IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ROY C. JOHNSON, et al.,

Plaintiffs,

CITY OF TULSA,

Defendant,

LODGE #93 OF THE FRATERNAL ORDER OF POLICE,

Defendant-Intervenor.

Case No. 94-CV-39-H(M)

ORDER

This matter comes before the Court pursuant to the Joint Motion for Approval and Adoption of the Consent Decree (Docket No. 737), filed on December 3, 2002 by Plaintiffs and Defendant City of Tulsa (the "City"). The Court has reviewed the arguments and authorities submitted by Plaintiffs, the City, and Defendant-Intervenor Lodge #93 of the Fraternal Order of Police (the "FOP"). For the reasons set forth below, the Joint Motion for Approval and Adoption of the Consent Decree (Docket No. 737) is hereby granted and the Consent Decree is hereby approved.

I

On January 14, 1994, Roy C. Johnson filed a complaint against the City of Tulsa alleging racial discrimination in employment and demanding, inter alia, in excess of $1.5 million in damages and an injunction against further discriminatory treatment. The City denied all allegations and asserted certain affirmative defenses. In July 1994, the case was stayed in order

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to facilitate settlement discussions. That stay was lifted on February 14, 1996.

Several months later, on May 1, 1996, Plaintiff Johnson sought to expand the lawsuit by filing a motion for certification of a class or, in the alternative, for joinder of additional parties. At the time of Plaintiff Johnson's second amended motion on November 19, 1996, he sought to join seventeen additional named plaintiffs. The City objected to joinder of any additional parties. On April 11, 1997, the Court granted the motion for joinder and denied class certification, subject to re-urging upon presentation of further evidence. Plaintiffs subsequently re-urged the motion to certify the class, and the Court, by order of March 17, 1998, granted the motion. The class was comprised of all African-American persons who were then or would in the future be sworn personnel of the Tulsa Police Department (the "TPD") and all African-American persons who were former sworn personnel of the TPD and whose employment terminated on or after January 14, 1992. There were nineteen named plaintiffs, all of whom asserted claims of systemic and long-standing racial discrimination within the TPD. The City denied all allegations of discrimination.

The case was effectively stayed for settlement negotiations through the end of 1998, but, when those negotiations failed to result in a settlement, the parties commenced active discovery.[1] At the end of 2001, the parties filed a series of motions, including: Plaintiffs' motion for partial summary judgment, the City's motion to sever the supervisory plaintiffs from the class, and the

[1] On February 1, 2001, William F. Kaspers, from the Atlanta, Georgia office of the Paul, Hastings, Janofsky and Walker LLP law firm ("Paul, Hastings") was granted leave to appear pro hac vice on behalf of the City.

City's motion to define the temporal scope of Plaintiffs' Section 1983, Section 1981, and Title VII claims. During this period of hard-fought litigation and several failed settlement attempts, the parties invested countless hours in preparation and incurred millions of dollars in attorney fees and costs.

Finally, after over two years of discovery and the publicly reported payment of over $1.5 million in legal fees to the City's outside counsel, the parties jointly requested a stay in the proceedings for the purpose of engaging in new settlement discussions and further requested that the Court appoint United States Senior District Judge Lee R. West of the Western District of Oklahoma as the settlement judge pursuant to Local Rule 16.2. At the parties' request, the Court stayed the proceedings.[2]

After nearly five months of settlement negotiations, on April 1, 2002, a proposed consent decree (the "April 2002 Decree") signed by Plaintiffs and the City was filed under seal. Then-Mayor Susan Savage executed the April 2002 Decree on behalf of the City. The incoming mayor, William LaFortune, who took office later that day, received a copy of the April 2002 Decree and a statement entitled "Final Condition of Settlement." This statement provided Mayor LaFortune the opportunity to agree to the adoption of the proposed settlement or to reject it at any time on or before noon on Friday, April 5, 2002.[3]

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[2] On January 9, 2002, the Court granted the motion to withdraw filed by Paul, Hastings, the City's outside law firm.

[3] The statement provided in its entirety as follows:

> Notwithstanding the execution of all documents necessary to settle the above-captioned case, the parties agree that there remains a final condition of

On April 5, 2002, at a status hearing before the Court, counsel for the City notified the Court that Mayor LaFortune had lodged no objection to the April 2002 Decree, and, at the joint request of the parties, the Court gave its preliminary approval to the April 2002 Decree. On April 24, 2002, the Court approved the parties' joint proposed notice of settlement, which was then sent to class members and served upon all Tulsa police officers and the FOP. The parties' notice advised of a May 22, 2002 deadline for the filing of objections to the April 2002 Decree, and of a fairness hearing set for June 14, 2002.

On May 2, 2002, nearly eight and one-half years after the original complaint was filed, the FOP moved to intervene in the case. On May 14, 2002, Plaintiffs objected to the FOP's motion to intervene, arguing that the FOP's motion was untimely and that the FOP did not have a sufficient interest in the case to intervene. The City responded that it did not oppose intervention but argued that, if the Court granted intervention, it should be limited and that the FOP should

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settlement. Specifically, the settlement agreement will be effective upon the earlier of (i) a statement signed by incoming Mayor William LaFortune agreeing that the settlement shall become effective immediately, or (ii) the passage of time until noon on Friday, April 5, 2002. That is, if Mayor William LaFortune does not file a statement of agreement under subpararaph (i), and does not otherwise object in the manner set forth below, the agreement will become effective at noon on Friday, April 5, 2002.

By contrast, if incoming Mayor William LaFortune desires to render a nullity the settlement agreement and thereby continue the above captioned lawsuit, he may do so by executing the attached Objection to Settlement and presenting it to the Court on Friday, April 5, 2002.

The parties have been advised that the Court will conduct a hearing in this matter on Friday, April 5, 2002, at 1:30 p.m. to receive a status report.

not be granted full rights as an intervening party. On May 22, 2002, the FOP filed a motion requesting that the Court reject the April 2002 Decree, primarily on the grounds that it violated the FOP's rights as the "exclusive bargaining agent" for all TPD officers. The FOP was the only objector to the April 2002 Decree.

On June 13, 2002,[4] the Court commenced extensive hearings on the fairness of the April 2002 Decree and the FOP's motion to intervene. Additional hearings on the fairness of the April 2002 Decree were held on July 15, 16, and 17, 2002. At the July 16, 2002 hearing, Mayor LaFortune testified that he would have preferred to have had more time to study the April 2002 Decree before having to make the decision to either agree to its adoption by the Court or to object. (7/16/02 Tr. at 568-69, 591.) At the July 17, 2002 hearing, Thomas Rink, an officer of the TPD, testified that, at the behest of the FOP, he had, during working hours, compiled information from the personnel files of African-American officers solely for the purpose of opposing the April 2002 Decree. (7/17/02 Tr. at 670-71.) Officer Rink had improperly compiled this information from the officers' personnel records to which he had access in his capacity as manager of the TPD Resource Center. He further testified that he had provided the results of his work, not only to his immediate TPD supervisor, but also to other TPD personnel up the chain of command, including then-Chief of Police Ronald Palmer. Officer Rink testified that he had not been disciplined for his unauthorized use of TPD personnel information and that he did not

[4] The fairness hearing had been moved from June 14, 2002 to June 13, 2002.

expect to be. (7/17/02 Tr. at 674.)[5]

On July 17, 2002, based upon Mayor LaFortune's tentative testimony regarding the April 2002 Decree in its current form, and the clear evidence that those who would be responsible for enforcing the April 2002 Decree, including Officer Rink and others, lacked a commitment to its successful implementation, the Court determined that it could not find that the April 2002 Decree was in the best interest of the community, except and unless the mayor and the City were prepared to give it their "unequivocal" commitment. Accordingly, in order to give Mayor LaFortune a full opportunity to further consider the April 2002 Decree, the Court extended the date by which the mayor would be required to either object to or agree to the proposed decree until noon on August 16, 2002.

On August 16, 2002, Mayor LaFortune and the City filed a statement withdrawing the City's support for the April 2002 Decree in its current form. Based on Mayor LaFortune's statement and the City's withdrawal from its joint motion to approve and adopt the proposed decree, the Court rejected the April 2002 Decree. The Court immediately returned the case to a "trial track" and referred to Magistrate Judge Frank H. McCarthy the issue of developing a workable schedule that would be acceptable to the parties.

On September 3, 2002, pursuant to a hearing before Magistrate Judge McCarthy,[6] the

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[5] Officer Rink had been subpoenaed to testify by the FOP. Because he appeared in Court during working hours, however, Officer Rink testified that the City would be paying him for his opinion testimony in opposition to the proposed decree. (7/17/02 Tr. at 672.)

[6] On August 21, 2002, Magistrate Judge McCarthy held a hearing to develop a proposed schedule.

Court entered a scheduling order to govern the proceedings leading up to a January 21, 2003 non-jury trial. Included in the scheduling order were deadlines for filing responses and replies to all pending motions that were not fully briefed at the time the case was stayed in November 2001 and deadlines for the parties to file additional dispositive motions and motions to de-certify the class. All-day hearings on all pending motions were scheduled for November 13 and 14, 2002.

On September 10, 2002, the Court granted the FOP's motion to intervene pursuant to Federal Rule of Civil Procedure 24(a)(2) over the objections of Plaintiffs and the City.[7] The Court found that the FOP satisfied the four-factor test for intervention articulated by the Court of Appeals for the Tenth Circuit in Coalition of Arizona/New Mexico Counties for Stable Econ. Growth v. Dep't of the Interior, 100 F.3d 837, 840 (10th Cir. 1996).[8] First, the Court found that, notwithstanding the fact that the FOP had notice of the divergence of its interests from the City

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[7] After the April 2002 Decree was rejected, the City suggested that the FOP be allowed to participate in any future settlement conferences but "oppose[d] the FOP's full intervention as a party entitled to participate in all future proceedings, including trial." (Def.'s Supplemental Mem. in Resp. to Mot. to Intervene at 2.)

[8] The four-factor test for intervention as of right under Federal Rule of Civil Procedure 24(a)(2) is as follows:

> [A]n applicant may intervene as of right if: (1) the application is "timely"; (2) the applicant claims an interest relating to the property or transaction which is the subject of the action; (3) the applicant may as a practical matter be impaired or impeded; and (4) the applicant's interest is not adequately represented by existing parties.

Coalition of Arizona/New Mexico Counties, 100 F.3d at 840 (internal quotations and citations omitted).

since November 2001, the FOP's motion to intervene was timely.[9] The Court found the motion to intervene timely because, after the Court's rejection of the April 2002 Decree, the case had returned to the November 2001 status quo ante, when it was stayed to facilitate settlement negotiations. Second, the Court found that, because certain remedies sought by Plaintiffs could affect the terms and conditions of employment of FOP members and arguably implicate certain provisions of the Collective Bargaining Agreement between the City and the FOP (the "CBA"), the FOP had claimed an interest that was a subject of the action and that this interest might be impaired if the FOP was not allowed to intervene. Finally, the Court found that the City's and the FOP's interests were no longer aligned, such that the FOP's interests were not adequately represented by the City. Thus, because it found that the FOP satisfied all four factors of the Coalition of Arizona/NewMexico test and the requirements for intervention pursuant to Federal Rule of Civil Procedure 24(a), the Court granted the FOP's motion to intervene.

On September 13, 2002, the City moved the Court to appoint a settlement judge to facilitate renewed settlement negotiations between the parties. In its motion, the City stated that "the differences between the parties' respective draft consent decrees were not substantial," but that it was "apparent that the services of a settlement judge are required." (Def.'s Application for a Settlement Conference at 1.) At a hearing on September 16, 2002, the Court held the City's motion in abeyance, pending Plaintiffs and the FOP joining in such a request.

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[9] The Court found that the FOP had notice of the settlement discussions and the possibility of settlement of the case from conversations with the City, the extensive public record tracking the progress of the case, and a November 2001 order staying the case. (9/10/02 Order at 10.)

On November 13 and 14, 2002, the Court held hearings on certain pending motions, including, inter alia, Plaintiffs' motion for partial summary judgment, the City's motion to sever the supervisory plaintiffs from the class, the City's and the FOP's separate motions to decertify the class, the City's motion to define the temporal scope of Plaintiffs' Section 1983, Section 1981, and Title VII claims, and Plaintiffs' motion for reconsideration of the Court's September 2002 order granting the FOP's motion to intervene.

On November 13, 2002, the parties, including the FOP, jointly moved the Court to designate United States District Judge Claire V. Eagan as the settlement judge under the Northern District Local Rules. The parties specifically requested that a settlement conference be scheduled for November 26, 2002. On November 14, 2002, the Court granted the parties' motion and designated Judge Eagan settlement judge in the matter pursuant to Local Rule 16.2(c), succeeding Judge West. (11/14/02 Order at 1.)[10] Beginning on November 21, 2002, Judge Eagan met with the parties and their attorneys at various times leading up to extensive settlement negotiations between Plaintiffs, the City, and the FOP on November 26, 2002.

On December 3, 2002, after nearly nine years of litigation, Plaintiffs and the City filed a second Joint Motion for Approval and Adoption of the Consent Decree, which attached a new proposed consent decree (the "December 2002 Decree"). Plaintiffs and the City also filed a joint motion requesting that the Court stay further proceedings pending the Court's consideration of

[10] At the Court's request, the parties certified that their "Joint Application for a Settlement Conference, requesting Court-administered settlement negotiations, was made in good faith and not for the purpose of delay in this case." (Id. at 2.)

this new proposed decree. Plaintiffs' and the City's joint motion for approval of the proposed decree informed the Court that the December 2002 Decree had not been agreed to by the FOP. (Joint Mot. for Approval and Adoption of the Consent Decree at 1.)

