechanism for
9 making law enforcement more effective, and he relates a
10 couple of different examples, situations where officers,
11 perhaps, have a sense of bravado, never wanting to admit in
12 court that they were in any fear for their own well being.
13 And as a result, they were having evidence thrown out.

14 So, there is an occasion for counseling the
15 officers. This isn't a matter of admitting fear. These are
16 what the legal standards are and this is how you testify
17 based on what happened here. And the result of that kind of
18 review and counseling would actually lead to less evidence
19 being suppressed and better police work being done.

20 THE COURT: Frankly, there are not that many cases
21 in which a suppression is warranted under the current state
22 of the law in any event, but it does happen. That's what I
23 was concerned about. That the conduct of the officer be
24 viewed or judged with regard to some standard of culpability
25 as opposed to some mere technical non-compliance with a law

1 that is very difficult to apply.

2 The Terry frisk is probably one of the hardest
3 that we have to apply. And as I say, it requires a split
4 second judgment, but I understand what your position is on
5 it now. And I, knowing that, frankly, I think it's an
6 improvement in the language, and I'm glad that you have
7 submitted this joint motion.

8 MR. ROSENBAUM: Thank you.

9 THE COURT: Mr. Shorall, is there anything that
10 you would like to add concerning the joint motion or any
11 other matter?

12 MR. SHORALL: Thank you, Your Honor. Only that the
13 City joins in the statement of Mr. Rosenbaum, on behalf of
14 the United States, with respect to the joint motion. And
15 also, to inform the Court that the Court's mandate was that
16 the parties seriously and conscientiously examine those
17 issues which were raised before the Court by the FOP and
18 others during this last hearing. And to inform the Court
19 that the parties have undertaken that serious and
20 conscientious review that was requested of them. Thank you,
21 Your Honor.

22 THE COURT: I guess I should say which parties. I
23 see Mr. Campbell sitting there and I don't know whether he
24 feels like a potted plant or not at this moment.

25 But Mr. Campbell, you've heard what's been said

1 about the interpretation of the consent decree. And I guess
2 my question is whether, at least as to the provisions
3 discussed, it obviates some of the concerns that were
4 expressed by you and the FOP earlier.

5 MR. CAMPBELL: On the issue of the anonymous
6 complaints, I think it goes a long way towards addressing
7 what I raised in court and also the contract provisions that
8 apply to anonymous complaints, and really, the past practice
9 that we've had that's been developed.

10 I guess at this point, the Court is still on point
11 one which is the joint motion?

12 THE COURT: Right.

13 MR. CAMPBELL: I guess you'd want to hear from me
14 on the motion to intervene at a subsequent time?

15 THE COURT: Exactly. As to the joint motion
16 regarding the interpretation, it would be my anticipation
17 that you wouldn't have any objection to, if the consent
18 decree were to be amended in that regard which, of course,
19 the Court will be almost bound to do since the parties asked
20 that it be amended, that that would be appropriate.

21 MR. CAMPBELL: I would say on the issues that have
22 been addressed, we can agree that that goes a long way
23 towards answering the questions that we had on these three
24 items.

25 THE COURT: Right. I understand.

1 MR. CAMPBELL: As to the other items, they are
2 still out there.

3 THE COURT: All right. Next, we have the motion
4 for intervention as of right or permissive intervention
5 under Federal Rule of Civil Procedure 24 filed on behalf of
6 the FOP and the response and the responses to that motion.

7 I think the reasons Mr. Campbell sets forth in his
8 motion are fairly self-evident. Essentially, the motion
9 sets forth that the decree directly has an impact on all
10 police officers since it imposes, according to the
11 intervener, new terms and conditions of employment, some of
12 which alter the present collective bargaining agreement, and
13 Mr. Campbell asserts that the FOP's interest in the decree
14 involves common questions of law and fact that have been
15 raised by the parties. That would lead us to the Rule 24
16 intervention.

17 As you know, the United States and the City have
18 responded in opposition to the motion to intervene. So, if
19 it would be all right, Mr. Campbell, I would hear from the
20 United States and the City and then you would be given an
21 opportunity to respond to that.

22 MR. ROSENBAUM: Your Honor, the United States'
23 position on the FOP motion to intervene to the objections to
24 the decree is this.

25 We believe that the Court has an obligation to

1 address the issues raised by the FOP before entering the
2 decree. But that having addressed those issues and make the
3 determination that we believe is appropriate, which is that
4 the decree does not alter the existing collective bargaining
5 agreement or impair collective bargaining rights under Act
6 111 of the Pennsylvania Code, that would lead to the
7 conclusion that the FOP lacks sufficient, a sufficient
8 interest to participate in the litigation.

9 So, this is -- this issue is more matter of where
10 you put the different boxes, but it's not an effort to avoid
11 a court determination on the issues raised by the FOP.

12 THE COURT: I had a question about, usually, when
13 we get a motion to intervene, there is a piece of litigation
14 that's likely to last for a while. Where you have a consent
15 decree, I don't know what you intervene in.

16 Does the FOP want to intervene and become a
17 signatory to the consent decree? I don't think so. So what
18 are they intervening in? Except perhaps this phase of the
19 proceedings where the Court does the due diligence, if you
20 will, the required inquiry as to the appropriateness of the
21 consent decree. And in effect, we have granted what
22 amounted to a right to be heard, whether we call it
23 intervention or not we have.

24 But you see, what are you intervening in once the
25 decree is entered? I don't know how to answer that

1 question.

2 MR. ROSENBAUM: Well, there is some Third Circuit
3 cases that give some guidance in this area. And what the
4 Third Circuit case law recognizes is that in a consent
5 decree setting, you are in something different than the
6 run-of-the-mill cases as the Court's statements recognize.

7 But they divide the inquiry into whether there is
8 an attempt to intervene on the merits of the litigation or
9 an attempt to intervene on the remedy proffered in the
10 consent decree.

11 In a case like this one where the United States
12 does not seek to impose liability on the FOP, the City, but
13 does through its complaint seek to impose liability on the
14 City, the City has the discretion that any litigant would
15 have to decide, weigh the risks of litigation, and the
16 benefits of a system and decide to opt for settlement, and a
17 party that is not going to be held liable or has no risk of
18 being held liable in the litigation can't intervene on the
19 merits to force litigation on the merits.

20 The City has the prerogative, in this case, to
21 decide to settle the litigation. The Third Circuit has,
22 however, recognized that there may be some circumstances
23 where there is a sufficient interest in the remedy to
24 warrant intervention by a party that cannot be held liable
25 in order to be heard as to the remedy. So, I have viewed

1 the FOP's motion as a motion to intervene for purposes of
2 addressing the remedy.

3 THE COURT: Well, you see, that's where I ran into
4 kind of a conceptual problem. Because let's suppose the
5 Court grants the intervention and the Court signs the
6 consent decree. They are not a party to the consent decree.
7 Where does that leave them?

8 It would seem to me that any interest would be
9 extinguished at that point. And further, as you've
10 indicated, under Section 14141 of Title 42, I don't think
11 the FOP could be a party to be sued by the Department of
12 Justice under that statute. Do you agree?

13 MR. ROSENBAUM: Not under the circumstances
14 present in Pittsburgh and probably not in any other
15 circumstance. The statute does talk about a governmental
16 authority or an agent. And so there may be some factual
17 circumstances where there is, as to some issue, there is an
18 agency relationship.

19 We are not seeking, in this case, to impose
20 liability on the FOP. But I think that -- I think what
21 we're talking about probably is whether there is a limited
22 intervention for purposes of being heard on the -- on the
23 propriety of the decree or whether it's more appropriate to
24 address the propriety of the decree by hearing the issues
25 and granting the FOP amicus status to be heard as to its

1 objections and --

2 THE COURT: Which is, in effect, what we've done.

3 MR. ROSENBAUM: That's right.

4 THE COURT: But by calling for what I termed a
5 public hearing the last time and inviting, through the
6 media, the FOP and others to attend, in effect, I felt that
7 they were being given an opportunity not only to be heard in
8 open court but also to submit briefs and arguments which we
9 entertained.

10 MR. ROSENBAUM: We don't have any objection to
11 that being formally designated as amicus status so that it
12 has some more formal recognition than some of the other
13 parties who commented but have not moved to intervene and
14 have not filed any pleadings in the case.

15 As I said, I think the Court is obliged to address
16 the arguments raised by the FOP. But upon determining that
17 the decree does not alter the collective bargaining
18 agreement or impair the state granted collective bargaining
19 rights, that would both serve as a basis for determining
20 that the FOP doesn't have a sufficient interest in it and as
21 a basis for entering the decree.

22 One other aspect that I can think of that might
23 have some bearing on what label you put on the FOP's
24 participation has to do with appeal rights.

25 THE COURT: Yes. I think it would. In essence,

1 when you have a consent decree, there is generally not an
2 appeal because the two parties have fashioned the remedy and
3 have agreed to it.

4 But if you have a party who disagrees with the
5 provisions of the consent decree who is allowed to intervene
6 and then we have an appeal of the consent decree itself.

7 MR. ROSENBAUM: That's right. As opposed to an
8 appeal from a denial of intervention.

9 I think, in this case, we may end up in the same
10 place because, as I've said, the basic issue is do the
11 issues raised by the FOP have any merit. And if they don't,
12 then they are not entitled to intervene and the decree
13 should be entered.