On December 5, 2002, the Court held a status hearing for the parties to preliminarily identify any issues that needed to be addressed in conjunction with the Court's consideration of the Joint Motion for Approval and Adoption of the Consent Decree and the related motion to stay the proceedings. Following the hearing, the Court directed the parties to file a joint proposal as to how best to proceed to ensure the rights of all interested parties and to submit additional briefing on "relevant authorities regarding the rights of intervenor Lodge #93 of the Fraternal Order of Police [] in this case and the appropriate procedures by which the FOP's rights can be fully protected." (12/5/02 Order at 1.)[11]

On December 11, 2002, the Court held a second status conference to further address the issues raised by the December 2002 Decree and the motion to stay. At the hearing and in its briefs filed with the Court, the FOP argued that, because it has not consented to the December 2002 Decree and because the proposed decree may affect the rights of the union and its members, the Court does not have the authority to approve the settlement proposed by Plaintiffs and the City. The FOP further argued that the Court's September 10, 2002 order, which granted the FOP's motion to intervene, bestowed upon the FOP the power to block a settlement between

[11] The Court's order did not stay the case, but extended the deadlines for filing motions in limine, pretrial disclosures, and an agreed pretrial order until after a status hearing set for December 11, 2002.

Plaintiffs and the City.

On December 13, 2002, the Court found "that the FOP [did] not have a unilateral right to reject the proposed settlement and to force Plaintiffs and the City to trial at this stage." (12/13/02 Order at 4.) The Court further found that the cases cited by the FOP in support of its argument were "inapposite because they do not address whether a party who has intervened before a settlement is reached may force the settling parties to trial by objecting to the agreement, without first demonstrating that its rights will be impaired by that agreement." (Id. at 2 (emphasis in original).) The Court explained that its September 10, 2002 order granting intervention did not grant the FOP the absolute power to unilaterally "veto" the proposed consent decree.[12] Accordingly, the Court struck the trial, which was then set for January 21, 2003, and scheduled a

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[12] In this regard, the Court specifically stated as follows:

> First, the Court's September 10, 2002 order, instead of granting the FOP broad veto power, merely responds to the City's suggestion that the FOP should not be granted intervenor status because the City would protect the FOP's interests at future settlement conferences. Second, it is elemental that the Court's order must be construed in accordance with existing Supreme Court authority. As described above, in Local No. 93, the Supreme Court expressly rejected the notion that an intervenor could veto a consent decree merely by withholding its consent. 478 U.S. at 529 ("Thus, while an intervenor is entitled to present evidence and have its objections heard at the hearings on whether to approve a consent decree, it does not have power to block the decree merely by withholding its consent.") (emphasis added). Therefore, even if, as the FOP apparently claims, the Court's September 10, 2002 order appeared to provide the FOP with the power to "veto" any settlement between Plaintiffs and the City, such a grant would be inconsistent with existing Supreme Court precedent.

(12/13/02 Order at 4.)

fairness hearing for consideration of the proposed December 2002 Decree in its place.[13] On December 16, 2002, the Court formally stayed the case and entered a scheduling order to govern the proceedings leading up to fairness hearings commencing on January 21, 2003.

On December 18, 2002, the Court approved the Notice of Proposed Settlement of Class Action, Fairness Hearing, and Right to Object ("Notice of Proposed Settlement") proposed by Plaintiffs and the City. This notice was then sent to class members and served upon the FOP and all TPD officers.[14] This notice advised of a January 16, 2003 deadline for filing objections to the December 2002 Decree and of a fairness hearing set for January 21, 2003.

On January 8, 2003, the FOP filed the Objections of Lodge #93 of the Fraternal Order of Police to New Proposed Consent Decree (Docket No. 757) (hereinafter "FOP's Objections"). In its objections, the FOP argues that the December 2002 Decree should be rejected because it "violates the collective bargaining agreement (the 'CBA') between the FOP and the City of Tulsa [] and also in other ways tramples the rights of the FOP and its members." (FOP's Objections at 1.) The FOP objects to the December 2002 Decree on three broad grounds: (1) it unilaterally obligates the police department to adopt and/or change policies that are the subject of mandatory bargaining and thus is an unfair labor practice under the FPAA and the CBA; (2) it violates the

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[13] The Court, citing Local No. 93, Int'l Assoc. of Firefighters v. City of Cleveland, 478 U.S. 501 (1986) (hereinafter "Local No. 93"), specifically noted that "the FOP will be afforded full due process rights at the hearing through the opportunity to present objections to call and cross-examine witnesses, and to introduce relevant evidence." (12/13/02 Order at 5.)

[14] As provided in the Court's December 16, 2002 scheduling order, this Notice of Proposed Settlement was posted on the City's Intranet beginning on December 13, 2002. On December 30, 2002, all TPD officers received the Notice of Proposed Settlement with their paychecks.

Oklahoma Fire and Police Arbitration Act ("FPAA") and the CBA because it substitutes the Court for the required mandatory arbitration process; and (3) it violates principles of federalism. On January 8, 2003, the FOP also filed the Motion of Lodge #93 of Fraternal Order of Police ("FOP") For A Ruling On the Effect of the Consent Decree on the FOP and Its Members (Docket No. 759).

On January 16, 2003, consistent with the timing requirement provided in the Notice of Proposed Settlement, 214 FOP members and three Tulsa citizens submitted individual objections to the December 2002 Decree, which were filed on their behalf by the FOP. (FOP's Jan. 16, 2003 Certificate of Service.)[15] Of those 214 individual objections submitted by FOP members, two were from unnamed members of the Plaintiff class.[16] On January 21, 2003, at the Court's direction, the FOP filed a List of Objectors Wishing to Testify. This list indicated that only one of the individual objectors, Officer Dianna Liedorff, desired to testify at the fairness hearings.

On January 21, 22, 27, 28, and 29, 2003, the Court conducted hearings on the fairness of

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[15] The Court notes that, according to the record, there are approximately 680 FOP members, (1/29/03 Tr. at 727:11-12), and the "bargaining unit" consists of approximately 800 officers, (1/29/03 Tr. at 728:3-10).

In addition, the Court notes that two additional objections were filed by FOP members on January 17, 2003. Although those objections were untimely filed under the requirements of the Notice of Proposed Settlement, the Court has nevertheless reviewed and considered those objections in analyzing the proposed decree.

[16] On January 16, 2003, World Publishing Company filed a Motion to Intervene and Opposition to the Protective Order and Other Portion of the Settlement and Consent Decree (Docket No. 987). Although World Publishing Company's motion contained objections to the proposed decree, the Court will address those objections in a separate order, concurrent with the entry of the protective order contemplated by the proposed decree.

the December 2002 Decree.[17] During the course of these hearings, Plaintiffs, the City, and the FOP called and cross-examined witnesses and presented evidence in support of their respective positions. In this regard, Plaintiffs and the City called the following witnesses who testified in support of the December 2002 Decree: Mayor LaFortune; Chief of Police David Been; Captain and named Plaintiff Walter Busby; Pittsburg Chief of Police Robert McNeilly; and Tulsa community leaders Milford Carter, Weldon Tisdale, and Nancy Day. The FOP called the following witnesses who testified in opposition to the December 2002 Decree: FOP President Robert Jackson; TPD Sergeant David Brockman; TPD Officer and Plaintiff class member Demita Kinard. Officer Dianna Liedorff also appeared and informed the Court that she did not desire to supplement her written objections with testimony.[18]

II

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, "[a] class action shall not be dismissed or compromised without the approval of the court[.]" Fed. R. Civ. P. 23(e). A district court is empowered to approve a proposed settlement of a class action if the proposed settlement is "fair, reasonable and adequate." Gottlieb v. Wiles, 11 F.3d 1004, 1014 (10th Cir.

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[17] The hearing on January 28, 2003 was devoted, in part, to issues regarding World Publishing Company's motion to intervene and objections to the proposed decree.

[18] At the hearing on January 21, 2003, the Court informed the FOP that each written objection would be considered "as if it were a sworn good-faith statement of what they believed and [would] be weighted absolutely as a direct statement as if it were testified so from the stand." (1/21/03 Tr. at 11:9-12:3.) The Court's position in this regard, as articulated at the hearing, is consistent with the general principle that "[i]t is unnecessary for objectors to appear personally at the settlement hearing in order to have their written objections considered by the court." See Howard B. Newberg and Alba Conte, Newberg on Class Actions § 11.56, at 11-137 (3d ed. 1992).

1993) (citing Jones v. Nuclear Pharmacy, Inc., 741 F.2d 322, 324 (10th Cir. 1984)). In determining whether the proposed settlement meets the standard for approval, the Court must first be concerned with the protection of the rights of the passive class members. See 7B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1979.1 (2d ed. 1986 & 2001 Supp.); see also Weinberger v. Kendrick, 698 F.2d 61, 69 n.10 (2d Cir. 1982) (stating that trial judge is "guardian for class members") (citing cases). The Court is also required to "ensure that the agreement is not illegal, a product of collusion, or against the public interest." United States v. Colo., 937 F.2d 505, 509 (10th Cir. 1991).

The Court of Appeals for the Tenth Circuit has identified the following four factors that a district court should consider in determining whether a proposed settlement is fair, reasonable, and adequate:

(1) Whether the proposed settlement was fairly and honestly negotiated;
(2) Whether serious questions of law and fact exist, placing the ultimate outcome of the litigation in doubt;
(3) Whether the value of an immediate recovery outweighs the mere possibility of future relief after protracted and expensive litigation; and
(4) The judgment of the parties that the settlement is fair and reasonable.

Gottlieb, 11 F.3d at 1014 (quoting Jones, 741 F.2d at 324); Rutter & Wilbanks Corp. v. Shell Oil Co., 314 F.3d 1180, 1188 (10th Cir. 2002) (citations omitted). "It is the responsibility of the proponents of the settlement to provide sufficient evidence to support a conclusion that the settlement is fair . . . ." Gottlieb, 11 F.3d at 1015; see also Jones, 741 F.2d at 325 (citations omitted). Plaintiffs and the City urge the Court to adopt and approve the December 2002 Decree, arguing that the proposed decree meets the requirements for "fairness" set forth in Gottlieb.

(Joint Mot. for Approval and Adoption of the Consent Decree at 1-2.) The Court will address each factor in turn below.

A. Whether the Proposed Settlement Agreement Was Fairly and Honestly Negotiated

The first factor for the Court to consider in determining the "fairness" of the proposed settlement is "whether the proposed settlement agreement was fairly and honestly negotiated." Gottlieb, 11 F.3d at 1014 (citations omitted). The fairness of the negotiating process is to be examined "in light of the experience of counsel, the vigor with which the case was prosecuted, and [any] coercion or collusion that may have marred the negotiations themselves." Malchman v. Davis, 706 F.2d 426, 433 (2d Cir. 1983). In Wilkerson v. Martin Marietta Corp., the district court found that the proposed consent decree was fairly and honestly negotiated where "[t]he completeness and intensity of the mediation process, coupled with the quality and reputations of the Mediators, demonstrate a commitment by the parties to a reasoned process for conflict resolution that took into account the strengths and weaknesses of their respective cases and the inherent vagaries of litigation." 171 F.R.D. 273, 285 (D. Colo. 1997).

The Court finds that the parties' positions in this racial discrimination lawsuit have been vigorously litigated for over nine years. The parties' zealous advocacy in support of their respective positions is demonstrated by the countless motions, responses, and replies on both substantive and procedural issues filed by the parties since January 1994. As of the date of this order, the docket contains more than 1,000 entries. (See Civil Docket for Case No. 94-CV-39 (N.D. Okla.).)

Moreover, the Court observes that the parties have engaged in intense discovery efforts

aimed at proving their respective positions. During the discovery phase of the case, Plaintiffs and the City conducted over one hundred depositions and witness interviews, (11/19/02 Order at 16; FOP's Resp. to Sept. 18 Order, Ex. G), and it has been represented that approximately 300,000 pages of documents were obtained through discovery (Resp. of Lodge #93 of the Fraternal Order of Police ("FOP") to Ct. Order of Sept. 18, 2002 at 11.)[19] The Court finds that this extensive pre-trial discovery enabled the parties to fully evaluate the strengths and weaknesses of the class claims and defenses before entering into their final settlement negotiations.

The Court further finds that the December 2002 Decree was the result of the November 2002 court-administered settlement negotiations conducted under the auspices of United States District Judge Claire V. Eagan. Judge Eagan is well-recognized in the legal community for her experience, qualifications, and integrity. Her ability and fairness are unquestioned. Indeed, the parties expressly requested that she conduct the final settlement negotiations. Moreover, the Court finds that the settlement negotiations conducted under her guidance were arms-length negotiations among three parties of equal bargaining power, and that all parties to the case participated in those negotiations.

Most significantly, however, the Court finds that neither the FOP nor any member of the Plaintiff class has objected to the fairness of the negotiations. See Wilkerson, 171 F.R.D. at 284

[19] Indeed, as of January 2002, Plaintiffs alone had incurred more than $42,000 in copying costs. (Pls.' Resp. to Lodge #93 of the Fraternal Order of Police's Mot. to Compel Deps. and to Produc. Docs., filed May 16, 2002, Ex. D.)

(finding negotiations fair and honest where no objector alleged or advanced any facts or evidence of fraud, collusion, or overreaching with consent decree). Although the FOP was given a full opportunity to object to the proposed decree and did object to the proposed decree on other grounds, the FOP did not object to the December 2002 Decree on the ground that the process that led to settlement was unfair. (See FOP's Objections; 1/9/03 Tr. at 9:19-19:9; Resp. of Fraternal Order of Police Lodge #93 ("FOP") to Questions of Judge Sven Erik Holmes on Jan. 9, 2003.)[20] For these reasons, the Court finds that the December 2002 Decree was fairly and honestly negotiated.

B. Whether Serious Questions of Law and Fact Exist That Place the Ultimate Outcome of the Litigation in Doubt

The second Gottlieb factor for the Court to analyze in considering the "fairness" of the proposed decree is whether there are serious questions of law and fact that place the ultimate outcome of the litigation in doubt. Gottlieb, 11 F.3d at 1014.

Based upon a careful review of the record since March 1995,[21] which reflects the strategies, positions, and certain aspects of the evidence to be addressed by the parties at trial, the Court finds that serious questions of both fact and law exist that render the outcome of the litigation uncertain. First, the Court finds that the vigorous prosecution of this lawsuit by the parties in the nine years since the case was filed, as described above, demonstrates the parties'

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[20] In fact, in reliance upon the FOP's statement that it did not object to the fairness of the settlement process, Plaintiffs and the City withdrew their motion to call the settlement judge, Judge Eagan, as a witness at the fairness hearings. (1/9/03 Tr. at 19:11-21:6.)

[21] This case was transferred to the undersigned on March 7, 1995.

uncertainty with respect to the outcome of this litigation. Second, immediately before the case was again stayed for settlement negotiations on November 14, 2002, the Court heard argument on a number of substantive motions pending before it, including: Plaintiffs' motion for partial summary judgment; the City's motion to sever the supervisory plaintiffs from the class; the City's and the FOP's separate motions to decertify the class; the City's motion to define the temporal scope of Plaintiffs' Section 1983, Section 1981, and Title VII claims; and Plaintiffs' motion for reconsideration of the Court's September 2002 order granting the FOP's motion to intervene. Because the case has been stayed since the parties' argument at the November 13 and 14, 2002 hearings, the Court has not entered a ruling on any of these motions, and such rulings would significantly impact the parties' respective cases if the matter were to proceed to trial. The Court finds that the fact that these substantive motions have not yet been decided supports the conclusion that the outcome of the litigation is in doubt.[22] Finally, the Court observes that Plaintiffs would have borne a heavy burden of proving their claims if this case were to proceed to trial. For these reasons, the Court concludes that the outcome if this litigation is in doubt.

C. Whether The Value of an Immediate Remedy Outweighs the Possibility of Future Relief After Protracted and Expensive Litigation

The third Gottlieb factor for the Court to consider is "whether the value of an immediate remedy outweighs the possibility of future relief after protracted and expensive litigation." Gottlieb, 11 F.3d at 1014. The Court of Appeals in Gottlieb held that courts, in applying this

[22] The Court notes that the issues raised in these motions are not the only unsettled issues in this lawsuit.

factor, should weigh the "value" of settlement against the additional risk and costs associated with continued litigation:

> Under the third . . . factor, that value is to be weighed not against the net worth of the defendant, but against the possibility of some greater relief at a later time, taking into consideration the additional risks and costs that go hand in hand with protracted litigation.

Id. at 1015.

First, the Court finds that the value of settlement for the City includes the curtailment of the legal costs of defending this action. See Local No. 93, 478 U.S. at 528 ("A consent decree is primarily a means by which parties settle their disputes without having to bear the financial and other costs of litigating."); Carson v. Am. Brands, Inc., 450 U.S. 79, 87 (1981) ("Settlement agreements may [] be predicated on an express or implied condition that the parties would, by their agreement, be able to avoid the costs and uncertainties of litigation.").

It has been publicly reported that, during 2002, the City paid $1.5 million to its outside law firm, Paul, Hastings, for services rendered in connection with this litigation and that the City is potentially liable for an additional $691,000 to the firm for work performed during that period.[23] See Curtis Killman, Law Firm Suing City for Fees, TULSA WORLD, Apr. 23, 2002, at

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[23] Although Paul, Hastings did not file an appearance in this case until February 2001, it has been publicly reported that the $2 million in fees were incurred for representation that occurred between April 1998 and January 2002. See Curtis Killman, Law Firm Suing City for Fees, TULSA WORLD, Apr. 23, 2002, at A1. On May 14, 2002, following the withdrawal of Paul, Hastings, Joel Wohlgemuth, of Norman, Wohlgemuth, Chandler & Dowdell ("Norman, Wohlgemuth"), filed an appearance in this case as outside counsel on behalf of the City. The Court anticipates that, in light of the extensive proceedings during the past twelve months, the fees incurred by the City for Norman, Wohlgemuth's representation may also be substantial.

A1; P. J. Lassek, City Releases Disputed Invoices, TULSA WORLD, Mar. 22, 2002, at A1. In this regard, former Mayor Susan Savage testified at the June 2002 fairness hearings with respect to the April 2002 Decree that she considered the "highly publicized" cost of litigation when deciding to enter into the previous decree. (6/13/02 Tr. at 18:15–19:10.) Similarly, Mayor LaFortune testified at the January 21, 2003 hearing that he also considered the rising attorney fees as a factor in determining that the December 2002 Decree was cost effective. (1/21/03 Tr. at 51:6-14.)

The Court finds that, based on the record, a trial of this lawsuit would have been lengthy and complex. (See, e.g., Pls.' Prelim. Witness List, filed Oct. 7, 2002 (identifying 104 prospective witnesses); City's Prelim. Witness List, filed Oct. 7, 2002 (identifying 55 prospective witnesses).) Clearly, a trial and the likelihood of further protracted litigation, regardless of the outcome, would have been very expensive for all parties. In this regard, Mayor LaFortune testified at the fairness hearings that, in determining that the proposed decree is cost effective, he specifically considered the fact that the largest amount of attorney fees in this case would be generated in the weeks leading up to trial. (1/21/03 Tr. at 51:6-14.)

Second, the Court finds that the value of settlement for the City also includes the opportunity to compromise with Plaintiffs regarding the relief requested. Carson, 450 U.S. at 87. It is possible that, if Plaintiffs were to have tried the case and received all the relief requested in the second amended complaint, the City could have been liable for up to $17 million in damages to Plaintiffs, in addition to attorney fees and costs.

Third, the Court finds that the value of settlement for Plaintiffs includes a comparatively

expeditious resolution of this matter and relief from the burden of the costs of further litigation in this case.[24] To date, Plaintiffs have received no relief whatsoever in this case. After over nine years of litigation, including several failed attempts at settlement, Plaintiffs have represented to the Court that they are satisfied that obtaining some, but not all, of the relief requested through settlement outweighs the "mere possibility" of greater relief at a trial in the future.

Fourth, the Court finds that the value of settlement in this case for both Plaintiffs and the City includes the avoidance of any uncertain future remedy. If this case were to proceed to trial on the merits and Plaintiffs were to prevail, both Plaintiffs and the City may become subject to a Court-imposed remedy that either one or both parties would find undesirable. Carson, 450 U.S. at 87 (noting that settlement agreement may be predicated, in part, on condition that parties would avoid uncertainties of litigation). Captain Busby testified at the fairness hearings that this uncertainty – the uncertainty of a "forced" solution – is part of the reason that he believes the December 2002 Decree is a better option than proceeding to trial. (1/22/03 Tr. at 278:17-22.) The Court finds that the uncertainty of any future remedy that could be imposed by the Court weighs in favor of the agreed settlement between Plaintiffs and the City. For these reasons, the Court finds that the value of an immediate resolution significantly outweighs the possibility of future relief after protracted and expensive litigation.

D. Whether The Parties to the Decree Believe It Is Fair and Reasonable

The fourth Gottlieb factor for the Court to evaluate in considering the proposed decree is

[24] In matching the efforts that the City employed to defend this case, it is likely that Plaintiffs also have expended significant resources, including substantial attorney fees and costs.

whether the parties believe the proposed settlement is fair and reasonable. Gottlieb, 11 F.3d at 1014. The Court finds, at the outset, that the fact that the lead representatives of the Plaintiff class and the official representatives of the City are signatories to the proposed decree establishes that they believe it to be fair and reasonable. Named Plaintiffs Captain Busby, Derrek Lewis, Marvin Blades, and Tyrone Lynn signed the proposed decree on behalf of the Plaintiff class, and Mayor LaFortune signed the proposed decree on behalf of the City.

Moreover, on behalf of Plaintiffs, Captain Busby testified at the January 2003 fairness hearings that the December 2002 Decree is the "best resolution" to this litigation because it is "amicable" and because both Plaintiffs and the City have agreed to its terms and "have committed themselves to implementing [it]." (1/22/03 Tr. at 279:15-19.) Captain Busby also stated that his testimony concerning the April 2002 Decree is "in large part" still applicable to the current proposed decree. (Id. at 268:12-20.) At the July 2002 fairness hearings regarding the April 2002 Decree, Captain Busby testified that he believed the prior proposed decree was fair to all members of the Plaintiff class and to all TPD officers. (7/15/02 Tr. at 174:6-10, 175:1-5.)[25]

At the fairness hearing on January 21, 2003, both Mayor LaFortune and Chief David Been testified that they fully support the December 2002 Decree. (1/21/03 Tr. at 24:15-18; id. at 147:5-8.) Mayor LaFortune testified that, as the mayor of the City, he "unequivocally" supports

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[25] The parties have agreed that the testimony adduced at the June and July 2002 fairness hearings would be part of the record for the January 2003 fairness hearings. (See Pls.' and Def. City of Tulsa's Joint Designations of Test. From the Proceedings Concerning the First Proposed Consent Decree; Designation of Tr. By Fraternal Order of Police Lodge #93; see also 12/5/02 Tr. at 7:20-24.)

the proposed decree. (Id. at 24:15-18.) He also testified that he believes the proposed decree is "fair to all parties." (Id. at 25:7.) Likewise, Chief Been testified that he believes the December 2002 Decree is the "best possible way" to further the cause of the TPD. (Id. at 147:5-11.)

In addition to considering the judgment of the parties with respect to the proposed settlement, the Court should also "defer to the judgment of experienced counsel who has competently evaluated the strength of his proofs." See Williams v. Vukovich, 720 F.2d 909, 922-23 (6th Cir. 1983). See also Lopez v. City of Santa Fe, 206 F.R.D. 285, 292 (D. N.M. 2002) ("[The] trial court is entitled to rely upon the judgment of experienced counsel for the parties . . . . Indeed, the trial judge, absent fraud, collusion, or the like, should hesitate to substitute its own judgment for that of counsel." (citation omitted)). In this case, Plaintiffs' counsel, Louis Bullock, and the City's counsel, Larry Simmons and Joel Wohlgemuth, are also signatories to the December 2002 Decree. All three of these attorneys are experienced trial lawyers, with extensive experience in federal litigation, including civil rights matters. Indeed, this Court, as well as the entire legal community, has the highest respect for the ability and wisdom of each of these attorneys. Thus, in determining whether to approve the December 2002 Decree, the Court takes into consideration the fact that the parties' experienced and capable lawyers have determined that the settlement is both fair and reasonable.

E. Objections By Class Members

Two members of the Plaintiff class, Demita Kinard and Wendell Franklin, objected to the

December 2002 Decree.[26] First, the Court commends the objecting class members for coming forward and voicing their views with respect to the proposed decree. See Lopez, 206 F.R.D. at 292 (commending objecting class members for filing objections). As the district court in Lopez explained, "[i]t is of utmost importance for the Court to be knowledgeable of any objections by class members in order to make a fully informed determination that has such a binding effect on the entire class as a whole." Id.

The Court notes, however, that the fact that some class members object to the proposed settlement does not itself prevent the Court from approving the agreement. 7B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1797.1 (citations omitted); see also In re S. Ohio Correctional Facility, 173 F.R.D. 205, 214 (S.D. Ohio 1997) (citations omitted). A relatively small number of class members who object to a proposed decree may, in fact, be an indication of the settlement's fairness. See Howard B. Newberg and Alba Conte, Newberg on Class Actions § 11.48, at 11-116 (3d ed. 1992) (citations omitted); see also Am. Employers Ins. Co. v. King Res. Co., 556 F.2d 471, 478 (10th Cir. 1977) (finding that the fact that there was only one objector was "of striking significance and import").

The Court has seriously considered the objections raised by the two members of the Plaintiff class to determine whether those objections suggest substantial reasons why the proposed decree might be unfair. 7B Charles Alan Wright & Arthur R. Miller, Federal Practice

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[26] Ms. Kinard testified at the fairness hearings on behalf of the FOP in opposition to the proposed decree. (1/27/03 Tr. at 428:10 - 458:4.) Mr. Franklin did not testify, but was notified that the opportunity was available to him.

and Procedure § 1979.1 ("The court must independently evaluate whether the objections being raised suggest serious reasons why the proposal might be unfair."); Williams, 720 F.2d at 923 ("Objections raised by members of the Plaintiff class should be carefully considered."); see also Lopez, 206 F.R.D. at 292. For the reasons set forth below, the Court finds that Ms. Kinard's and Mr. Franklin's objections do not provide a sufficient basis for denying approval of the December 2002 Decree.

Both Ms. Kinard and Mr. Franklin object to the December 2002 Decree on the stated basis that the allegations of discrimination set forth in the second amended complaint are untrue and cannot be proven. (See 1/27/03 Tr. at 457:7-23; W. Franklin's Obj. to Proposed Settlement and Consent Decree.)[27] In evaluating the fairness of the settlement, however, courts are not to decide the merits of the case or resolve unsettled legal questions. Carson, 450 U.S. at 88; Gottlieb, 11 F.3d at 1015 (finding that while courts have an "independent duty" to analyze the evidence "[i]ndependent analysis does not mean . . . that the district court must conduct a foray into the wilderness in search of evidence that might undermine the conclusion that the settlement is fair."). Thus, because a decision on the merits of this case is inappropriate in determining whether the December 2002 Decree is fair and reasonable, the Court overrules Ms. Kinard's and Mr. Franklin's objections on this ground.

Ms. Kinard and Mr. Franklin further object to the December 2002 Decree on the stated

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[27] Ms. Kinard also objects to Section 10.1 of the proposed decree because it "makes the assumption that the Black Officers Coalition is currently an asset." (D. Kinard's Obj. to Proposed Settlement and Consent Decree at 2.)

basis that the proposed decree includes the implementation of various policies and practices that are currently in place within the TPD. (D. Kinard's Obj. to Proposed Settlement and Consent Decree at 1-2; W. Franklin's Obj. to Proposed Settlement and Consent Decree at 1.)[28] In this regard, Ms. Kinard specifically identified two provisions of the December 2002 Decree that she believes are overlapping with current TPD practices: (1) Specialty Assignment Training; and (2) the Career Development section of the police academy.[29] Mr. Franklin did not specifically identify any provisions he believes are overlapping.