14 And the United States would be prepared to fight
15 that battle under either Ruprecht, we think, and because of
16 the decision of the Third Circuit in the Harris case, that
17 Ruprecht, in these circumstances, it more clearly falls on
18 the side of amicus participation and consideration of the
19 arguments than on the side of the line of intervention for
20 purposes of being heard on the remedy proper and the consent
21 decree.

22 THE COURT: Yes, I did go through each of the
23 paragraphs that the FOP claims -- I'm talking paragraphs of
24 the collective bargaining agreement which, I think, has been
25 referred to as the working agreement between the City of

1 Pittsburgh and the Fraternal Order of Police, Fort Pitt
2 Lodge No. 1, effective from January 1, 1996 through December
3 31, 1997.

4 I went through each of the paragraphs and read
5 what the FOP had to say about it and read what the
6 government and the City had to say about it in response.

7 I'll wait to hear from Mr. Campbell, but I'm
8 having some difficulty seeing that there is any direct
9 violation of the terms of the collective bargaining
10 agreement because if there was, then you would have to
11 consider another question, and that would be a supremacy
12 type issue or a Section Five of the Fourteenth Amendment
13 issue.

14 But at least so far, I am not certain that there
15 is any violation of the collective bargaining agreement.

16 MR. ROSENBAUM: That's our position as we've
17 expressed in the paper we filed which, as Your Honor noted,
18 takes each of the issues raised by the FOP point by point
19 and compares the language in the collective bargaining
20 agreement with the language in the decree to demonstrate
21 there is either no language in the collective bargaining
22 agreement as to some of the complaints raised by the FOP; or
23 where there is, we have carefully crafted a consent decree
24 so the consent decree can be implemented in a way that's
25 consistent with the collective bargaining agreement.

1 THE COURT: All right. Thank you. Why don't we
2 hear from Mr. Shorall, if there is anything you want to add
3 to what the United States has said, and then we'll hear from
4 Mr. Campbell.

5 MR. SHORALL: May it please the Court, the City has
6 nothing further to add.

7 THE COURT: Thank you.

8 MR. CAMPBELL: Your Honor, you raised the question
9 if there is a consent decree, what is there to intervene in.

10 Well, actually, this consent decree states that
11 there is continuing jurisdiction with the Court for a period
12 of five years. Where does our interest come from? It's
13 apparent they felt a need to include a reference to the FOP
14 in this agreement and to state that they did not intend to
15 interfere with our collective bargaining rights.

16 I asked this question under their proposed system.
17 You can have a situation where, if an officer has three
18 complaints within a two-year period of the same nature, the
19 City can, as one of their actions, transfer that officer.

20 Now, the issue becomes what, if anything, can the
21 officer do? Does the officer have any rights? Well, the
22 FOP believes, under the contract, that any transfer that you
23 have can be taken to arbitration, whether it's for the good
24 of the department or for its -- for purposes of manning.

25 Now, let's assume that that officer's transferred

1 and an arbitrator hears the case and rules that there is no
2 basis to transfer him. He should go back to his assignment.

3 Now, what's the position of the City and the
4 government at that point? I mean, are they saying, well,
5 wait a minute. You can't do that. You know, our consent
6 decree says the City can transfer him. You can't undo what
7 we're doing here. This is one of our options. That's one of
8 the things we can do.

9 I'd like to hear from the government as to whether
10 or not that is their position, whether or not we lose our
11 right, under the grievance procedure, to grieve transfers
12 which we do everyday now. The City can attest to that. We
13 have grievances that are going on all the time and some of
14 them are for the, quote, good of the department.

15 In other words, an officer is being transferred
16 because the City feels it's better to move him from one area
17 to another area. The officer has a right to do that. Now,
18 does that supersede it?

19 THE COURT: Perhaps it would be useful to deal
20 with these various objections ad seriatim and ask
21 Mr. Rosenbaum to respond to this issue and then we'll hear
22 some of the other ones that you have.

23 If nothing else, Mr. Campbell, it provides us with
24 a record that we can refer to later as to what the parties
25 intended. And that's, frankly, some of the reason for the

1 dialogue I'm asking the parties to engage in.

2 MR. ROSENBAUM: As to transfers, Your Honor, there
3 are transfers that can be made for the good of the bureau
4 under the collective bargaining agreement, and there are, I
5 believe and I defer to the City for this, temporary
6 transfers that can be made with more discretion for the
7 police bureau.

8 The consent decree, when it talks about transfers
9 or refinements, I'll stick with transfers, again, doesn't
10 dictate that a transfer be imposed in each particular
11 circumstance and doesn't state whether the transfer needs to
12 be on a temporary basis or permanent basis.

13 I believe, and again I'll defer to the City, there
14 may be different rules in the collective bargaining
15 agreement depending on whether it's a transfer or a
16 temporary transfer. And that may affect whether it is
17 grievable by the officer.

18 To the extent that anything may be grieved under
19 the collective bargaining agreement, the consent decree
20 doesn't take away the right to have that grievance heard by
21 an arbitrator.

22 THE COURT: Mr. Campbell, I think, posits the
23 hypothetical that the arbitrator makes an award and the
24 Department of Justice takes the position that under the
25 consent decree, that the award has to be disregarded.

1 MR. ROSENBAUM: It's hard to answer the question
2 in the abstract for this reason, Your Honor. If the
3 arbitrator's responsibility and prerogative is to interpret
4 a collective bargaining agreement, not to interpret the
5 consent decree, and if the decision by the arbitrator is
6 within the four corners of the collective bargaining
7 agreement, then the consent decree does not alter the
8 collective bargaining agreement. But the consent decree
9 does, if the interpretation of what the consent decree
10 requires is the prerogative of this Court and the arbitrator
11 can't enter an award, that is inconsistent with the terms of
12 the consent decree. So, in other words, there may be
13 circumstances where there is a, hypothetically, a violation
14 of the collective bargaining agreement but the City took
15 action that was required by the consent decree. At least I
16 don't think there is on its face. But there is,
17 hypothetically, the possibility of that might exist.

18 I think there is a Supreme Court case from the
19 early eighties called W. R. Grace where that kind of
20 situation arose. The company had obliged itself to handle
21 layoffs in certain ways under conciliation agreement with
22 the city but then had the collective bargaining agreement
23 that obliged the company to handle layoffs in a different
24 way.

25 And where the Supreme Court came out was to give

1 effect to both agreements. The company did the layoffs
2 consistent with the conciliation agreement with the EEOC but
3 then was required to pay back pay and other rights to the
4 employees who were adversely affected and had rights under
5 the collective bargaining agreement.

6 So, at least hypothetically, I don't think we've
7 got any of those situations here, but hypothetically, I
8 think it's possible. I think W. R. Grace teaches how that
9 would be addressed which is that the employee who has rights
10 under the collective bargaining agreement would not bear the
11 brunt of the City's commitments under the Federal Court
12 order but the remedy that may be provided to the officer may
13 be guided by the overriding provisions of the consent
14 decree.

15 THE COURT: See, one of my concerns is that, in
16 part, we are here today because of the failure of the
17 current system to provide systemic change such as would have
18 prevented the necessity for the Department of Justice to be
19 here in the City of Pittsburgh doing this.

20 And I don't want to give a blanket pass on
21 anything that happens through the collective bargaining
22 mechanism if that collective bargaining mechanism would
23 prevent the Court from effectuating the purposes of the
24 Fourteenth Amendment through whatever means.

25 I think then some hard decision-making has to come

1 as to whether some particular aspect of the consent decree,
2 while in and of itself may not seem to be important to the
3 Fourteenth Amendment or some other constitutional right but
4 in the context of the kind of systematic action which is
5 necessary to effectuate rights may be. We often see that in
6 cases to remedy discrimination where there is a lot of kind
7 of picayune little details and any one of them may not sound
8 important. But if the Court is committed to effectuating
9 the broad constitutional guarantees, sometimes they are
10 necessary.

11 I do understand what you're saying in general,
12 though, the collective bargaining process and the right to
13 grieve and arbitrate should just go on without any regard
14 until we run into a collision, if we run into a collision.

15 MR. ROSENBAUM: That's right. Then I think if we
16 have a collision, the FOP's standing and interest to
17 intervene to be heard as a party on that collision would be
18 much different than it exists today when we're in the
19 position of hypothetical theorizing whether something might
20 rise down the road that would create some difficulties.

21 But I agree that the Court, through its powers to
22 enforce the consent decree and the underlying statutory and
23 constitutional provision on which the consent decree is
24 predicated, you know, does have the power to enforce the
25 decree. And there's some case law that we've found in the

1 Second Circuit that addresses the consent decree the
2 government has with the Teamsters, and it talks about the
3 authority of the court to use the writs enacted to govern
4 the conduct of non-parties to the consent decree when that
5 conduct threatens to impair the purposes and the operation
6 of the consent decree after giving that party -- that
7 non-party to the consent decree -- an opportunity to be
8 heard.

9 So, there are mechanisms that exist for the Court
10 to be involved in the collective bargaining agreement and
11 arbitration process, if that should prove necessary down the
12 line.

13 I guess all I'm saying today is we don't have
14 anything that's right in front of us that where we're here
15 suggesting to the Court that the Court will necessarily have
16 to exercise that power.