The Court finds that, as a general proposition, the fact that certain provisions in the December 2002 Decree memorialize in writing current TPD practices is not a sufficient basis upon which to sustain an objection to the proposed decree. Therefore, the Court finds that, with respect to the specific provisions identified by Ms. Kinard, a degree of overlap of those provisions with current TPD policies and practices is not a material basis for rejecting the

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[28] The Court notes that, at the fairness hearings before the Court, Ms. Kinard testified that, in her opinion, the proposed decree neither hurts nor helps the TPD. (1/27/03 Tr. at 455:14-16.)

[29] In her objection, Ms. Kinard stated as follows:

> Specialty Assignment Training is already in place. Upon being accepted to detective Division and many of the undercover positions, the individual is given training to acquaint him or her with the special needs and functioning of the unit.
>
> * * *
>
> Section 5.9 addresses a Career Development section of the academy. Officer Gustafson currently coordinates training for the Department. Officers who are interested in developing a particular aspect of their career, have the opportunity to do so now . . . .

(D. Kinard's Obj. to Proposed Settlement and Consent Decree at 2.)

December 2002 Decree. Accordingly, the Court overrules Ms. Kinard's and Mr. Franklin's objections on these grounds.[30]

Ms. Kinard further objects to Section 5.5 of the proposed decree, which addresses the issue of recruiting for specialty positions. (D. Kinard's Obj. to Proposed Settlement and Consent Decree at 2.) Ms. Kinard explains that, "[i]f it were not for the active recruiting efforts of many of the supervisors, they would not have personnel that would fulfill their needs." (Id.)

Section 5.5 provides that the City shall adopt and implement a policy "prohibiting those in the chain of command of positions being filled from directly or indirectly recruiting persons to apply for a specialty assignment" other than through the TPD's current process, which is memorialized in Section 5.2 of the December 2002 Decree. (December 2002 Decree § 5.5.) While the Court understands that Section 5.5 could affect recruiting for specialty assignments such that, in some cases, recruiting may be more difficult, the Court, nevertheless, finds that this provision is not meant to serve as a blatant prohibition on recruitment. Instead, Section 5.5 is intended to prohibit the inherent conflict of interest that arises from an individual in the chain of command having a pre-disposition in favor of a particular applicant by virtue of having recruited that individual. (See December 2002 Decree § 5.5; see also Pls.' & City's Joint Post-Hearing Brief at 37 (citing 1/22/03 Tr. at 270:1-5).) Section 5.5 is an effort to ensure a decision-making

[30] The Court observes that the FOP's objections to the December 2002 Decree are inconsistent with this objection asserted by Ms. Kinard and Mr. Franklin. Unlike Ms. Kinard and Mr. Franklin, the FOP contends that the proposed decree contains new policies and practices and that, because these new policies and practices should be subject to the collective bargaining process, the proposed decree should be rejected.

process for specialty assignments that is both open and fair. (Id.)

Mr. Franklin further objects to the December 2002 Decree on the basis that the "opt-out" procedures were unfairly presented. (W. Franklin's Obj. to Proposed Settlement and Consent Decree at 1.) In his objection, Mr. Franklin explains that, shortly after completing the police academy, he received a letter from Plaintiffs' counsel regarding the lawsuit and that this letter contained a form that he could complete to "opt-out" of the Plaintiff class. (Id.) Mr. Franklin explains that he did not read the letter in its entirety and, therefore, did not know that he was included in the lawsuit by virtue of his failure to return the opt-out form. (Id.) To the extent that Mr. Franklin is asserting that, had he read the letter informing him of the opt-out procedures, he would have done so, this is not a sufficient basis for rejecting the proposed decree. To the extent Mr. Franklin is making the broader assertion that the opt-out provisions were unclear or unfair, the Court notes that only two members of the Plaintiff class have come forward and objected to the proposed decree and that only Mr. Franklin has objected to the opt-out procedures. Accordingly, because there is nothing in the record, other than Mr. Franklin's general statements in his written objection, indicating that the opt-out procedures were infirm, the Court overrules Mr. Franklin's objection on this ground.

III

Having found that the proposed settlement satisfies the Gottlieb factors, the Court must determine whether the December 2002 Decree violates any contractual or legal rights of a non-consenting third party. Local No. 93, 478 U.S. 501. See also United States v. City of Hialeah, 140 F.3d 968, 973 (11th Cir. 1998) ("The district court has the responsibility to insure that a

consent decree is not 'unlawful, unreasonable, or inequitable.'"). In its objections, the FOP argues that the December 2002 Decree should be rejected because it violates the union's contractual and legal rights under both Oklahoma law and the CBA with the City. (FOP's Objections at 1-2.)

In Local No. 93, the Supreme Court held that a district court was not barred from entering a consent decree over the objection of the intervening union where the consent decree did not bind the union to act or refrain from acting, did not impose any legal duties or obligations on the union, and did not purport to resolve any claims asserted by the union. Local No. 93, 478 U.S. at 528-29. In that case, Plaintiff, an organization of black and Hispanic firefighters, sued the city of Cleveland, alleging that the city's examination and other promotion practices discriminated against minority firefighters. Local No. 93, 478 U.S. at 507-509. Plaintiff and the city reached a settlement of the litigation that involved the imposition of racial quotas on promotions. When presented with the proposed consent decree, the district court deferred a decision on its approval because the negotiations leading to the proposed decree did not include the intervening firefighters union. Id. Counsel for all three parties then participated in hours of "intensive negotiations" under a magistrate judge's supervision and agreed to a revised decree. However, submission of the revised decree to the district court was made contingent upon approval by the union membership, and the union members "overwhelmingly rejected the proposal." Id.

Plaintiff and the city of Cleveland, without the support of the union, then filed a second proposed consent decree and moved for its approval. The court approved and adopted the consent decree "as a fair, reasonable, and adequate resolution of the claims raised in [the] action"

and overruled the union's objections. Id. at 512 (citations omitted). The Supreme Court, in approving and adopting the bilateral consent decree, held as follows:

> Local 93 and the United States also challenge the validity of the consent decree on the ground that it was entered without the consent of the Union. They take the position that because the Union was permitted to intervene as of right, its consent was required before the court could approve a consent decree. This argument misconceives the Union's rights in the litigation.
>
> A consent decree is primarily a means by which parties settle their disputes without having to bear the financial and other costs of litigating. It has never been supposed that one party – whether an original party, a party that was joined later, or an intervenor – could preclude other parties from settling their own disputes and thereby withdrawing from litigation. Thus, while an intervenor is entitled to present evidence and have its objections heard at the hearings on whether to approve a consent decree, it does not have power to block the decree merely by withholding its consent. Here, Local 93 took full advantage of its opportunity to participate in the District Court's hearings on the consent decree. It was permitted to air its objections to the reasonableness of the decree and to introduce relevant evidence; the District Court carefully considered those objections and explained why it was rejecting them. Accordingly, "the District Court gave the union all the process that [it] was due . . . ."
>
> Of course, parties who choose to resolve litigation through settlement may not dispose of the claims of a third party, and *a fortiori* may not impose duties or obligations on a third party, without that party's agreement. A court's approval of a consent decree between some of the parties therefore cannot dispose of the valid claims of nonconsenting intervenors; if properly raised, these claims remain and may be litigated by the intervenor. And, of course, a court may not enter a consent decree that imposes obligations on a party that did not consent to the decree. However, the consent decree entered here does not bind Local 93 to do or not to do anything. It imposes no legal duties or obligations on the Union at all; only the parties to the decree can be held in contempt of court for failure to comply with its terms. Moreover, the consent decree does not purport to resolve any claims the Union might have under the Fourteenth Amendment, or as a matter of contract.

478 U.S. 528-29 (internal quotations and citations omitted).

Consistent with the Supreme Court's holding in Local No. 93, if the Court finds that the

December 2002 Decree adversely affects the rights of a non-consenting third-party, it may not approve the agreement without a finding of liability. Local No. 93, 478 U.S. 529; Hialeah, 140 F.3d at 976 ("The rule is that '[t]hose who seek affirmative remedial goals that would adversely affect other parties must demonstrate the propriety of such relief.' Such a demonstration requires a trial on the merits . . . and it cannot be accomplished in a consent decree proceeding if the rights of a nonconsenting third party are affected.") (citations omitted). But see Lelsz v. Kavanagh, 783 F. Supp. 286 (N.D. Tex. 1991) ("[A] number of courts have explicitly held that an intervenor's power to oppose a settlement, even when its interests are affected, is limited to the right to air its objections to the reasonableness of the settlement and to introduce evidence.") (citing Kirkland v. N.Y. State Dep't of Corr. Servs., 711 F.2d 1117, 1125-28 (2d Cir. 1983); EEOC v. Am. Tel. & Tel. Co., 556 F.2d 167, 173-74 (3d Cir. 1977)).

As noted above, the FOP, in its objections, asserts that the December 2002 Decree should be rejected because it violates the union's contractual and legal rights under the CBA and the Oklahoma Fire and Police Arbitration Act (the "FPAA"), and because entry of the proposed decree would violate principles of federalism. (FOP's Objections at 1-2.) The FOP maintains that, because the proposed decree violates its rights, the December 2002 Decree cannot be approved without a trial on the merits. (Id.)[31] Thus, before the Court may approve the proposed

[31] The FOP, citing Sanguine v. U.S. Dep't of Interior, 798 F.2d 389 (10th Cir. 1986), appears to be arguing that, even if the Court finds that the December 2002 Decree does not affect its legal or contractual rights, the FOP is, nevertheless entitled to a trial because they are not a party to the proposed settlement. The Court, however, finds as a matter of law that Sanguine does not stand for this proposition. In Sanguine, the issue on appeal was whether the district court abused its discretion by setting aside the consent decree it had entered before the

decree, it must first determine whether the December 2002 Decree impermissibly affects the contractual and legal rights of the FOP, and whether it implicates any federalism concerns.[32]

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intervening tribal members were granted intervention. Sanguine, 798 F.2d at 391. Because the intervening tribe was not a party when the consent decree was entered, the Court of Appeals for the Tenth Circuit found that the intervenors were not adequately represented prior to the entry of the decree and affirmed the district court's decision to set aside the prior judgment. Id. In this case, the FOP had not only been granted intervention but had also participated in settlement negotiations before Judge Eagan when Plaintiffs and the City agreed to the proposed decree. Therefore, because the facts of Sanguine are distinguishable from the facts in the instant case and because Sanguine must be construed in accordance with the Supreme Court's opinion in Local No. 93, the Court finds that Sanguine does not require a trial on the merits if the Court finds that the December 2002 Decree does not impair the FOP's contractual or legal rights under the CBA or Oklahoma law.

[32] The Court notes that, in the context of reviewing a proposed consent decree, the question of whether the proposed agreement violates the contractual rights of others is a question of law for the court. Hialeah, 140 F.3d at 973 (citations omitted). "It is difficult to envision an issue more purely legal than that of whether one written agreement, the consent decree, conflicts with another written compact, the existing collective bargaining agreement." Id. (quoting United States v. City of Miami, 664 F.2d 435, 451 n.7 (Former 5th Cir. 1981) (en banc) (Gee, J., concurring in part and dissenting in part)). In this regard, during a status hearing before the Court, counsel for the FOP acknowledged that the Court may properly decide, as a matter of law, whether the proposed consent decree violates the CBA:

> THE COURT: . . . I understand that at any fairness hearing, like the fairness hearing that has occurred previously in connection with the earlier consent decree, that you'll have full opportunity to call witnesses, cross-examine witnesses, adduce evidence and so forth, and that will not be in any way confined to whether or not there's a violation of the Collective Bargaining Agreement.
>
> This is really just a very narrow question, and that is, insofar as there is a claim that the Collective Bargaining Agreement is violated and thus the rights of the FOP are infringed upon, is that something that can be resolved as a matter of law, as indicated in Hialeah and the City of Miami, or is that something that, in addition to other [] claims, would also require adducing evidence?
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> MR. ROGERS: I think it can be revolved [sic] now as a matter of law, but if you do not agree with that, we think we can show through evidence that that evidence will show it does violate it.

A. The December 2002 Decree Does Not Violate the FOP's Rights as "Exclusive Bargaining Agent"

The FPAA provides that members of the police department in any municipality may be afforded "well-recognized rights of labor such as the right to organize, to be represented by a collective bargaining representative of their choice and the right to bargain collectively concerning wages, hours and other terms and conditions of employment." OKLA. STAT. tit. 11, § 51-101.A. The CBA between the City and the FOP specifically incorporates these rights and also provides that "Lodge #93, Fraternal Order of Police" is the "exclusive bargaining agent" for all TPD employees other than the Chief of Police, one officer designated by the Chief, and civilian employees. (CBA Art. 1, § 1.1; CBA Art. 9, § 9.8.)[33] There are approximately 800 officers in the "bargaining unit" represented by the FOP. (1/29/03 Tr. at 728:3-10.)

The FOP argues that the December 2002 Decree should be rejected because the City does not have the unilateral right to adopt and implement any policy that touches upon a "mandatory

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(12/11/02 Tr. at 22:13-23:6.)

[33] Section 9.8 of the CBA provides that:

> Employer agrees that under [the FPAA] the City and the Lodge are the only parties which may legally and appropriately confer, negotiate and enter into agreements on matters which relate to wages, hours and other conditions of employment as provided in the [FPAA] and the collective bargaining agreement covering all employees.

(CBA Art. 9, § 9.8.)

subject of bargaining."[34] The FOP further claims that, under the "Prevailing Rights" provision of the CBA, (CBA Art. 11, § 11.3), and the FPAA, the City may not change any "rule, regulation, fiscal procedures, working conditions, departmental practices or manner of conducting operation and administration" of the TPD without the agreement of the FOP or impasse arbitration. (FOP's Objections at 15-16 (citing OKLA. STAT. tit. 11, § 51-111).)[35] The FOP argues that the December 2002 Decree changes certain TPD policies and practices in violation of the union's entitlements under the prevailing rights provision of the CBA and the FPAA.