17 THE COURT: Let's take this thing to where
18 Mr. Campbell, I think, wants to take it. Let's suppose that
19 you -- and I think I'm agreeing with you -- are correct in
20 saying that the collective bargaining process and the labor
21 law of the Commonwealth of Pennsylvania stays in place. And
22 if and when there is ever a collision between that and the
23 effectuation of constitutional guarantee, then we'll deal
24 with it.

25 Mr. Campbell, I think, would say, but where's my

1 chance to be heard, Judge, when that collision comes about?
2 I think he wants some kind of a status here so that if, for
3 example, we had that situation where the FOP member won a
4 right under the collective bargaining agreement through the
5 arbitration process and let's say the City or the government
6 said we can't do that. It's thwarting the purpose of this
7 consent decree and we end up in court.

8 I think that that's the concern that the FOP would
9 have. Would they have rights to be affected and would they
10 have a place before this Court in being heard?

11 MR. ROSENBAUM: I think in terms of the
12 sufficiency of the interest, it would certainly be -- the
13 FOP would certainly and the particular employee might
14 certainly meet that standard when we had a concrete
15 situation.

16 The issue would be one of timeliness, and while I
17 can't bind the government in perpetuation, I can say that
18 the timeliness inquiry and the intervention is a fluid one.
19 It's not simply timeliness from the time the complaint was
20 filed. All that may be relevant.

21 It's timeliness from the time that your interest
22 arose or ripened. And so, if we were in a situation where
23 the City or the United States were contending that an
24 arbitrator award was inconsistent with this -- with the
25 consent decree and we're back before the Court seeking

1 relief, if there was a timely move to intervene from the
2 time that situation arose, then I think you'd have a timely
3 motion and a sufficient interest and the government's
4 position is likely to be much different than it is here.

5 THE COURT: We probably measure the timeliness
6 from the point where that peculiar interest arose.

7 MR. ROSENBAUM: That's correct.

8 THE COURT: I would think that that would be
9 appropriate because the FOP can't anticipate what will
10 happen to the members in the future. So that if and when
11 something does happen that is alleged to be a violation of
12 the collective bargaining agreement, then we could measure
13 the timeliness from that event.

14 MR. ROSENBAUM: Right. This is the point that I
15 had made the last time we were together when I suggested
16 that the analogy to challenge the constitutionality of a
17 statute and where there is on the face a challenge, as long
18 as the Court can determine that to enforce the statute in a
19 constitutional way, the statute will be upheld in response
20 to an on its face challenge. But that leaves either that
21 party raising the challenge or other parties to raise as an
22 applied challenge down the road in specific concrete
23 settings.

24 I think where we are today in terms of entering --
25 entry in the consent decree is a nature of on its face

1 challenge to the consent decree. As long as the consent
2 decree can be implemented in a way that does not alter the
3 collective bargaining agreement or impair collective
4 bargaining rights, then I think that the consent decree can
5 be, quote, upheld which means entered with everybody
6 recognizing that over the course of the lifetime of this
7 consent decree, there may be specific occasions where the --
8 where the assessment of the relationship between the
9 collective bargaining agreement and the consent decree is
10 different in kind because we've got a concrete setting in
11 front of us.

12 And then I think that would entail both a judgment
13 at that time about who has the right to intervene and be
14 heard about that specific conflict, and a ruling as to that
15 specific conflict about what the consent decree means in
16 relation to the collective bargaining agreement.

17 THE COURT: I think what you've just said has been
18 a great help to me. Intellectually, there is a question of
19 whether the employee unit has any say so where it's not
20 liable and where the City of Pittsburgh has the legal duty
21 and constitutional duty to operate the police department in
22 accordance with the Constitution.

23 So, as -- in terms of proposing the consent
24 decree, while they may be heard, it was bothering me to
25 think of the employee group as an intervener. But what

1 you've said clarifies for me, at least, the notion that this
2 group if it were directly affected by the implementation of
3 the decree should have some right to be here. So it's one
4 thing about what goes into the decree, that may be a city
5 prerogative or at least it's more clearly so.

6 But when it comes to a question of implementation,
7 then I think we have an actual injury or claimed injury that
8 should be heard or at least there should be a forum for it
9 to be heard. I think what you're saying that that could be
10 done on a case-by-case basis. If we did not allow that
11 intervention, there would still be that opportunity.

12 MR. ROSENBAUM: That's right. I'm saying that the
13 denial of intervention at this time would not preclude
14 intervention at a later date to address a specific
15 controversy by implementation of the consent decree.

16 THE COURT: All right. Mr. Campbell, I know we
17 kind of went off in a different direction from what you were
18 talking about.

19 I was trying to get a sense for protecting the
20 rights of the people that are in the collective bargaining
21 unit. At the same time respecting the City's prerogative to
22 fulfill its duties, I don't want to do anything that's going
23 to interfere with the City's initiative in getting this
24 consent decree effectuated.

25 MR. CAMPBELL: Well, I think if the Court looks at

1 the paragraphs that we've raised and the items, we haven't
2 tried to really tread on the areas that are strictly
3 management rights. We didn't challenge the whole concept of
4 this consent decree.

5 I think, what we did, we attempted to challenge
6 them in the areas where we feel we have collective
7 bargaining rights.

8 Now, let me just pose another scenario and see how
9 the parties would react to this because to me, this is the
10 key to our complaint against this proposed decree.

11 There is a term that's used on certain complaints
12 that they will be found not resolved. And if you have three
13 similar type complaints that are not resolved within a
14 two-year period, the City is to take certain action.
15 If you have five of any type that are not resolved, the City
16 is to take action. That is -- this is the agreement between
17 the government and the City.

18 As far as the FOP is concerned, implicit in this
19 is even though there has been no finding, you're being found
20 guilty of something because they are sending you back for
21 retraining. They are putting with a field training officer.
22 They are going to transfer you. They are going to reassign
23 you.

24 Now, let's presume the FOP, in exercising our
25 collective bargaining rights under Act 111, seek to remove

1 that as one of the standards that OMI can find. In other
2 words, it's all are nothing. You're either innocent or
3 guilty of the charge. There is no not resolved.

4 In other words, we can't decide one way or the
5 other. In other words, the officer is saying, either you
6 tell me that the evidence isn't sufficient, or if you think
7 it's sufficient, give me a right to be heard and have it
8 determined by some neutral party whether or not I did what
9 I'm accused of.

10 I believe it's the feeling of the majority of the
11 Pittsburgh police officers that for the period of five years
12 that this is in effect, that they would like the right, when
13 they are accused, they'll stand before their accuser, and
14 they will let somebody hear their case, and they will let
15 them determine it. And if they determine that they did
16 something wrong, then that will be the basis for taking
17 action against them, not because the matter ends up being
18 not resolved.

19 Well, we really couldn't say that you did it, but
20 we're going to send you back for retraining or we're going
21 to transfer you out of the detective division. We're going
22 to put you back on the street. To the police, this is a
23 punishment.

24 Let's assume under Act 111, which provides that
25 the arbitrator can grant whatever the employer can do

1 voluntarily, so the City voluntarily, in theory, could
2 eliminate this finding of not resolved and make it all or
3 nothing. You are either innocent or guilty of the charges.

4 Now, at this point I think this takes away the
5 government's early warning program. In other words, where
6 officers aren't really being punished, but we're sending
7 them for retraining and we're going to reassign them on the
8 basis that there is a trend developing here.

9 It's really punishment without any due process
10 rights as far as we're concerned.

11 Now, assume an arbitrator says that. Would the
12 government and the City come in and say wait, and say he had
13 no power to do that.

14 THE COURT: It's possible.

15 MR. CAMPBELL: That's where they are taking away
16 our collective bargaining rights.

17 THE COURT: That's possible, too. Now, we're into
18 the affecting constitutional rights and what is necessary to
19 do that.

20 What the experts have opined is that in most
21 police departments, the acts -- excuse me. I've got a
22 terrible cold -- that give rise to the citizen complaints
23 are generally engaged in by very few officers but they
24 generate huge numbers of complaints. The City becomes
25 responsible, as the municipal entity, or can if it fails to

1 take action because of that. And one of the techniques for
2 dealing with it is, in fact, identifying early on people who
3 have a high incidence of complaints, even if they aren't
4 found to be guilty and then doing something about it.
5 That's this whole notion of early warning.

6 The cities that have done it, according to the
7 experts, have found that they have been able to reduce both
8 generalized complaints of misconduct and specific complaints
9 of misconduct as to that officer.

10 Now, that's why we're here. We're talking about
11 responsibility of the City to do something about what the
12 Department of Justice says is a pattern of wrongful conduct
13 which the Department of Justice claims and the City, again,
14 that the City didn't effectively address.

15 MR. CAMPBELL: But we're willing to go a step
16 further. But in effect, the government and the City is
17 telling us we're not permitted to do that.

18 In other words, our position on this is, we don't
19 believe that this pattern exists. We don't believe that
20 there are that number of officers that are out there, and we
21 want to prove it by actually giving them a right to have the
22 case heard and have a determination made whether or not they
23 did what they are accused of, or they are innocent of what
24 they are accused of. If they are guilty with progressive
25 discipline, they'll be off the job. If there are officers

1 that are out there everyday abusing people, violating their
2 rights, we're not here to protect them.

3 But on the other hand, don't take some officer,
4 make an accusation against him, and say, well, we can't
5 prove you did do it, but we're going to hold it against you.
6 You know, we have to protect these officers from people
7 making wild accusations.

8 I mean, I have a police report I can make
9 available to the Court. I don't want to go through the
10 whole detail -- because it involves a minor -- using the
11 names. But basically, what was involved in this case, and
12 it's taken place since this litigation started, is this is
13 an officer that's in the COPS (spelled phonetically) program
14 and his idea is to work with neighborhood groups and it's a
15 new concept and it's apparently working.

16 A number of parents come to this officer and say
17 there is an eleven-year old who is bullying, who is beating
18 up everybody in the neighborhood. He's beating up every
19 little kid that gets off the school bus. He's terrorizing
20 the neighborhood.

21 Now, the officer goes to the home to talk to the
22 parents to see if they can control the boy, or they can do
23 something to see that he's not terrorizing these kids at the
24 bus stop. And the father comes down -- and well, I won't
25 use the language he uses, but he was using foul language on

1 the officer, telling him he had no right to be there, that
2 he had no reason to be looking into the behavior of his son,
3 to mind his own business, and then he adds, by the way, what
4 is your badge number, he said, because I'm going to file a
5 complaint against you and you know what complaints can do.

6 You know the veiled threat is, if you come around
7 here and bother us, I'll file complaints against you. And
8 if you get enough complaints, then we'll see if you remain a
9 COPS officer here. I'll get your job.

10 Now, that's the reality of what the officers have
11 to face. I'll make that police report available to the
12 Court. I'll make it available to the parties, but you have
13 to understand from the point of view of the police officer,
14 they can't go out there and do their job with this kind of
15 threat hanging over their head.

16 THE COURT: What you pose is a possibility, and I
17 can see where there could be some concerted action on the
18 part of citizens to frame an officer by filing unwarranted
19 complaints, but I doubt whether that situation has arisen.

20 And the only thing I can say is that the City's
21 interest would be as strong as the police officer's interest
22 in protecting against that kind of unfounded conspiracy
23 against police officers. So, the City would have no
24 incentive not to try to keep effective law enforcement.

25 MR. CAMPBELL: Yes. But what I'm suggesting is,

1 given a complaint like that, if that person filed that, that
2 would come under the heading of not resolved. It's a
3 swearing contest. It's the officer's word against this
4 individual's word. This is a conversation that takes place
5 between two individuals. There is no third party present.
6 So, that's a not resolved. That officer has to walk away,
7 under this plan, knowing that's strike one. He's got strike
8 one against him. He has no way to ever get that out of his
9 file for the rest of his career. That stays with him even
10 after he leaves the job according to this consent decree.

11 That's why what we're saying is if during the
12 period of this consent decree, these officers should have
13 some right to get these things resolved, they shouldn't be
14 stuck with a not resolved in their file. They are going to
15 add up over the years. There can be no merit to it, and
16 they are going to be pursued.

17 THE COURT: I'm not sure that's true. The experts
18 say that there is a probability -- I'll get to the word -- a
19 causal, causal connection between the number of complaints
20 and the potential that the officer is involved in this
21 conduct. If that were true, we wouldn't keep arrest records
22 for lifetime history of people who get arrested. There is a
23 presentence investigation report that I get that doesn't
24 have the person's arrest record from juvenile, from before
25 they were 18 years old right up until the time that they are

1 in front of me in court. That's because people have
2 established some causal connection and as the officers will
3 often say, well, this person has been running through the
4 rain drops for 22 years and he finally got nabbed.

5 So, the point is, at least from what the experts
6 say, there is some effective usage of the complaint
7 incidents and that's why the records are kept. It may be
8 that some of the complaints were unfounded but that is the
9 problem. I don't see that it's a whole lot different from
10 the arrest records that citizens gets that go with them for
11 life.

12 MR. CAMPBELL: Well, you can go to court and get
13 that expunged.

14 THE COURT: Not necessarily, not easily.

15 MR. CAMPBELL: Well, it can be done but what they
16 are saying here, effectively, an officer can never get his
17 record expunged. He doesn't have the right a citizen has.

18 THE COURT: All right. Well, I'd like to hear
19 what the government has to say as a response to that, if
20 there is any. It might be that there isn't.

21 MR. ROSENBAUM: Just a couple of things to
22 highlight, Your Honor, in response. As the Court noted,
23 both expert affidavits, Lou Reiter and James Fyfe's
24 affidavits, address the issue of early warning systems and
25 address the reason why major metropolitan police departments

1 and major police organization have suggested that early
2 warning systems be used and why it's appropriate to take --
3 for police management to look at officers who are generating
4 substantial numbers of complaints, whether or not they are
5 determined to be well founded. Because if there are
6 officers who get a series of similar complaints over a
7 period of time or a substantial number of complaints over a
8 period of time, they are worth looking at.

9 Now, the decree, when there is not a finding that
10 the -- a cause finding in response to the complaint, the
11 decree does not require that that any discipline be imposed.

12 THE COURT: That's what I thought. It does require
13 that the records be kept of this complaint.

14 MR. ROSENBAUM: It requires that the records be
15 kept and it requires, like our discussion earlier about
16 paragraph 27, when a court finds that there has been an
17 unreasonable search and seizure. Similarly, when there are
18 three similar complaints over a two-year period or five of
19 any kinds of complaints over a two-year period, that is an
20 event that requires police management to take a look at the
21 officers and the complaints and the circumstances and decide
22 what kind of non-disciplinary action may be warranted.

23 So, it is -- there is a uniform trigger but the
24 assessment of that individual officer and the kinds of
25 complaints that were filed and what lie -- what lies behind

1 a finding of not resolved are all supposed to be assessed by
2 the police bureau supervisors before deciding whether
3 remedial training assignment to a field training officer,
4 counseling, transfer or reassignment is appropriate.

5 What Mr. Campbell does is probably what I would do
6 in his shoes is try and create a parade of harms and take
7 this officer, who is clearly not culpable of anything and
8 was set up by the complainant, and posit that the police
9 bureau is going to take the most drastic action, not
10 disciplinary, and count against that officer.

11 That's not -- the decree is not designed to have
12 that happen. And the decree is simply designed to give
13 management the information it needs and the tools it needs
14 to identify officers who may have problems that can be
15 addressed through non-disciplinary mechanisms. But it does
16 not require that any sort of -- it's not a sentence
17 guidelines approach to all of this. It still rests with the
18 discretion of the police supervisors.

19 But as our experts note and as we believe, this
20 kind of mechanism is critical to giving the police
21 supervisor the information they need to make judgments and
22 to try and solve problems before they get serious and to
23 require that the police supervisors do just that.

24 The collective bargaining agreement does not
25 define the categories of determinations that the City can

1 use in its complaint process. They have been in existence
2 for sometime. The collective bargaining agreement, as we
3 identified in our papers, has certain requirements as they
4 relate to what are called unfounded complaints and certain
5 rights that adhere to the officer to grieve cause findings
6 when discipline is imposed.

7 But the bargaining agreement itself does not
8 address, except in this limited area, how the City
9 investigates complaints and what categories of complaints,
10 categories of disposition that the City can use.

11 THE COURT: All right. Mr. Campbell, there are
12 probably other sections you want to deal with. I'm not sure
13 that that explanation was entirely satisfactory, but at
14 least there is some indication on the record of how the
15 Department of Justice views this consent decree. Unless I
16 hear something to the contrary from the City, I'll assume
17 that the City agrees with that interpretation.

18 MR. CAMPBELL: Your Honor, some of the -- one of
19 the other matters that has been raised, and it's my
20 understanding that this is a matter of state law -- and that
21 is that officers must give recorded statements. And I don't
22 believe, without someone's consent, you can tape record a
23 statement that they give under these circumstances. We've
24 raised that issue. It's permissible and I know it's done a
25 lot of times in private enterprise where you want to tape

1 somebody, you ask their permission and you get it on the
2 tape. But we don't feel an officer can be compelled to do
3 that.

4 Now, the government and the City have taken the
5 position that this is legal but we feel it's not legal.
6 We're saying it can be done if the officer consents to it.

7 Another problem we also have, and we've raised
8 this, and the parties don't want to seem to address it is
9 the conflict of interest that we feel exists between the
10 City Law Department. In the sense that the City Law
11 Department is also in charge of -- the head of the City Law
12 Department is in charge of not only the law department but
13 OMI.

14 And to me, just on the face of it, it smacks of a
15 conflict of interest. And especially in the area where we
16 have litigation and the City might determine that they are
17 going to settle this litigation. Now, the officer may be a
18 party to the litigation, and as far as he's concerned, he's
19 not going to settle it at all. He's willing to go to trial.

20 But because the City wants to settle it, the
21 litigation goes away and then the head of the City Law
22 Department, who's just decided to settle that case, now, in
23 the capacity of head of OMI, is going to discipline the
24 officer. That's clearly a conflict of interest.

25 The party who makes the decision to settle the

1 litigation can't turn around then and be in charge of the
2 disciplinary procedure that's going to take place against
3 the officer.