Plaintiffs and the City contend that the December 2002 Decree does not intrude upon the FOP's rights as exclusive bargaining agent because, although the proposed decree will change certain policies and practices of the TPD, entering into and implementing the December 2002 Decree is a legitimate exercise of the City's authority under the "Management Rights and Responsibilities" provision, set forth in Article 2 of the CBA. (Pls.' & City's Joint Resp. to Objections at 3-11.)

The management rights provision in Article 2 sets forth certain functions that are solely

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[34] "Mandatory subjects of bargaining" include "wages, hours, and other terms and conditions of employment." 20 Richard A. Lord, A Treatise on the Law of Contracts by Samuel Williston § 55:32 (4th ed. 2001) (citations omitted). (See also CBA Art. 9, § 9.8.)

[35] Section 51-111 of the FPAA provides, in pertinent part, as follows:

> All rules, regulations, fiscal procedures, working conditions, department practices and manner of conducting the operation and administration of fire departments and police departments currently in effect on the effective date of any negotiated agreement shall be deemed a part of said agreement unless and except as modified or changed by the specific terms of such agreement.

OKLA. STAT. tit. 11, § 51-111.

the responsibility of management.[36] For example, under the management rights provision, the City retains the right to: "determine Police Department policy including the rights to manage the affairs of the Police Department in all respects;" "establish and enforce Police Department rules, regulations, and orders;" and "introduce new, improved or different methods and techniques of Police Department operation or change existing methods and techniques." (CBA Art. 2, § 2.2(a), (j), and (k).) The City also retains the right to "organize and reorganize the Police Department;" and "to determine the amount of supervision necessary." (Id. Art. 2, § 2.2(e) and (l).)

Whether the City has the authority to enter into the proposed decree depends, in part, on the appropriate interpretation standard to be applied in construing the management rights provision of the CBA. In this regard, the FOP argues that the "clear and unmistakable waiver" standard articulated by the Supreme Court in Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 708 (1983), applies in this case. (FOP's Objections at 16-17.) Under the clear and unmistakable waiver standard, Plaintiffs and the City would be required to introduce evidence of specific intent

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[36] Section 2.1 of the CBA contains the broad statement of the City's rights with respect to the management of the TPD:

> Lodge recognizes the prerogative of Employer to operate and manage its affairs in all respects and in accordance with its responsibilities, and the powers of authority which Employer has not officially abridged, delegated, granted, or modified by this Agreement are retained by Employer, and all rights, powers, and authority Employer had prior to the signing of this Agreement are retained by Employer and remain exclusively without limitation within the rights of Employer.

(CBA Art. 2, § 2.1.) Section 2.2 of the CBA, on the other hand, enumerates the City's specific rights with respect to management of the TPD.

on the part of the union to waive its right to bargain on the particular subject matter at issue. Metropolitan Edison, 460 U.S. at 708. The FOP argues that the Oklahoma Public Employees Relations Board (the "PERB")[37] has adopted the clear and unmistakable waiver standard, and, therefore, that the Court should apply this standard in interpreting the management rights clause in this case. (FOP's Objections at 17-19 (citing IAFF Local 256 v. City of Jenks, PERB No. 211 (1990); FOP Lodge 125 v. City of Guymon, PERB No. 329 (1996)).)

By contrast, Plaintiffs and the City maintain that the management rights provision of the CBA should be interpreted under the standard articulated by the Court of Appeals for the District of Columbia Circuit in NLRB v. U.S. Postal Serv., 8 F.3d 832 (D.C. Cir. 1993), which is known as the "contract coverage" standard.[38] Under the contract coverage standard, if an issue is "covered by" a collective bargaining agreement, the "union has exercised its right and the question of waiver is irrelevant." Id. at 836 (internal quotations and citations omitted). In other words, parties to a collective bargaining agreement may agree to a management rights provision "which permits the employer to exercise rights of management and make substantive changes concerning terms and conditions of employment during the term of a collective bargaining agreement without requiring bargaining by the employer on such subject." City of El Reno,

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[37] The PERB, a statutorily created body composed of three members appointed by the Governor, is the entity vested with the power under the FPAA to "adopt, promulgate, amend, or rescind such rules as it deems necessary" and to hold public hearings on "any proposed rule of general applicability designed to implement, interpret, or prescribe policy, procedure or practice requirements" under the provisions of the act. OKLA. STAT. tit. 11, § 51-104.

[38] The contract coverage standard, adopted after the Supreme Court's decision in Metropolitan v. Edison by the Courts of Appeals for both the District of Columbia Circuit and the Seventh Circuit, has been neither adopted nor rejected by the Supreme Court.

PERB Case No. 353 (citing NLRB v. U.S. Postal Serv., 8 F.3d 832).

Plaintiffs and the City contend that the PERB has adopted the contract coverage standard set forth in NLRB v. U.S. Postal Serv. and, therefore, that such standard should be applied in this case. (Pls.' & City's Joint Resp. to Objections at 6 (citing Lodge No. 103, Fraternal Order of Police v. City of Ponca City, PERB No. 349 (1997); and Fraternal Order of Police, Lodge 151 v. City of El Reno, PERB No. 353 (1998)).) As additional support for its argument that the CBA should be interpreted under the contract coverage standard, Plaintiffs and the City contend that the version of the management rights provision contained in the CBA was the result of hard-fought negotiations between the City and the FOP, during which the City gave a "significant amount of consideration to the FOP" in exchange for the specific powers contained in Article 2. (Pls.' & City's Joint Resp. to Objections at 4-5.)[39]

For the reasons set forth below, the Court applies the contract coverage standard in this case. Recent PERB decisions interpreting the scope of management rights provisions under the FPAA have adopted the standard set forth by the District of Columbia Circuit in NLRB v. U.S. Postal Serv., 8 F.3d 832, and have determined that "an employer's unilateral change in mandatory subjects of bargaining during the term of a contract is 'permissible when a

[39] In this regard, Plaintiffs and the City attach to their joint response a document represented to be the FOP's proposed "watered-down" version of Article 2. (Pls.' & City's Joint Resp. to Objections, Ex. C.) Among the changes that the City asserts were proposed by the union but rejected by the City during negotiations was the substitution of the language granting the City the power "[t]o research and offer possible changes to Police Department policy" instead of "[t]o determine Police Department policy," as is provided in the current CBA. (Id. (emphasis added).)

management rights clause evidences a grant of permission by the union to unilaterally effect such changes.'" Lodge No. 103, Fraternal Order of Police v. City of Ponca City, PERB No. 349 (1997) (citing IAFF Local 2171 v. City of Del City, PERB Case No. 194 (1990)); Lodge No. 127, Fraternal Order of Police v. City of Midwest City, PERB Case No. 375 (2001) (citing IAFF Local 2171 v. City of Del City, PERB Case No. 194).

The Court rejects the FOP's argument that PERB decisions subsequent to Lodge No. 103, Fraternal Order of Police v. City of Ponca City, PERB No. 349, and Fraternal Order of Police, Lodge 151 v. City of El Reno, PERB No. 353, have "made clear that a management rights clause does not constitute a waiver of a union's rights." (Reply of Lodge #93 of the Fraternal Order of Police to Pls.' and Def. City of Tulsa's Joint Resp. to Objections of Lodge #93 of the Fratneral Order of Police (FOP) to New Proposed Consent Decree at 11.)

The only PERB decision cited by the FOP as authority for this proposition, Lodge No. 127, Fraternal Order of Police v. City of Midwest City, PERB No. 375 (2001), does not support the union's argument. In Lodge No. 127, Fraternal Order of Police v. City of Midwest City, PERB No. 375, the PERB concluded as a matter of law that:

> Under the FPAA, an employer's unilateral change in mandatory subjects of bargaining during the term of a contract is permissible only when a management rights clause evidences a grant of permission by the union to unilaterally effect such changes. I.A.F.F. Local 2171 v. City of Del City, PERB Case No. 194 (1990).

Lodge No. 127, Fraternal Order of Police v. City of Midwest City, PERB No. 375. The FOP argues that this decision, because it cites to the 1970 PERB decision in IAFF Local 2171 v. City of Del City, indicates that the PERB, in Lodge No. 103, Fraternal Order of Police v. City of

Ponca City, was not changing and had not changed its view regarding the interpretation standard to be applied in determining whether a municipality could unilaterally effect changes to terms and conditions of employment based on a grant of permission in the management rights provision of a collective bargaining agreement. The Court, however, rejects this argument because the PERB, in Lodge No. 103, Fraternal Order of Police v. City of Ponca City, clearly adopted the contract coverage standard of interpretation:

> Parties to a labor agreement may reach an agreement which permits the employer to issue policies and make substantive changes concerning terms and conditions of employment during the term of a collective bargaining agreement without requiring bargaining by the employer on such subjects. N.L.R.B. v. U.S. Postal Serv., 8 F.3d 832 (D.C. Cir. 1993), United Technologies Corp., 287 NLRB No. 16 130 LLRM (BNA) 1086 (1987).

Id.

Therefore, because the Oklahoma PERB has most recently adopted the approach of the Court of Appeals for the District of Columbia Circuit, which essentially holds that the waiver doctrine is inapposite in unilateral change cases involving a claim of contractual privilege, the Court finds that the appropriate standard to be applied in this case is the contract coverage standard.

As explained above, under the contract coverage standard, the Court's analysis turns on the interpretation of the contract at issue, rather than on the question of waiver. See NLRB v. U.S. Postal Serv., 8 F.3d at 837. In other words, if the City has the power under the management rights provision of the CBA to enter into the proposed decree, the need for a showing of the FOP's specific intent to waive the right to bargain over each particular subject is obviated. See

id. Thus, in deciding whether the FOP's contractual and legal rights under the CBA and FPAA are impaired by the proposed decree, the Court must first determine whether the City has the authority, under the management rights provision of the CBA, to enter into the December 2002 Decree.[40]

The parties urge the Court to declare, on a wholesale basis, that the entire decree is valid or invalid based on the powers granted, or not granted, by the management rights provision of the CBA. The FOP argues that, even under the contract coverage standard, the City does not have the authority under the management rights provision of the CBA to enter into the proposed decree. Plaintiffs and the City, on the other hand, argue that the proposed decree is a valid exercise of the City's prerogatives under that provision. (See FOP's Objections at 14-16; Pls.' &

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[40] "Although collective bargaining agreements are not ordinary contracts and are not governed by the same common law concepts that govern private contracts . . . certain basic contract interpretation principles apply to construction of labor agreements." Volkman v. United Transp. Union, 73 F.3d 1047, 1050 (10th Cir. 1996) (internal quotations and citations omitted). "If the language of an agreement is unambiguous, it may be construed as a matter of law without resort to extrinsic evidence of intent." Id. (citation omitted); see also Scrivner v. Sonat Exploration Co., 242 F.3d 1288, 1293 (10th Cir. 2001) (quoting OKLA. STAT. tit. 15, § 154) ("The language of a contract is to govern its interpretation, if the language is clear and explicit and does not involve an absurdity."). "Contracts are to be construed with each clause helping to interpret other clauses." Pub. Serv. Co. of Okla. v. Burlington N. R.R. Co., 53 F.3d 1090, 1097 (10th Cir. 1995) (citing Shepard v. French, 612 P.2d 727, 729 (Okla. Ct. App. 1980)). "Particular clauses of [a] contract, though persuasive in isolation, are not deemed controlling when violative of the general intent of the parties expressed in the contract as a whole." Id. (quoting United States v. H.G. Cozad Constr. Co., 324 F.2d 617, 619 (10th Cir. 1963)). Applying these canons of construction, "a management rights clause may not be considered apart from the rest of a collective bargaining agreement" because implied terms may exist within the agreement that give a management rights provision a narrower scope than, at first reading, its terms may suggest. 20 Richard A. Lord, A Treatise on the Law of Contracts by Samuel Williston § 55:35 (4th ed. 2001) (emphasis added) (citations omitted).

City's Joint Resp. to Objections 3-11.)

The Court finds that wholesale adoption of either of these broad interpretations of the management rights provision, without specific ties to a particular section of the proposed decree, would frustrate the purpose and function of the CBA. Accordingly, the Court will address below those specific sections of the December 2002 Decree that the FOP claims relate to mandatory subjects of bargaining, and which were the focus of the evidence presented to the Court in connection with the FOP's objections to the proposed decree. In analyzing these specific sections of the proposed decree, the Court will determine whether they are a permissible exercise of the City's powers under the management rights provision of the CBA and, therefore, not in conflict with the FOP's contractual and legal rights under the CBA and the FPAA.[41]

Before addressing the specific sections of the December 2002 Decree, it is important to note two particularly significant changes between the April 2002 Decree and the December 2002 Decree. First, Plaintiffs and the City added a rule of construction to the December 2002 Decree, which provides that the proposed decree shall be interpreted so as to be in accordance with the CBA. Section 1.5 provides in its entirety as follows:

> The Parties recognize the existence and validity of the Collective Bargaining Agreement ("CBA") between the City and the Fraternal Order of Police, Lodge

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[41] Pursuant to the Notice of Proposed Settlement, the FOP was required to file any objections to the December 2002 Decree no later than January 8, 2003. On that date, the FOP filed a sixty-four page statement of its objections, which included a twenty-six page brief, (FOP's Objections), and a thirty-eight page exhibit specifically identifying the bases for the union's objections to certain provisions of the proposed decree, (FOP's Objections, Ex. A). The Court notes that this filing constitutes the record of the FOP's objections to the December 2002 Decree and controls over any wholly divergent argument raised by counsel in subsequent briefs.

> No. 93 ("FOP"). It is the intent of the Parties to comply with the CBA and, therefore, all operating directives provided for by this Decree shall be read to be in accordance with language in the CBA.

(December 2002 Decree § 1.5.)[42] Second, Plaintiffs and the City added a severability clause to the December 2002 Decree. (See December 2002 Decree § 34.1.) Section 34.1 provides in its entirety as follows: "In the event any provision of this Decree is declared invalid for any reason by the Court, said finding shall not affect the remaining provisions of this Decree." (Id.)