4 I don't know why this has ever happened. It used
5 to be that the Office of Professional Standards or OPS,
6 whatever it was, answered directly to the mayor. The person
7 who has the ultimate responsibility for running the City,
8 and we've raised this issue at both the City and the
9 government. We feel what's going to happen is, somebody is
10 going to be punished or terminated, and we're going to raise
11 this issue, and we're going to get the matter overturned.
12 We are just raising it now and we hope that they correct it.
13 There is no need for it to exist, and I'm putting everybody
14 on notice that it is going to be raised if discipline action
15 is taken against somebody.

16 THE COURT: Well, even within the same situation
17 where there is sufficient bifurcation of adjudicative and
18 investigative responsibilities, you can have that situation
19 including under Pennsylvania law. Pennsylvania law frowns
20 upon the same body acting as both prosecutor and
21 adjudicator. But if there is a sufficient distance between
22 the two, it may be proper.

23 Now, what I'm gathering here is that the gravamen
24 of your complaint is with the City Law Department because
25 you said it would be okay if it was the mayor but yet, both

1 are in the executive branch of the City, and the gravamen of
2 your complaint is a distrust or whatever of the City Law
3 Department.

4 What I'd be more interested in is whether the
5 adjudicative body of OMI has a sufficient independence from
6 the City Law Department or the executive branch, if you
7 will, that it could be considered a place where a fair and
8 impartial hearing could be conducted.

9 MR. CAMPBELL: Well, it can't be when who is the
10 head of the law department is also the head of OMI.

11 THE COURT: But nobody from the law department
12 sits as one of the deciding members of the OMI, as I
13 understand.

14 MR. CAMPBELL: No. Everybody in OMI, they answer
15 to the person who is the head of the law department. In
16 other words, whoever is the head of the law department at a
17 particular time is the head of OMI. That's the person that
18 the head supervisor there answers to. That's my
19 understanding of how it works and to me, I agree with you.
20 They should be independent especially in light of what they
21 are -- the expanded powers they have under this consent
22 decree.

23 THE COURT: Well, if the citizens, at least some
24 of them, have their way this next election, there will be an
25 entirely different mechanism. I don't know what's going to

1 come of that.

2 MR. CAMPBELL: Actually, that mechanism isn't
3 designed to replace OMI.

4 THE COURT: Well, I don't know.

5 MR. CAMPBELL: They haven't shown any decision to
6 handle day in and day out complaints about police officers.
7 They want to save their powers for the spectacular case or
8 the big case.

9 THE COURT: Well, I don't know but you see, it's
10 not at all uncommon for an entity, which is the employer of
11 an employee, to have the responsibility and duty to settle a
12 lawsuit and then have to deal with the matter of the
13 disciplinary action, if any, against the employee
14 separately.

15 Let's take, for example, the many corporate
16 entities that we have where an employee is charged with
17 sexual harassment or some violation of Title 7. The company
18 has entirely within its prerogative to assist the situation
19 and to decide to settle the case, and that's entirely
20 separate of what action, if any, it takes against the
21 employee. It may be that it takes none. That the case was
22 settled for other reasons and not because they believe it
23 was guilt. So, I don't think you can remove the prerogative
24 of the agency of government, which is the City, to settle
25 those cases that the City believes are appropriate to be

1 settled.

2 MR. CAMPBELL: No. No, I don't disagree with
3 that, Your Honor. But what I disagree with is that the
4 person who settles that case makes that decision, then puts
5 on another hat and sits in charge of an investigation of the
6 police officer.

7 Now, I've suggested to the City there is an easy
8 way to resolve this. The bar association, for example,
9 attorneys will take a situation where there is potential
10 conflict of interest and give you an answer to it. I would
11 suggest the City do it because if it's sometime down the
12 road, it's not done and somebody raises that, the City is
13 going to open themselves up to great liability as far as I'm
14 concerned.

15 THE COURT: That, I think, is the kind of
16 fine-tuning that I wouldn't be in a position to effectuate.
17 I mean, it's not really a part of the consent decree. The
18 consent decree assumes the existence of the OMI. The
19 existence is an effective mechanism to effectuate the
20 purposes of the consent decree and another interest, is it
21 fair. Is it a fair way for an officer to be heard? From
22 what I've heard, it is.

23 MR. CAMPBELL: Well, I'm making this argument as
24 much to the parties as I am to the Court because I mean,
25 it's been raised and I understand it's not for you to

1 determine today.

2 But I think it's a problem that, you know, that's
3 going to come up in the future. And possibly, we may be
4 back down here intervening, as Mr. Rosenbaum said we might
5 be able to, on the basis of the way this is being run.

6 THE COURT: I think that's possible. I'm looking
7 at the clock. It's just about 11:00. And I wouldn't doubt
8 that your court reporter needs a little bit of a break.
9 However, why don't we take a ten-minute break and then we'll
10 come back and finish with the balance of the matters
11 pending.

12 (Whereupon, recess had.)

13 THE COURT: Mr. Campbell, I was thinking about
14 what you said about the Pennsylvania wire tap statute, and
15 I'll agree that it's a very strict type of statute. I think
16 Florida is the only other state with a comparable statute,
17 and it, of course, provides privacy protection far beyond
18 the federal law, but I don't recall whether it requires
19 consent or knowledge to the tape recording. And there is a
20 difference because the statute is found under the privacy
21 provisions of the Pennsylvania law. And of course, the
22 officer's privacy wouldn't be violated even if he didn't
23 consent so long as he knew that or she knew that the
24 conversation was being tape recorded.

25 Now, I don't know, I haven't looked at that

1 statute in years, but it is a very strict one. That may be
2 something that we'll have to take a look at. But it's my
3 guess that the statute is on privacy. That would not -- the
4 proposed procedure would not impact privacy rights or would
5 not have any impact on privacy rights. All right.

6 MR. ROSENBAUM: Your Honor, I'm sorry. If I may,
7 on that very issue, I would direct the Court's attention to
8 a decision called Commonwealth versus Christopher 620 A2d.
9 449. It was decided in 1992. The court there -- the court
10 held in Christopher that a client who secretly taped his
11 conversation with a county social worker, in public office,
12 did not violate the statute as to -- the social worker had
13 no expectation of privacy with regard to the conversation.
14 And the court cited the test in determining what constitutes
15 a justifiable expectation of privacy in communication in the
16 following language. To determine whether one's activities
17 fall within the right of privacy, we must exam first whether
18 an appellant has exhibited an expectation of that privacy,
19 and second whether that expectation is one that society is
20 prepared to recognize as reasonable.

21 So, it would be our view that a police officer in
22 a setting where a police department can require the officer
23 to respond to allegations about his conduct can determine
24 the way in which that response is made, there is no
25 expectation of privacy.

1 THE COURT: Frankly, I would think it would be as
2 much for the protection of the officer as for the protection
3 of the interrogator. Because it's possible that people
4 would become overzealous in their job of investigating the
5 officer and perhaps maltreat the officer. The tape would
6 provide a written record of that kind of overreaching
7 behavior or other misbehavior on the part of the questioner.

8 MR. ROSENBAUM: In fact, in some states, the
9 statutes have been passed requiring that they be taped, and
10 it's been at the instance of the police officer
11 representatives. Presumably for that very reason.

12 THE COURT: Right. I know it's long been the
13 practice of the City homicide department to tape record all
14 statements made by suspects or defendants in a criminal
15 homicide case. It's just about as long as I can remember.
16 I don't think there is anything particularly unusual about
17 this requirement in connection with the interview with a
18 police officer regarding the complaint.

19 MR. ROSENBAUM: In fact, the collective bargaining
20 agreement recognizes that that might happen and requires
21 that transcripts be provided.

22 THE COURT: All right. Thank you. The next
23 matter we have to deal with is the motion of the Williams
24 plaintiffs to consolidate the case at 96-560 with 97-354.

25 And as I've indicated, the United States has

1 responded essentially saying it's all right with us as long
2 as it doesn't delay implementation of the consent decree.

3 The City, however, has opposed the permissive
4 joinder under Rule 24, and I think I can understand some of
5 the City's concern.

6 While this litigation, at least as active
7 litigation, will become quiescent upon the entry of the
8 consent decree, there is this rather large body of
9 litigation that we've referred to collectively as the
10 Williams plaintiffs which is the class action lawsuit that's
11 pending. And I think I can understand some of the City's
12 discomfiture in perhaps working side by side with a party in
13 the implementation of this consent decree and at the same
14 time defending in the class action case or the number of
15 individual cases that might arise from the class action.

16 So, in any event, that is pretty much what I've
17 seen and I'll hear now from the Williams plaintiffs.

18 MR. O'BRIEN: Good morning, Your Honor. We have
19 filed the motion to consolidate these two cases and for
20 several reasons. First, historically, of course, our
21 lawsuit was filed eleven months ago, essentially, setting
22 forth the same allegations that the Justice Department's
23 lawsuit makes against the City of Pittsburgh.

24 And with the consent decree, it purports to
25 provide the injunctive relief sufficient to put an end to

1 the practices that we sought to put an end to.

2 We are, I think, inextricably bound together here
3 in terms of these two lawsuits. First, I would point out to
4 the Court, as the Court knows, that virtually every other
5 lawsuit that has been filed involving the City of Pittsburgh
6 has been consolidated with the Williams case. Those cases
7 involve damages. So that's different. But our motion here
8 seeks to consolidate strictly for the purpose of injunctive
9 relief. I think there are many good reasons for the Court
10 to do that.