The Court finds that Plaintiffs and the City intended, in modifying the April 2002 Decree by adding Sections 1.5 and 34.1 to the December 2002 Decree, to avoid any violation of the FOP's rights under the CBA and, if necessary, to sever any provisions that impermissibly interfere with the FOP's rights under that agreement. Thus, for purposes of analyzing whether the December 2002 Decree conflicts with the CBA, the Court, in an effort to effectuate Plaintiffs' and the City's intent expressed in Section 1.5, construes the proposed decree, where possible, in a manner that does not violate the CBA.[43] Further, the Court acknowledges the parties' desire for

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[42] Section 1.1 of the December 2002 Decree defines "Parties," for purposes of the proposed decree, as Plaintiffs and the City. (December 2002 Decree § 1.1.) Accordingly, quotations to the proposed decree that refer to "Parties" should be understood as a reference to parties to the settlement agreement rather than parties to this case.

[43] See 11 Richard A. Lord, A Treatise on the Law of Contracts by Samuel Williston § 30:25 (4th ed. 1999) ("So long as the contract makes clear reference to the document and describes it in such terms that its identity may be ascertained beyond doubt, the parties to a contract may incorporate contractual terms by reference to a separate, noncontemporaneous document, including a separate agreement to which they are not parties . . . .") (citations omitted). See also, e.g., Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 574 (1984) (holding that City of Memphis did not intend to depart from existing seniority system established through city's arrangements with union where original decree anticipated that city would recognize seniority and later decree stated that it was "not intended to conflict with any provisions" of original decree).

the Court, in interpreting the proposed decree, to sever any provision that it finds cannot be construed in a manner that does not violate the CBA. It is through this prism that the Court will analyze the individual provisions of the December 2002 Decree that the FOP claims relate to mandatory subjects of bargaining, and which were the focus of the evidence addressed by the Court in connection with the FOP's objections to the proposed decree. The Court's analysis of these objections is as follows:[44]

1. Section 3.1 – Data Collection

Section 3.1 of the December 2002 Decree requires the creation of a data collection system to capture and analyze data relating to "individual, squad, shift, division, and individuals in the chain of command." (December 2002 Decree § 3.1.) The proposed decree identifies fifteen specific types of data to be collected. (Id.) With the exception of supervisor contact reports (§ 3.1.g), pedestrian stop reports (§ 3.1.l), and search and seizure reports (§ 3.1.m), all of this data is currently being collected by the TPD. (1/21/03 Tr. at 174:3 - 181:14.)

The FOP argues that "the original decision to collect the data and the intended use of the data are both separate and independent mandatory subjects of bargaining and, thus, violate the FOP's rights" under the CBA. (FOP's Objections, Ex. A at 5.) The FOP further argues that the creation of new forms is, and has historically been, a mandatory subject of bargaining. Finally, the FOP argues that the requirement to complete these new forms is a "new work rule" and that

[44] Although the FOP lodged objections to fifty subsections of the December 2002 Decree, the Court omits explicit analysis of those objections that it has found are patently without merit.

failure to complete the forms could subject officers to discipline.

Plaintiffs and the City maintain that Section 3.1 falls under the City's express management rights to "introduce new, improved, or different methods and techniques of Police Department operation or change existing techniques" and to "determine the amount of supervision necessary." (Pls.' & City's Joint Resp. to FOP's Mot. for a Ruling on the Effect of the Consent Decree on the FOP and Its Members (hereinafter "Pls.' & City's Joint Resp. to FOP's Mot."), Ex. A at 2 (citing CBA Art. 2, § 2.2(k) and (l)).) Plaintiffs and the City further maintain that, while the FOP may be permitted to bargain over what the form will look like, it cannot prevent the City from requiring these forms as a new method of operation and an increase in supervision. Finally, Plaintiffs and the City maintain that the City has the power under Section 2.2(d) of the CBA to discipline officers for "just cause" and that any disciplinary consequences arising from an officer's failure to complete this form would not change the "just cause" disciplinary standard.

Applying the contract coverage standard described above, the Court concludes that the City has the authority, pursuant to the management rights provision of the CBA, to implement the data collection system described in Section 3.1 of the December 2002 Decree. The Court finds that the collection of three new categories of data falls within the City's enumerated rights under Article 2 of the CBA to "introduce new, improved, or different methods and techniques of Police Department operation or change existing techniques" and to "determine the amount of

supervision necessary." (See CBA Art. 2, § 2.2(k) and (l).)[45] The Court finds that, although the union has historically bargained over the design of any new forms, the FOP's right to bargain in this regard does not supplant the City's management rights under Article 2 of the CBA to modify existing methods and techniques or to determine the necessary supervision of officers.

The Court further finds that Section 3.1 of the December 2002 Decree does not contain any new discipline rules or change the "just cause" disciplinary standard set forth in Section 2.2(d) of the CBA. (Compare December 2002 Decree § 3.1 with CBA Art. 2, § 2.2(d) (granting the City the right "[t]o discipline, suspend or terminate any employee for good and sufficient cause (good and sufficient cause is synonymous with 'just cause')".) The Court finds that, although an officer could be disciplined for his or her failure to complete a new form under Section 3.1, such discipline does not change the "just cause" standard under Article 2 of the CBA. (See CBA Art. 2, § 2.2(d).)[46] Moreover, the Court observes that nothing in the proposed

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[45] The Court notes that, at the January 2003 fairness hearings, Chief Been testified that even the three types of data characterized as "new" information are, for the most part, collected in some form today. (1/21/03 Tr. at 175:21-181:21.) In this regard, Chief Been testified that, for these categories of data, the documentation of the data on a report form, rather than the collection of the data itself, would be the new method under the proposed decree. (Id.)

[46] As Plaintiffs and the City suggest in their brief, the City cannot discipline officers without "just cause." (Pls.' & City's Joint Resp. to FOP's Mot., Ex. A at 10-11 ("Anytime that the Decree calls for appropriate discipline or corrective action, it is assumed that the City cannot violate its contractual duties under the CBA in taking any such corrective action. In other words, the City must still have 'just cause' before disciplining any officer.").) In this regard, Section 3.1 of the proposed decree specifically provides that "[d]ata collection itself shall not be the basis for disciplining officers." (December 2002 Decree § 3.1.) Testimony was adduced at the fairness hearings that raw data collected pursuant to Section 3.1 of the proposed decree would not be the sole basis for disciplining officers. (1/21/03 Tr. at 74:9-76:9.) Therefore, because data collection itself will not be the sole basis for discipline and because the City cannot discipline

decree prevents the FOP or any of its members from filing a grievance with respect to any unjust discipline in the future. For these reasons, the Court finds that Section 3.1 of the December 2002 Decree is a valid exercise of the City's management rights under Article 2 of the CBA and, thus, overrules the FOP's objections to this provision.

2. Section 5.1 – Specialty Assignments

Section 5.1 of the December 2002 Decree provides that "[a]ll specialty assignments shall be made on the basis of merit and fitness." The proposed decree does not contain definitions for the terms "merit" and "fitness."

The FOP argues that the inclusion of this provision in the proposed decree is contrary to the FOP's rights under the CBA because it "is a change to the current process in which some discretion is used by the City to fill specialty assignments." (FOP's Objections, Ex. A at 4.) The FOP further argues that "the Decree freezes and restricts future FOP bargaining over the criteria to fill 'specialty assignments' for the duration of the Decree." (Id.) Finally, the FOP argues that the subjective determination of the "merit" and "fitness" criteria, which are not defined in the CBA, are mandatory subjects of bargaining. (Id.)

Plaintiffs and the City contend that the FOP has no substantive objection to Section 5.1. (Pls.' & City's Joint Resp. to FOP's Mot., Ex. A at 3 ("FOP does not allege that assignments based solely upon merit or fitness is unfair or discriminatory to any officer.").) They further contend that Section 5.1 falls under the City's express management rights to "introduce new,

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officers without "just cause," the Court finds that Section 3.1 does not contain a new discipline rule or change the "just cause" disciplinary standard.

improved, or different methods and techniques of Police Department operation or change existing techniques." (Id. (citing CBA Art. 2, § 2.2(k)).) Finally, Plaintiffs and the City argue that "[t]he fact that the FOP will not be permitted to bargain to change the assignments standard from 'merit' and 'fitness' during the life of this Decree is a 'minor and ancillary' restraint on the FOP." (Id. (citing Gen. Bldg. Contractors Assoc. v. Pa., 458 U.S. 375, 399 (1982)).

The Court finds that Section 5.1 of the December 2002 Decree is consistent with the City's existing system for appointments and promotions. See TULSA, OKLA., CITY CHARTER ch.10, § 1.1 ("Appointments and promotions in the classified service of the city shall be made solely on the basis of merit and fitness, determined by competitive procedures.") (emphasis added). In this regard, the Court finds that Section 5.1 of the proposed decree is merely a restatement of existing City policy. Furthermore, the Court finds that the City has the authority, pursuant to Article 2 of the CBA, to declare that specialty assignments shall be based on "merit" and "fitness." (See CBA Art. 2, § 2.2(a) (granting City the right "[t]o determine Police Department policy").)

The Court further finds that nothing in the December 2002 Decree precludes the City from bargaining with the FOP about the meaning of the terms "merit" and "fitness."[47] As with the creation of any new forms under Section 3.1 of the proposed decree, the FOP's right to bargain in this regard does not supplant the City's right under Article 2 of the CBA to determine

[47] Surely the FOP does not intend to argue in bargaining with the City that specialty assignments should be given to non-meritorious or unfit individuals. Of course, what constitutes "merit" and "fitness" for a particular assignment will remain a subject for collective bargaining.

TPD policy. (See CBA Art. 2, § 2.2(a).)[48] For these reasons, the Court overrules the FOP's objections to Section 5.1 of the proposed decree.

3. Section 5.3 – Training in Basic Investigation

Section 5.3 of the December 2002 Decree requires the TPD to establish, within twelve months of the entry of the proposed decree, "a one-day training in basic investigation, which shall include report writing, search warrants, and case management." (December 2002 Decree § 5.3.) Section 5.3 further mandates that the TPD "require that training as a prerequisite to applying for a position as a Detective/Investigator in Detective Division, SID,[49] or Uniformed Division, by September 1, 2005." (Id.)

The FOP objects to Section 5.3, arguing that the proposed decree establishes, without negotiation with the union, "definite nonnegotiable training prerequisites, thereby preempting the FOP's rights and violating the FOP's rights as exclusive bargaining agent under the CBA Preamble and Article 1.1, Article 9.8, and Article 11.3." (FOP's Objections, Ex. A at 9.) The FOP argues that the December 2002 Decree creates a new position of "investigator," for which the scope and duties are mandatory subjects of bargaining. (Id. (citing FOP Lodge 125 v. City of Guymon, PERB No. 329 (1996)).) Finally, the FOP argues that "[t]he CBA also only grants the City the right to 'train . . . new employees', Article 2.2(h); it does not authorize the City to

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[48] Moreover, even if Section 5.1 could be construed as imposing a burden on the FOP's rights under the CBA, the Court finds that any such burden is de minimis. Cf. Gen. Bldg. Contractors Assoc., 458 U.S. at 399 (stating that district court order granting injunctive relief imposing "minor and ancillary" restrictions against a defendant against whom no liability was found may be permissible upon "an appropriate evidentiary showing").

[49] The Court assumes that "SID" refers to the Special Investigations Division of the TPD.

unilaterally mandate training of existing employees." (Id.)

Plaintiffs and the City argue that implementing Section 5.3 is within the City's "general management rights to determine policy, manage affairs of [the] TPD, assign work, establish rules and regulations, determine job classifications, etc." (Pls.' & City's Joint Resp. to FOP's Mot., Ex. A at 4 (citing CBA Art. 2, § 2.2(a), (e), (g), and (j)).) Plaintiffs and the City further assert that the FOP mischaracterizes the language of the December 2002 Decree because Section 5.3 does not "create" any new position.[50]

The Court finds that the City has the authority, pursuant to Article 2 of the CBA, to require a one-day training in basic investigation for applicants for the position of detective/investigator. Specifically, the City has the right under the CBA to "determine Police Department policy" and "to manage the affairs of the Police Department in all respects." (CBA Art. 2, § 2.2(a).) The City also has the right to "establish Police Department rules, regulations and orders." (Id. § 2.2(j).)

The Court further finds that Section 5.3, unlike Section 5.9 discussed below, does not indicate any intention on the part of Plaintiffs or the City to create a new position. (Compare December 2002 Decree § 5.3 with id. § 5.9 (identifying positions called for by the proposed decree as "newly created positions").) Accordingly, the Court overrules the FOP's objections to Section 5.3 of the proposed decree.

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[50] Moreover, Plaintiffs and the City contend that the FOP has no substantive objection to Section 5.3 of the proposed decree. (Id. ("FOP does not allege that new prerequisite is unfair or discriminatory to any officer.").)

4. Section 5.5 – Recruiting for Specialty Assignments

As described above, Section 5.5 of the December 2002 Decree prohibits those in the chain of command from "directly or indirectly recruiting persons to apply for a specialty assignment," other than the process previously adopted by the City and described in Section 5.2 of the December 2002 Decree.

The FOP argues that this requirement constitutes the establishment of a "new work rule." The FOP further argues that such establishment of a new work rule, and the disciplinary consequences for violation of this rule, are both mandatory subjects of bargaining under the CBA. (FOP's Objections, Ex. A at 9.)

Plaintiffs and the City maintain that the ban on informal and subjective recruiting is "simply a 'change' in 'existing techniques' of making specialty assignments" and within the City's management rights under the CBA. (Pls.' & City's Joint Resp. to FOP's Mot., Ex. A at 3 (citing CBA Art. 2, § 2.2(k)).) Plaintiffs and the City further maintain that the City has the power under Section 2.2(d) of the CBA to discipline officers for "just cause" and that any disciplinary consequences for a violation of this rule would be based on the power granted to the City under that section of the management rights provision.