11 First, in our lawsuit, all the parties that are
12 interested in this particular relief are before the Court,
13 the City is before the Court, FOP is before the Court, the
14 66 plaintiffs and the purported class, and the Justice
15 Department has no opposition to the consolidation.

16 So, if the Court consolidates, we've now put
17 everybody together in one place.

18 THE COURT: What would be gained by putting the
19 two cases together? As you know, it doesn't change the
20 burden of proof or any other matter in the Williams
21 litigation. So, I'm just trying to figure out how this
22 would be of assistance?

23 MR. O'BRIEN: It's of assistance in that the
24 consent decree is a piece of paper that this Court,
25 hopefully, will sign and make a matter of record.

1 The real test of this document will be in its
2 implementation and its effectiveness. And that's not going
3 to be known for another five years.

4 So, whether it will be implemented, whether it
5 will be effective, we don't know who the next mayor is going
6 to be, whether it's going to change. We don't know if the
7 same people at the Justice Department who have an interest
8 in the document will be there next year or two years from
9 now.

10 So, the real test of this document is
11 implementation and effectiveness. And we, the plaintiffs,
12 who brought this lawsuit on behalf of a class, have a vital
13 interest in an ultimate result.

14 Our request for injunctive relief, based on this
15 document most appropriately may be stayed by this Court
16 pending whether this is effective or not but that request is
17 still there.

18 And as we have indicated to the Court, we feel
19 that our class should be certified so that we can monitor
20 the effectiveness of this agreement. If that's the case,
21 then it all ought to be in one place.

22 As I said, the FOP is a part of our lawsuit. If
23 issues arise, this would be the appropriate place to be, all
24 in one lawsuit. Ultimately, this Court, if there is going
25 to be a change in this consent decree, we, as the

1 plaintiffs, would have to be involved in that to be aware of
2 that because it may affect the class. It may affect the
3 class rights.

4 THE COURT: Well, see, the commonality is really
5 the pattern and practice type conduct that the government
6 alleged and the City denied.

7 MR. O'BRIEN: Correct.

8 THE COURT: What happens is the government comes
9 in under the statute which requires it to make a complaint
10 of the City's pattern and practice of ignoring or otherwise
11 condoning this alleged misconduct but the consent decree
12 doesn't admit fault.

13 So, what remains to be litigated in the Williams
14 case, and what may be a common issue of fact or law which is
15 why we consolidated them all in the first place, is this
16 question of pattern or practice.

17 Now, I have been wrestling with the idea of
18 whether there is a mechanism whereby the pattern and
19 practice could be established so that it wouldn't have to be
20 done sixty some odd times.

21 You know, I think that when Congress enacted
22 Section 14141 as part of the Omnibus Crime Control Act, in
23 part, it was in recognition of the limitations of Section
24 1983.

25 And there had been some attempts by government

1 attorneys, I remember Mr. Vaira (spelled phonetically) in
2 Philadelphia bringing a suit against the Philadelphia Police
3 Department and being promptly thrown out of court because he
4 didn't have standing.

5 Congress, I think, in enacting this section
6 recognized the difficulty of individual plaintiffs
7 establishing the requisite proofs of pattern and practice.
8 And I think we've discussed before the other question of how
9 many times do you have to prove it. Is there a collateral
10 estoppel type effect.

11 As you know, there is a case already decided by
12 this circuit in which the circuit, in very strong language,
13 ruled that there was such a pattern and practice. I think
14 that was Justice Rosen's decision.

15 In any event, I have been trying to think of a
16 mechanism but I can't see how putting the Williams case with
17 this case helps it. But maybe I'm missing something if
18 there is something.

19 MR. O'BRIEN: I think for clarification, the
20 damages issue, the damages claims are separate. All we're
21 talking about here is consolidating this for purposes of
22 injunctive relief. At some point in time, this Court is
23 going to have to decide whether our claims for injunctive
24 relief is moot.

25 THE COURT: Yes.

1 MR. O'BRIEN: This consent decree sits in the
2 middle of our claim for injunctive relief. If the consent
3 decree is adequate, this Court will have to address the moot
4 position. The Court is going to have to determine if this
5 consent decree is being implemented effectively.

6 We, as the plaintiffs' class, we're the only
7 parties before this Court who have actually been injured by
8 the alleged unconstitutional practices. We're the only
9 people before this Court who were here a year ago saying,
10 here's the problem. Something has to be done. We're the
11 ones who have been knocking on the door all this time to get
12 it open, to let people see and to make changes.

13 Now, this consent decree purports to do that. And
14 it's our position that having filed a class action and
15 having sought this relief, we are entitled to have this
16 Court certify that class just like it would in any other
17 kind of a settlement, to allow the class to monitor what is
18 going on for purposes of injunctive relief.

19 And if we're correct on that aspect of the case,
20 on that aspect of the issues, then these two cases, for
21 purposes of injunctive relief, should be consolidated.
22 There is no downside to this.

23 Assume that you don't consolidate these two cases.
24 If an issue arises regarding this consent decree, we're
25 going to have to come before the Court. If we get

1 information that this is not being complied with, we're
2 going to have to come before the Court.

3 We are the likely parties before this Court that
4 will have any information about non-compliance. I don't
5 think it's a misstatement to submit that in the community,
6 both amongst lay people and lawyers, we are the people that
7 parties come to to tell us about misconduct, that tell us
8 about problems.

9 We should not be separated from this lawsuit.
10 Much of what went into the Justice Department's lawsuit was
11 information that we had acquired. Information that we were
12 developing. That's not to take anything away from what the
13 Justice Department did or the amicable agreement that they
14 have reached but that is a fact.

15 THE COURT: Maybe it's -- maybe it's just that I
16 haven't dealt with this particular issue before but you see,
17 in order to be afforded the kind of relief that the
18 plaintiffs' seek in the injunctive equity part of Williams,
19 it's necessary that the Court find this pattern and
20 practice.

21 MR. O'BRIEN: We are not asking to be made parties
22 to this consent decree. We are not asking that -- the only
23 parties to the consent decree will be the City and the
24 Justice Department.

25 What we are saying is that for purposes of

1 implementation and monitoring, that we have a right to, in
2 fact, monitor this as representatives of the class. If you
3 don't certify the class in the Williams case, then all we
4 have are 66 separate damages actions going forward. And
5 three years from now, if those cases are resolved, there is
6 no mechanism for us as the class representatives to insure
7 the effectiveness of this decree.

8 There is no reason, there is no -- by certifying
9 this as a class, we're not saying that we're a party to this
10 consent decree. We are not saying that we can change the
11 terms of the consent decree. But we are then at least
12 before this Court whenever the City, whenever the Justice
13 Department and whenever the FOP are before this Court with
14 respect to this consent decree.

15 It could be that when a consent decree is entered,
16 that for the next five years, it will go perfectly, and
17 nobody will have any complaints. And at the end of five
18 years, there will never be another complaint of misconduct.
19 Thank God.

20 But that may not be the case. And there is going
21 to be information in the legal community, in the community
22 at large that may bear on the effectiveness of this consent
23 decree and the implementation of that consent decree.

24 And the plaintiffs, in their representative
25 capacity, Your Honor, are in the best position to receive

1 that information and provide that information to the Court.
2 I don't see a downside here.

3 The City complains that, well, that's making the
4 plaintiffs' a party to this. We're not asking for that and
5 that's very important. What we're saying is that if you
6 take these two lawsuits, the Williams case and the Justice
7 Department's case, they are identical.

8 The relief we sought is now purportedly granted in
9 this consent decree. And during the period of its
10 implementation, we, as the plaintiffs and the class
11 representatives, should be in a position to monitor this
12 just like we would in any other class action where
13 injunctive relief is sought.

14 THE COURT: I think I understand and it may be
15 that it's a question of what comes first. Your right to
16 monitor depends upon proof of what you claim, that there is
17 a pattern and practice. And even though there is a consent
18 decree, we don't have that proof because we don't have an
19 admission by the City that it exists. So, it may be
20 that this right that you're claiming is not yet
21 established.

22 MR. O'BRIEN: Here's my point on that, Your Honor.
23 I don't think that's necessary if you look at it from a
24 procedural point of view that we posit is the correct one
25 here.

1 Before the Court in the Williams case is the
2 motion for class certification. That class certification
3 goes exclusively to the issue of injunctive relief.

4 We believe that we meet all of the elements for
5 the class to be certified. If the class is certified, then,
6 as the class representative, all we're saying that we want
7 to do at that point is to monitor what is going on in a
8 consolidated case.

9 We don't intend on showing that there has been a
10 constitutional violation. It's just a procedural issue for
11 the Court to decide, i.e., whether the requirements of the
12 class action elements have been satisfied.

13 If the class is certified, all we're doing then is
14 we have a legal representative capacity where we can monitor
15 this by whatever means we choose to employ. It may be that
16 we'll monitor this based upon what we hear from the
17 community. We'll monitor this based upon what lawyers in
18 the area tell us. Keeping in mind that people come to us
19 because we were there first. We brought this lawsuit and we
20 are identified with this remedy.

21 If you take us out and we're not in that class
22 certified status and the cases aren't consolidated, then I
23 think that the Court loses that view of what's going on and
24 takes us out of the relief. Even though we're not a party
25 to relief, we don't have a party to the relief.

1 I realize that it's a little bit complicated but
2 the important points are this one. We're not seeking to be
3 a party to the consent decree, not necessarily. We are
4 seeking class certification and the reason that we believe
5 the class should be certified is so that we can monitor the
6 effectiveness and the implementation of the consent decree
7 which, I believe, we are entitled to be able to do that
8 since we brought this as a class action.

9 THE COURT: I understand.

10 MR. O'BRIEN: That's our motion.

11 THE COURT: All right. Mr. Shorall, I suspect you
12 have something to say about that?

13 MR. SHORALL: I do, Your Honor. If it please the
14 Court, Your Honor, if I may address certain of the issues
15 that were raised by Mr. O'Brien.

16 In the first instance, there is not a
17 consolidation -- pardon me -- there is not a class
18 certification at this point in time and that is something
19 which has been vehemently opposed by the City in the briefs
20 it has filed with this Court.

21 Moreover, Your Honor, the assessment by the Court
22 is clearly correct. The viability of the Williams case
23 depends in all regards upon the underlying causes of action
24 that have been advanced by the individual plaintiffs.

25 The Court correctly indicates that there have been

1 discussions as to the proof that may be available with
2 regard to pattern and practice so that 63 of those pattern
3 and practice cases need not be tried.

4 But the fact of the matter is, Your Honor, none
5 has been tried. The City has not admitted a pattern and
6 practice and to permit a consolidation which, in the first
7 instance, the Williams plaintiffs have no standing request,
8 would clearly give to the Williams plaintiffs the imprimatur
9 of the Court that they have, in fact, proven a case which
10 they have not.

11 The Williams plaintiffs cannot have a claim
12 against the City which is cognizable on relief until such
13 time when they have individually proven that there has been
14 a deprivation of their individual rights and that that is as
15 a result of a pattern and practice.

16 THE COURT: See, I don't agree with that. I think
17 they can have a class action for the purpose of alleging
18 common issues of law and fact as to their injuries and as to
19 the City's responsibility which is, of course, the pattern
20 and practice case.

21 MR. SHORALL: Clearly. But their relief would not
22 be available until such time as that was proven.

23 THE COURT: Exactly. They couldn't get individual
24 relief in the form of damages.

25 MR. SHORALL: Or collective removal until that was

1 proven because until they met their burden of proof which
2 they need do, there is no ability for the Court, either in
3 its own right or through a jury, to enter any relief against
4 the City.

5 We've not come to that point where there has been
6 any proof whatsoever and the City has not admitted, as the
7 Court correctly notes, any liability in the consent to the
8 consent decree.

9 Moreover, Your Honor, the Williams plaintiffs are
10 attempting to do indirectly which they could not do
11 directly.

12 There is no right for the Williams plaintiffs to
13 participate pursuant to 42 U.S.C. 14141. That's clearly a
14 case to be brought by the United States with respect to the
15 City of Pittsburgh or any government.

16 Moreover, Your Honor, I think that the Court
17 correctly notes that for or has correctly inquired of
18 Mr. O'Brien for the Court to grant any type of monitoring
19 right to plaintiffs, who have not proven a case against the
20 City, which case is contested and is in discovery through a
21 consolidation with a case which necessarily becomes moot, if
22 the Court enters the consent decree is an inappropriate
23 method to proceed. There is an auditor in place, Your
24 Honor, and ultimately, that auditor's reports are made
25 public and are submitted to you.

1 We would suggest, Your Honor, that any monitoring
2 by the Williams plaintiffs, as suggested, is not permissible
3 within the terms and conditions of the underlying statute
4 but also is surplusage. The auditor's role is particularly
5 for that reason, and the auditor is going to be determined
6 in conjunction with the Justice Department and this Court
7 plays a role as well.

8 So, with all due respect to Mr. O'Brien and to the
9 63 Williams plaintiffs, we believe that their participation
10 through consolidation is, in the first instance, not
11 warranted, and in the second instance would be inappropriate
12 to be granted by this Court.

13 THE COURT: All right. I've been trying to figure
14 out a way in which we could try this common issue of law and
15 fact related to the pattern and practice because, as you
16 know, to prove that, as your discovery shows, it gets pretty
17 fact intensive as to what the City knows and what it has
18 done and what it has failed to do and so on.

19 I don't want to interfere with that opportunity.
20 So, I think what I'm going to do is take the matter of the
21 consolidation under advisement until I have a chance to
22 think this through, and also until I have a chance to
23 explore some mechanism where we can intelligently approach
24 the pattern and practical issue on a consolidated basis, if
25 we can.

1 One of the things that concerns me, under 1983,
2 there is generally a right to a jury trial. So, it concerns
3 me as to what can be established outside the contours of
4 1983 in the context of this injunctive relief, and I think
5 we need to take a look at that issue. So, I'm going to take
6 that under advisement for right now.

7 MR. SHORALL: Does the Court have any further
8 request of the City in this regard?

9 THE COURT: No, I don't think so. I appreciate
10 the City's discomfiture on the consolidation, but I also can
11 understand where, as Mr. O'Brien says, these are the real
12 people who at least claim that they are the victims of
13 the inappropriate control of the City and that is
14 a very compelling reason to allow them to have some
15 role in this.

16 MR. SHORALL: The Court, however, recognizes that
17 it is a claim, and it is a claim which is disputed by the
18 individual officers, by the individual parties, the mayor
19 who is named as a party, various police officers and
20 officials who are named as party, the City who is named as
21 party.

22 So, not only is the City desirous of the Court
23 recognizing that all of those individual 63 plaintiffs have
24 cases which are disputed but also that the City has advanced
25 and advances that consolidation under the terms and

1 conditions as proposed by the plaintiffs would be violative
2 of any standing rights which they would have under 42
3 U.S.C. 14141.

4 THE COURT: I don't think they have any rights
5 under that statute.

6 MR. SHORALL: I concur.

7 THE COURT: I think it's only the Department of
8 Justice that has the duty to pursue claims under that
9 statute.

10 MR. SHORALL: And the consent decree is a progeny
11 of the discussions between the Justice Department and the
12 City relating directly to that statute, not to Section 1983.
13 It does have all of those types of functions that
14 Mr. O'Brien would propose that he provide built into the
15 mechanism of the consent decree which ultimately ends with
16 the review by this Court. Thank you, Your Honor.

17 MR. O'BRIEN: Just one addition. Just for
18 clarification, so that it is -- so that our position is
19 stated. We do not seek consolidation in any way with
20 respect to any of the damages and issues.

21 Our sole request here is with respect to the
22 injunctive relief which this Court ultimately will have to
23 determine, if this injunctive relief meets out our claim for
24 injunctive relief in the Williams case.

25 I think you raised the issue of the sequence of

1 events. I think the pivot point here is that the motion for
2 class certification, as a procedural device, has to be
3 determined. And if this Court determines that there is a
4 class for the purposes of injunctive relief only, then it
5 seems to me that these two cases are intertwined in such a
6 way that they should be consolidated. That's our position
7 in this, Your Honor.

8 THE COURT: For at least purposes of today's
9 discussion, I was assuming that the class would be certified
10 and then trying to see whether it makes sense to have the
11 certified class but without the requisite findings to
12 participate in the implementation of this consent decree.

13 I do understand what your point is.

14 MR. O'BRIEN: We're not asking that we be directly
15 involved as a party to the consent decree, to be a named
16 party for purposes of monitoring.

17 We're saying that once that class is certified, in
18 relationship to the injunctive relief, that as the class
19 representatives, we have a duty and the obligation to insure
20 that the injunctive relief that potentially moots out our
21 claim for injunctive relief is enforced and implemented
22 effectively.

23 That's where we're coming from. If what I have
24 just said is true and accurate under the appropriate legal
25 standards, then the cases should be consolidated. The

1 damages claim can go on. This Court -- and I glean we're
2 going to have to come up with some procedure for deciding
3 the custom and policy issues as to the damages claim. That
4 can go on separately. It's not consolidated. It has
5 nothing to do with our duties as the class representatives
6 for purposes of injunctive relief.

7 MR. SHORALL: Will the Court entertain just briefly
8 from the City? Thank you.

9 With all due respect, Mr. O'Brien proposes to put
10 the bunny in the hat.

11 The Court correctly identified the requisite
12 findings as being just that. Requisite findings as a
13 condition precedent. The findings have not been made, nor
14 have they been admitted by the City.

15 Thank you, Your Honor.

16 THE COURT: All right. I think we're in a
17 position that we've covered -- has everybody had a chance to
18 be heard today? That was, of course, the purpose of this
19 hearing.

20 With regard to the motion for intervention as of
21 right or permissive intervention under Rule 24 filed on
22 behalf of the Fraternal Order of Police, the Court will deny
23 that motion.

24 I don't think there is a right for intervention
25 and I don't, as a matter of considering whether permissive

1 intervention is necessary, I don't think it is necessary.
2 Especially in view of the fact that this is a statute
3 created by Congress and conferring duties on the Department
4 of Justice and responsibilities and duties on municipal
5 entities of which the FOP is not one.