The Court finds that the City has the authority, pursuant to the management rights provision of the CBA, to prohibit individuals in the chain of command from directly or indirectly recruiting persons to apply for a specialty assignment. (See CBA Art. 2, § 2.2(k) (granting the City the right to "introduce new, improved, or different methods and techniques of Police Department operation or change existing techniques").) The Court further finds that the

introduction of this new prohibition neither establishes a new disciplinary rule nor changes the "just cause" disciplinary standard set forth in Section 2.2(d) of the CBA. For these reasons, the Court finds that Section 5.5 of the December 2002 Decree is a valid exercise of the City's management rights under Article 2 of the CBA and, thus, overrules the FOP's objections to this provision.

5. Section 5.6 – Review of Minimum Requirements

Section 5.6 of the December 2002 Decree requires the TPD to review established minimum requirements for all positions in order to ensure that they relate to the requirements of the position. (December 2002 Decree § 5.6.)

The FOP argues that this provision "constitutes a unilateral imposition of minimum position requirements which are mandatory subjects of bargaining and violates Articles 1.1, 9.8 and 11.3 of the CBA." (FOP's Objections, Ex. A at 10.) The union also criticizes Section 5.6 of the proposed decree, asserting that it imposes a management philosophy that is unrelated to the substance of the lawsuit.

Plaintiffs and the City contend that reviewing the established minimal requirements for all positions is something that falls under the City's "general management rights to determine policy, manage affairs of [the] TPD, assign work, establish rules and regulations, determine job classifications, etc." (Pls.' & City's Joint Resp. to FOP's Mot., Ex. A at 5 (citing CBA Art. 2, § 2.2(a), (e), (g), and (j)).) Plaintiffs and the City further contend that "[r]equiring the department to assure that minimum requirements for positions directly relate to requirements for performance of job[s] is related to the lawsuit in that Plaintiffs alleged that assignments were

given based upon entirely subjective criteria (race, cronyism, etc.)." (Id.) They explain that the purpose of this provision was to assure that position requirements will remain objective. (Id.)

The Court finds that the City has the power, pursuant to its general management rights under Article 2 of the CBA, to review the established minimal requirements for positions. The Court rejects the suggestion that the CBA prohibits the City from reviewing its own policies and job requirements. Such a broad reading of the prevailing rights clause in the CBA cannot stand when reviewed in tandem with the enumerated powers of management under Article 2. The Court further finds that, for the reasons articulated by Plaintiffs and the City, Section 5.6 is sufficiently related to the substance of Plaintiffs' claims. For these reasons, the Court overrules the FOP's objections to Section 5.6.

6. Section 5.7 – Qualifications for Specialty Assignments

Section 5.7 of the proposed decree provides that "the established minimum qualifications for positions shall not be waived," unless no one who meets the minimum qualifications for an open specialty assignment applies for that assignment. (December 2002 Decree § 5.7.) In the event that no one meeting the minimum qualifications applies, "the Department may open the position to all applicants and select the most qualified applicant for the position." (Id.)

The FOP argues that Section 5.7 of the December 2002 Decree "freezes the present 'minimum qualification,' thereby pre-empting the FOP's right under the CBA and FPAA to negotiate future changes to these requirements." (FOP's Objections, Ex. A at 10.) The FOP further argues that "Section 5.7 allows the department to select the 'most qualified person' without any definitive selection criteria, which also constitutes a violation of the FOP's right to

bargain [over] mandatory subjects of bargaining." (Id.)

Plaintiffs and the City maintain that the FOP mischaracterizes the December 2002 Decree because the proposed decree "does not say that some minimum job requirements cannot be changed or negotiated." (Pls.' & City's Joint Resp. to FOP's Mot., Ex. A at 5.) Instead, Plaintiffs and the City contend that the clear intent of this provision "is that minimum job requirements shall not be waived as THE criteria for filling specialty unit positions UNLESS no qualified applicant applies." (Id. (emphasis in original).)

The Court finds that Section 5.7 of the proposed decree does not conflict with the FOP's rights under the CBA and the FPAA to negotiate future changes to the "minimum qualifications" for specialty assignments. Specifically, the Court finds that nothing in the December 2002 Decree precludes the FOP from bargaining with the City over future changes to the minimum qualifications for specialty assignments or the meaning of the term "most qualified applicant." (See December 2002 Decree § 5.7.) Thus, the Court overrules the FOP's objections to Section 5.7 of the proposed decree.

7. Section 5.9 – Recruiting and Career Development

Section 5.9 of the December 2002 Decree provides that the City shall "organize at the Academy, a Recruiting and Career Development Section under the supervision of a sergeant assisted by a corporal, which shall be newly created positions." (December 2002 Decree § 5.9.) Under the proposed decree, the Recruiting and Career Development Section will be responsible for "consulting with supervisors and commanders of specialty units; identifying informal training opportunities; and acquainting themselves with the requirements of all specialty

positions." (Id.) The proposed decree further states that the Recruiting and Career Development Section will assist officers in developing and achieving career plans:

> Upon request of an officer, this section shall assist the requesting officer in developing a career plan which reflects the officer's individual career goals. The career plan shall specify assignments and training which are needed by the officer to achieve these goals. The sergeant in charge of this section shall serve as both an advisor and an advocate for officers in achieving their career plans and shall be an ex-officio member of the Training Committee. The Recruitment and Career Development Section shall further have the duty of insuring that all officers seeking promotion are kept informed of the testing procedures, the scope of the subjects to be tested or the materials from which the test questions are drawn . . . .

(Id.)

The FOP claims that "Section 5.9 of the Decree provides for the establishment of new positions to staff a new 'Recruiting and Career Development Section' without limiting the TPD's ability to select the sergeant or corporal to staff the Section." (FOP's Objections, Ex. A at 10.) The FOP further claims that Section 5.9 requires the implementation of "new work rules and terms and conditions of employment in violation of the CBA, such as identifying training opportunities and assisting officers in developing career plans." (Id.) The FOP also argues that "[t]o an undetermined extent, § 5.9 may also violate Article 6.2 of the CBA, which establishes an officer's ability to use seniority to select substation assignments and days off." (Id.) The FOP further asserts that "the creation of the career plan to accomplish specific career goals, as mandated by the Decree, is a mandatory subject of bargaining requiring negotiation with the FOP." (Id. at 10-11.) Finally, the FOP argues that, because Section 5.9 requires the sergeant in charge of the Recruitment and Career Development Section to act as an "advocate" for officers in achieving their career plan, this section of the proposed decree "violates the FOP's role as the

exclusive representative of bargaining unit members articulated in Article 1.1 of the CBA." (Id.)[51]

Plaintiffs and the City contend that the creation of new positions for a sergeant and corporal are within the City's management right to "hire, promote or transfer any employee." (Pls.' & City's Joint Resp. to FOP's Mot., Ex. A at 5 (citing CBA Art. 2, § 2.2(c) and (e)).) Plaintiffs and the City further contend that it "is not a 'new work rule' for the career development [sergeant] to help officers identify career opportunities, and assist them with their career plans, this is merely an assigned duty necessary to that position." (Id. (citing CBA Art. 2, § 2.2(e) and (g)).) Plaintiffs and the City argue that, because each individual officer has the right to determine his or her own career plan without union interference, the creation of a career plan for these individual officers is not a mandatory subject of bargaining. (Id. at 6.) Plaintiffs and the City contend that the FOP's "seniority" objection is speculative because nothing in the proposed decree impinges upon existing seniority rights. (Id.) Finally, Plaintiffs and the City, explaining that Section 1.5 of the December 2002 Decree requires that the proposed decree be read to be in accordance with the CBA, maintain that the "word 'advocate' is not used in the collective bargaining agent sense." (Id.)

First, the Court finds that neither the creation of two new positions nor the assignment of responsibilities and duties for those positions, as called for by Section 5.9 of the December 2002

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[51] Section 1.1 of the CBA provides, in pertinent part, that "Employer recognizes Lodge as the exclusive bargaining agent for all Employees of the Tulsa Police Department . . . ." (CBA Art. 1, § 1.1.)

Decree, constitutes a new work rule subject to mandatory bargaining with the union. The Court finds that both the creation of these new positions and the allocation of responsibilities are within the City's enumerated management rights to "hire, promote or transfer any employee;" to "allocate and assign work to all Employees within the Police Department;" and to "determine the organizational chart of the Police Department, including . . . the determination of job classifications." (See CBA Art 2, § 2.2(c), (g), and (e).)

Second, the Court finds that the creation of a career plan that reflects an officer's individual career goals is not a mandatory subject of bargaining that requires negotiation with the FOP. In fact, Section 5.9 of the proposed decree specifically provides that only "[u]pon the request of an officer, . . . this section shall assist the requesting officer in developing a career plan which reflects the officer's individual career goals." (See December 2002 Decree § 5.9 (emphasis added).) Because each individual officer presumably has the right to determine his or her own career plan without union interference, the Court finds that the creation of such a plan at an individual officer's request is not a mandatory subject of bargaining.

Third, the Court finds nothing in the language of Section 5.9 of the December 2002 Decree that, on its face, affects Section 6.2 of the CBA. Section 6.2 of the CBA provides, in pertinent part, as follows:

> Except where impractical due to skill levels of Employees, or experience of Employees, or where specific working conditions exist which would preclude certain Employees from working specific shifts or substations, and considering required manning levels, seniority will be the dominant factor to be considered by the Chief of Police. Seniority shall be exercised in the following sequence of priority with "a" being first:

(a) Substation assignment.
(b) Shift assignment.
(c) Assign regular days off.
(d) Grant annual leave.
(e) Seniority will be the dominant factor in granting time off up to forty (40) work hours before the requested day off . . . .

(CBA Art. 6, § 6.2.) Although the Court recognizes the significance of the issue of seniority in the collective bargaining context,[52] the Court overrules the FOP's objection in this regard because it has failed to specifically identify any real conflict between Section 5.9 of the December 2002 Decree and Section 6.2 of the CBA. (See FOP's Objections, Ex. A at 10 ("To an undetermined extent, § 5.9 may also violate Article 6.2 of the CBA . . . .").)

Fourth, the Court finds that, to the extent the language in Section 5.9 of the proposed decree, which requires the sergeant in charge of the Recruiting and Career Development Section to act as an "advisor and an advocate" for officers, conflicts with the FOP's role as exclusive bargaining agent pursuant to Article 1.1 of the CBA, the language in the CBA controls. (See December 2002 Decree § 1.5.) Therefore, the Court construes the term "advocate" in Section 5.9 in a manner that does not infringe upon the FOP's role as exclusive bargaining agent under the CBA and the FPAA. In other words, the Court construes the directive that the new sergeant advocate for officers to mean that he or she shall advocate in a manner that does not include acting as a collective bargaining agent. Because the Court finds that Section 5.9 of the December

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[52] See generally Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 570 n.4 (1984) ("Seniority has traditionally been, and continues to be, a matter of great concern to American workers. More than any other provision of the collective bargaining agreement . . . seniority affects the economic security of the individual employee covered by its terms.") (internal quotations and citations omitted).

2002 Decree can be read in a manner that does not violate the FOP's contractual rights under the CBA and the FPAA, the Court overrules the FOP's objections to Section 5.9.

8. Section 6.1 – Merit and Fitness Standard for Recruiting

Section 6.1 of the proposed decree mandates that all hiring shall be based on "merit and fitness." (December 2002 Decree § 6.1 ("All hiring shall be based on merit and fitness, as required by the City of Tulsa Personnel Policies and Procedures, Section 101.").)

The FOP objects to Section 6.1 of the proposed decree, arguing that hiring requirements are issues of past negotiations between the City and the FOP. (FOP's Objections, Ex. A at 11.) Specifically, the FOP objects as follows:

> [T]he hiring requirements, particularly the educational degree requirement, are issues of past negotiations with the FOP. For example, the FOP recently negotiated with the City in respect to the requirement that Tulsa police officers obtain a full four-year college degree. To the extent that "merit" or "fitness" could be interpreted to not require a college degree, the Decree would violate the past practice and agreement of the FOP.

(Id.)

Plaintiffs and the City respond to the FOP's objections by explaining that the December 2002 Decree does not change any objective existing hiring requirements. (Pls.' & City's Joint Resp. to FOP's Mot., Ex. A at 6.) Plaintiffs and the City maintain that "the [r]equirements of 'merit' and 'fitness' under Decree [Section] 1.5, must be read in accordance with the CBA." (Id.)

First, the Court finds that the policy articulated in Section 6.1 of the proposed decree – that "all hiring shall be based on merit and fitness" – is within the City's management rights

under the CBA "[t]o be the sole judge of the qualifications of applicants and training of new Employees" and "[t]o determine Police Department policy." (CBA Art. 2, § 2.2(h) and (a).) Second, the Court finds that nothing in Section 6.1 of the proposed decree changes any objective hiring requirements or prevents the FOP from negotiating with the City regarding hiring requirements in the future. For these reasons, the Court overrules the FOP's objection to Section 6.1 of the December 2002 Decree.

9. Section 6.5 – Temporary Employment Opportunities

Section 6.5 of the proposed decree provides that "[i]n order to attract and retain applicants, temporary employment opportunities of up to six months in duration shall be made available to persons accepted to the Academy." (December 2002 Decree § 6.5.)

The FOP objects to Section 6.5 of the December 2002 Decree on the grounds that it is unclear. In objecting to this provision, the FOP states:

> This section of the proposed Consent Decree is hopelessly unclear. Seemingly, it provides for temporary employment opportunities of up to six months for individuals who have been selected for, but prior to beginning, the [Police] Academy. If this interpretation is correct, such a procedure violates the CBA by giving away bargaining unit work to civilian employees. Further, this provision would violate an existing arbitration award which recognizes the FOP's inherent rights as the exclusive bargaining agent and defines the scope of the bargaining unit work, specifically Article § 1.1.

(FOP's Objections, Ex. A at 11.)