6 And secondarily, because I think that at any time
7 where individual interests of FOP members are affected by
8 the implementation of the court decree, that there will be a
9 ready mechanism for them to be heard in this Court.

10 I think, also, that to the extent that it was
11 important to hear from the FOP and their counsel, and I
12 think it was, and I appreciate the input that they have
13 given us in this proceeding, that we've accomplished that
14 by the amicus type appearance that we've permitted.
15 And we have received both written and verbal input
16 from the FOP.

17 So, that any benefit that would have been
18 gained by virtue of intervention, permissive
19 intervention prior to the adoption of the consent
20 decree was already, I think, achieved through the
21 procedures that we employed.

22 I emphasize that I liked Mr. Rosebaum's analysis
23 of the implementation stages of this consent decree and the
24 idea that the timing or the timeliness of a motion to
25 intervene in a particular matter arising out of the

1 implementation of the decree will be measured from the time
2 when the specific injury occurred. When I say injury, the
3 claimed right that was violated.

4 So, that I think that we can take a pretty broad
5 view of that and permit intervention where it would be
6 appropriate to protect the rights of third parties. But
7 right now, I don't think there is anything in here that
8 violates the rights of any third parties.

9 The motion of Williams versus the City of
10 Pittsburgh to consolidate No. 96-560 with No. 97-354, I'm
11 going to take that matter under advisement.

12 I appreciate the input of counsel. I think
13 there is some things for me to think about and maybe
14 it's that my head works a little slower than the
15 lawyers, but I need to kind of work this through and
16 see what would be the most effective means for both
17 the City, I hope, and the Williams plaintiffs to resolve
18 that case. Mr. Campbell?

19 MR. CAMPBELL: Your Honor, one thing that was
20 overlooked and I may be coming in the back door.

21 But the FOP is a party to that suit. So, when the
22 Court considers it, I think you'd have to consider, does the
23 FOP come in, if you do consolidate it, with the same
24 standing as the plaintiffs would have.

25 THE COURT: I think Mr. O'Brien would say that

1 there would be less incentive on the part of the FOP to
2 enforce the plaintiffs' rights and to monitor the consent
3 decree in the way that he envisions.

4 MR. CAMPBELL: But I mean, to monitor it from the
5 point of view of the FOP. I'd be coming in the back door
6 instead of the front door.

7 THE COURT: It's an interesting observation. All
8 right. In a sense, you'll be monitoring it anyway in the
9 fashion that we've described, and I hope that the FOP
10 understands that it's not the intention of the Court to
11 block avenues of redress for any real injury that is
12 suffered by a member of the FOP in the course of the
13 implementation of this decree. At least we want to provide
14 a forum where they will be heard.

15 And so, I think, as Mr. Rosenbaum explained, that
16 can be done in the context of this decree.

17 I have, as I've indicated, read all of the
18 pleadings as well as the two expert reports that were
19 submitted, one by Lou Reiter, and I note that he was a
20 former Los Angeles policeman and now he's a consultant in
21 police matters. And I also read the affidavit of Professor
22 Fyfe who is a professor of criminal justice at Temple
23 University.

24 I'm persuaded by the information provided in those
25 affidavits that this is a workable consent decree and that a

1 lot of thought was put into this consent decree by the City
2 and by the Department of Justice in trying to get an
3 agreement that will work; and what, of course, in my wildest
4 hopes is one that the City police can be proud of because it
5 doesn't behoove the City police to be continually defending
6 malfeasors if they have them on the department. And
7 eventually, it can make a better police department, at least
8 both experts think so, and indicate how in Boston and other
9 cities where provisions of the very kind contemplated in
10 this consent decree have resulted in more effective law
11 enforcement as well as some measure of protection for the
12 officers by having procedures to identify early miscreants
13 and to either discipline them or me
14 end to that.

15 In that fashion, the whole
16 doesn't have to suffer from the mis
17 people which I think both experts a
18 condition. That being that there are
19 are responsible for the balk of the

20 The Court finds that in its
21 in proposing this consent decree, the United States
22 Department of Justice has acted within the authority and
23 duties conferred upon it by 42 United States Code Section
24 14141 where a governmental agency's involved.

25 The Court should be, and this Court is highly

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9 cities where provisions of the very kind contemplated in
10 this consent decree have resulted in more effective law
11 enforcement as well as some measure of protection for the
12 officers by having procedures to identify early miscreants
13 and to either discipline them or move them to try to put an
14 end to that.

15 In that fashion, the whole police department
16 doesn't have to suffer from the misconduct of just a few
17 people which I think both experts allude to is a common
18 condition. That being that there is only a few people who
19 are responsible for the bulk of the harm.

20 The Court finds that in instituting this action and
21 in proposing this consent decree, the United States
22 Department of Justice has acted within the authority and
23 duties conferred upon it by 42 United States Code Section
24 14141 where a governmental agency's involved.

25 The Court should be, and this Court is highly

1 deferential to a settlement agreement in the case where the
2 agency is exercising its expertise and the settlement is
3 found to be in the public interest.

4 In this instance, the expertise of the Department
5 of Justice in the matters at issue is recognized by the very
6 statute which confers the duty upon the Department of
7 Justice to commence such action and also confirmed by the
8 history of the Department of Justice as a federal law
9 enforcement agency.

10 The Court further finds that the proposed consent
11 decree furthers the statutory purposes as embodied in 42
12 U. S. Code, Section 14141. By agreeing to the consent
13 decree, the City and the United States have avoided
14 expensive and protracted litigation, and it is a generally
15 accepted principle that the law favors settlements of
16 disputes.

17 The Court further finds that the proposed consent
18 decree -- I think I've already said -- furthers the purpose
19 of the statute. I don't know why I have it written down
20 twice.

21 The Court finds that the consent decree, as
22 proposed, fairly, adequately and reasonably resolves the
23 allegations that were made in the complaint. The Court
24 further finds that the terms of the proposed consent decree
25 do not violate the law and will serve the public interest as

1 determined by the elected officials of the City of
2 Pittsburgh. And that the decree provides for a comprehensive
3 methodology to responsibly manage and control instances of
4 police misconduct where they occur.

5 Further, nothing in the consent decree in any way
6 changes the authority of police officers under the federal
7 or state constitutions or law to effect arrests, conduct
8 searches or seizures or otherwise to fulfill their law
9 enforcement obligations to the people of the City of
10 Pittsburgh.

11 The Court also recognizes that the consent decree
12 may affect the rights of third parties, including the
13 members of the Fraternal Order of Police and members of the
14 general public as expressed by Mr. O'Brien.

15 The Court finds, however, that its terms are fair,
16 adequate, reasonable and not in violation of any law.

17 The Court finds that no provision of the
18 collective bargaining agreement between the City of
19 Pittsburgh and the Fraternal Order of Police is violated by
20 the terms of the consent decree and that the parties will be
21 free to continue with their history of collective bargaining
22 and grievance adjustments before the consent decree.

23 And as I've indicated, if and when some conflict
24 in those two objectives arises, then there will be the
25 opportunity for the parties to be heard on that matter.

1 Further, the entry of the consent decree does not
2 violate state law governing collective bargaining
3 agreements.

4 Because Section 14141 is plainly adapted to effect
5 the objectives of the Fourteenth Amendment, it is a lawful
6 exercise of congressional power to Section Five of the --
7 pursuant to Section Five of the Fourteenth Amendment, and I
8 say that because there was an assertion made that the
9 statute itself violated the Tenth Amendment made by the
10 Fraternal Order of Police, and I don't see that it does.
11 And I think there is ample case precedent that would
12 establish that the federal government has the power to do
13 just what it is doing in this circumstance.

14 I have said that the statute is plainly adopted to
15 effectuate the purposes of the Fourteenth Amendment because
16 it is appropriate to enforce compliance with the Fourteenth
17 Amendment.

18 Probably, in the event that there are appeals or
19 whatever, it might be useful to write a brief opinion and
20 make some more formal findings in this matter so we will do
21 that as soon as we get a chance to do that.

22 The Court will, based on the findings that I have
23 made on the record, approve the consent decree as explained
24 by the parties' joint motion regarding the interpretation of
25 the consent decree which the Court will also sign.

1 All right. Are there any other matters that
2 should be before the Court?

3 All right. I wanted to thank the lawyers and
4 others who have been involved in this process, and I think
5 you've done a good job trying to point out to the Court the
6 items that should be considered in looking at the fairness
7 to the police officer or to any impact on the collective
8 bargaining agreement.

9 I particularly appreciate the rather extensive
10 brief that the government submitted. I think that was
11 really quite useful in helping me to get a handle on what
12 needed to be done to finally approve the decree.

13 I compliment all of you for getting this work done
14 and getting it done in a very brief period of time. We'll
15 have to, at another time, deal with this motion to
16 consolidate. As soon as I get a chance to think through
17 what might be the best way to do it, we'll have another
18 status conference on that, Mr. Shorall. We'll discuss it
19 then and Mr. O'Brien, Mr. Walczak. Court is adjourned.

20 * * * * *

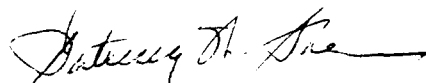
21 I certify that the foregoing is a correct transcript
22 from the record of proceedings in the above-entitled matter.

23

24

25

Date: May 2, 1997



Patricia W. Sherman,
Official Court Reporter