Plaintiffs and the City maintain that the FOP's objections mischaracterize Section 6.5 of the proposed decree because that provision "does not give any 'bargaining unit' work to civilians." (Pls.' and City's Joint Resp. to FOP's Mot., Ex. A at 6.) Plaintiffs and the City

further maintain that the City has the express management right to "hire . . . any employee." (Id. (citing CBA Art. 2, § 2.2(c)).) Plaintiffs and the City state that, because the FOP does not identify the arbitration award it refers to in its objections specifically, or even whether that arbitration award dealt with any issue raised by Section 6.5 of the proposed decree, they are unable to respond to this argument.

The Court finds that Section 6.5 of the proposed decree falls within the City's right under Section 2.2(c) of the CBA to "direct the members of the Police Department, including the right to hire, promote, or transfer any employee." (CBA Art. 2, § 2.2(c).) The Court finds that nothing in Section 6.5 of the proposed decree authorizes the City to give away "bargaining unit work" to civilians or prevents the FOP from filing a grievance in the event the City does hire civilians for "bargaining unit work."[53] Accordingly, the Court finds that Section 6.5 does not infringe upon the FOP's rights under the CBA or the FPAA and, therefore, overrules the FOP's objections to Section 6.5 of the December 2002 Decree.

10. Section 7.2 – Promotion Examination Process

Section 7.2 of the proposed decree provides that "the promotion examination process which is presently in place shall remain in place throughout the term of this Decree." (December 2002 Decree § 7.2.) Section 7.2 requires independent validation if the City desires to amend the current process:

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[53] As to the unspecified "arbitration award," the FOP has not provided enough information to enable the Court to identify, much less analyze, the arbitration award they refer to. Because the Court is unable to consider any argument based on this unspecified award, the Court overrules the FOP's objection on this ground.

> Should the City desire to amend that process, in addition to meeting any other requirements placed upon the City by the City Charter and the Collective Bargaining Agreement, all modifications shall be independently validated.

(Id.)

The FOP argues that "Section 7.2 of the Decree freezes the current promotional examination process through the term of the CBA." (FOP's Objections, Ex. A at 12.) The FOP argues that Section 7.2 imposes, for purposes of future negotiations, an obligation on the FOP and the City to ensure that any proposed modifications presented during collective bargaining are "independently validated." (Id.) The FOP argues that this imposition interferes with the union's rights under the CBA and the FPAA:

> The Decree prohibits the FOP from obtaining changes to the CBA during mid-term negotiation with the City unless the FOP's proposed changes are validated. There is no such present requirement and validation is not required by law. Thus, this provision interferes with the FOP's right to make proposals under the CBA and the FPAA.

(Id.)

Plaintiffs and the City begin by noting that the current promotional process has already been validated. (Id.) They also argue that the "FOP has no right to prevent the City from assuring that its promotional process is fair." (Id.)[54] Finally, Plaintiffs and the City argue that Section 7.2 is a legitimate exercise of the City's management rights under Article 2 of the CBA

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[54] Plaintiffs and the City contend that the FOP has no substantive objection to Section 7.2, noting that the FOP does not allege that the current promotional process is unfair or discriminatory to any officer. (Pls.' & City's Joint Resp. to FOP's Mot., Ex. A at 6.) In this regard, Plaintiffs and the City argue that the "FOP's argument is based upon pure speculation: i.e., though the FOP does not object to the current promotional policy, it might attempt to propose an un-validated process at some time in the future." (Id.)

because "[r]equiring independent validation of any new promotional process is an 'improved . . . method and technique' of Police Department operation." (Id. (quoting CBA Art. 2, § 2.2(k)).)

First, the Court finds that Section 7.2 of the December 2002 Decree is a valid exercise of the City's specific management right under Section 2.2(k) of the CBA to "introduce new, improved, or different methods and techniques of Police Department operation or change existing methods and techniques." (See CBA Art. 2, § 2.2(k).) Second, with respect to the FOP's argument that the proposed decree infringes upon its right to negotiate over a mandatory subject of bargaining, the Court finds that nothing in Section 7.2 of the proposed decree prevents the FOP from bargaining with the City regarding amendments to the promotion examination process. (See December 2002 Decree § 7.2.) In fact, Section 7.2 specifically refers to "other requirements placed upon the City by the . . . Collective Bargaining Agreement." (Id.)[55]

For these reasons, the Court finds that the FOP's rights to bargain are not implicated by Section 7.2 of the proposed decree. Thus, because the Court finds that Section 7.2 is an appropriate exercise of the City's management rights under Article 2 of the CBA and because the FOP is not precluded from bargaining with the City regarding modifications to the process, the Court overrules the FOP's objections to Section 7.2.

11. Section 11 – Discipline

Section 11 of the December 2002 Decree requires the City to "reorganize Internal Affairs

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[55] Indeed, the Court finds that Section 7.2 of the December 2002 Decree imposes no obligation on the FOP whatsoever. (See id.) Under Section 7.2, the onus of ensuring that all modifications to the promotion examination process are independently validated falls on the City, not the FOP.

into two squads" and to assign work to those squads according to the proposed decree. (December 2002 Decree § 11.1.) Specifically, Section 11.1 of the December 2002 Decree provides as follows:

> The City shall reorganize Internal Affairs into two squads. The current internal affairs function shall be assigned to a new Investigations Squad charged with conducting investigations of complaints. A second squad, the Audit and Inspections Squad, shall be charged with assuring that the Department is operating consistent with the Department's policies. It shall conduct such investigations and audits of the Department's data as necessary to meet this charge. The Audit and Investigations Squad shall be staffed by two sergeants, which shall be newly created positions.

(Id.)

The FOP objects to Section 11 of the proposed decree, arguing that the "decision to reorganize a Division of the TPD impacts the FOP's position as exclusive representative of the unit and its right to bargain." (FOP's Objections, Ex. A at 14-15.) In support of this argument, the FOP simply states that "[p]ast negotiations have specifically included negotiations of reorganizations." (Id. at 14.) The only contractual or legal authority the FOP identifies to support its argument that "reorganization is a matter which directly and dramatically affects the 'terms and conditions of employment' of many officers" is the general language in the Preamble of the CBA. (Id. at 14-15.) The FOP further objects to Section 11 on grounds that the creation of two new sergeant positions to staff the proposed Audit and Investigations squad, as well as the determination of the duties of those two new positions, are subjects of mandatory bargaining about which the FOP has the right to negotiate under the CBA. (Id. at 15.) Finally, the FOP argues that Section 11 of the proposed decree violates current TPD policy by changing the scope

of Internal Affairs and by requiring all complaints to go through Internal Affairs. (Id.)

Plaintiffs and the City argue that the adoption and implementation of Section 11 is within the City's management rights. (Pls.' & City's Joint Resp. to FOP's Mot., Ex. A at 8.) Specifically, Plaintiffs and the City contend that Section 11 falls within the City's power to "reorganize the Police Department," to "determine Police Department policy," "to direct the members of the Police Department," "to allocate and assign work," to "change existing methods and techniques" and to "determine the amount of supervision necessary." (Pls.' & City's Joint Resp. to FOP's Mot. at 8 (citing CBA Art. 2, §§ 2.2(e), (a), (c), (g), (k) and (l)).) Finally, Plaintiffs and the City argue that the "new Audit and Inspections squad is simply an 'improved . . . technique of' supervising the Department." (Id. (citing CBA Art. 2, § 2.2(k)).)

First, the Court finds that the City has the right to reorganize Internal Affairs into two squads pursuant to Section 2.2(e) of the CBA, which specifically grants the City the right:

> [t]o determine the organizational chart of the Police Department, including the right to organize and reorganize the Police Department and the determination of job classifications and ranks based upon duties assigned[.]

(CBA Art. 2, § 2.2(e) (emphasis added).) The Court further finds that, pursuant to Section 2.2(g) of the CBA, the City has the right to assign and allocate work, as provided for in Section 11.1 of the proposed decree. (See CBA Art. 2, § 2.2(g) (granting the City the right to "allocate and assign work to all Employees within the Police Department"); see also id. § 2.2(c) (granting the City the right to "direct the members of the Police Department, including the right to hire, promote, or transfer any employee").)

Second, the Court finds that the creation of two new sergeant positions in the proposed

Audit and Investigations squad is not a mandatory subject of bargaining about which the FOP has the right to negotiate under the CBA. The Court finds that the creation of these new positions is also within the City's enumerated management rights to "hire, promote or transfer any employee;" to "allocate and assign work to all Employees within the Police Department;" and to "determine the organizational chart of the Police Department, including . . . the determination of job classifications." (See CBA Art 2, § 2.2(c), (g), and (e).)

Because the CBA specifically grants the City the rights enumerated above and because the CBA specifically grants the City the power to "determine Police Department policy," the Court rejects the FOP's argument that Section 11 violates current TPD policy. Accordingly, the Court overrules the FOP's objections to Section 11 of the December 2002 Decree.

12. Section 13.4 – Retaliation

Section 13.4 of the December 2002 Decree requires that the City promulgate a policy to "provide for appropriate disciplinary action for any supervisor who, upon receiving written notice of specific acts of retaliation against any officer under their command, fails to investigate and take appropriate corrective action or to provide information as required by the chain of command." (December 2002 Decree § 13.4.) The proposed decree includes a statement that "[t]his policy shall require that persons in the chain of command are held accountable for eliminating retaliation directed at any officer under their command." (Id.)

The FOP objects to Section 13.4 of the proposed decree, stating that it is a "clear violation of the just cause standard established in Article 2.2(d) of the CBA." (FOP's Objections, Ex. A at 18-19.) The FOP argues that, by presupposing discipline is appropriate and

by mandating that anyone in the chain of command be held accountable for eliminating retaliation, the proposed decree imposes a strict liability standard on the supervisors with respect to retaliation claims for their "failure to supervise." (Id.) The FOP contends that "[p]re-determining that discipline must occur at some level, at least in terms of 'corrective action' . . . violates the 'just cause for discipline' standard of Article 2.2(d) of the CBA." (Id.) Finally, the FOP argues that Section 13.4 "violates TPD Policy 31-304(b)(9)(f)(g) which requires that only the Chief of Police makes final disciplinary decisions, not individual supervisors." (Id.)

Plaintiffs and the City respond that the FOP's objection to Section 13.4 is "moot because with or without the anti-discrimination policy [in Section 13 of the proposed decree], the City would have 'just cause' to discipline a supervisor who knowingly ignored illegal acts of retaliation committed by officers under his command." (Pls.' & City's Joint Resp. to FOP's Mot., Ex. A at 10-11.) According to Plaintiffs and the City, the policy articulated in Section 13.4 "will just be a written articulation of what is known." (Id. at 11.)

Plaintiffs and the City further assert that Section 13.4 does not change the "just cause" disciplinary standard set forth in Section 2.2(d) of the CBA. (Id. at 10.) Moreover, Plaintiffs and the City assert that nothing in the December 2002 Decree prevents the FOP from grieving any unjust discipline in the future. Finally, Plaintiffs and the City assert that "[a]nytime that the Decree calls for appropriate discipline or corrective action, it is assumed that the City cannot violate its contractual duties under the CBA in taking any such corrective action. In other words, the City must still have 'just cause' before disciplining any officer." (Id.)

The Court finds that Section 13.4 of the December 2002 Decree does not change the "just

cause" disciplinary standard set forth in Section 2.2(d) of the CBA. (Compare December 2002 Decree § 13.4 with CBA Art. 2, § 2.2(d) (granting the City the right "[t]o discipline, suspend or terminate any employee for good and sufficient cause (good and sufficient cause is synonymous with 'just cause')").) The Court finds that the City has the right, pursuant to Section 2.2(a) of the CBA, to articulate a policy that holds knowing persons in the chain of command accountable for eliminating retaliation directed at any officer under their command without infringing on the FOP's right under the CBA to bargain regarding issues of discipline. (See CBA Art. 2, § 2.2(a) (granting the City the right to "determine Police Department policy").) The Court further finds that nothing in the proposed decree prevents the FOP or any of its members from grieving any unjust discipline in the future. Accordingly, the Court overrules the FOP's objections to Section 13.4.

13. Section 14.1 – Backing

Section 14.1 of the proposed decree mandates that the City "adopt and implement a policy which specifically sets out the obligation of officers to provide backing to their fellow officers and establishes procedures for officers to inform supervisors in writing of specific alleged problems which they are experiencing in receiving backing." (December 2002 Decree § 14.1.) The proposed decree further requires supervisors to investigate complaints of failure to provide backing and to take appropriate actions:

> When a supervisor receives written notice of such problems, he shall be required to investigate the complaint, take appropriate action, if necessary, and report the notice and all actions taken, or why no action was necessary, up the chain of command.

(Id.)

The FOP objects to Section 14.1 of the proposed decree, arguing that the requirement that the City adopt and implement a policy mandating backing of fellow officers and investigation of any failures establishes new work rules and "contemplates implementing a policy affecting the terms and conditions of employment for which officers are subject to discipline and are mandatory subjects of bargaining." (FOP's Objections, Ex. A at 19-20.) The FOP also argues that the requirement that supervisors be held accountable for neglecting to act upon complaints that officers under their command failed to provide backing to other officers violates the just cause disciplinary standard in Section 2.2(d) of the CBA because it pre-supposes that some action must be taken against the officer involved. (Id. at 20.) Finally, the FOP argues that Section 14.1 of the proposed decree places supervisors in a "catch 22" because it requires them to discipline officers in violation of TPD policy, which provides that only the chief of police may discipline officers. (Id.)

Plaintiffs and the City contend that it is an "[e]xisting practice of the City to investigate and discipline officers for failure to back (no new rule)." (Pls.' & City's Joint Resp. to FOP's Mot., Ex. A at 11.) Plaintiffs and the City, therefore, state that Section 14.1 of the proposed decree is just a written articulation of existing practice. Moreover, the Plaintiffs and the City argue that, with or without this policy, the City would have "just cause" to discipline a supervisor who knowingly allowed officers under his or her command to shirk their duty to provide backing to other officers. (Id.) Plaintiffs and the City further contend that Section 14.1 of the proposed decree "'pre-supposes' nothing'" because Section 14.1 states that the supervisor will take

appropriate action "if necessary" and report up the chain of command why he or she did or did not take action. (Id.) Finally, Plaintiffs and the City argue that the policy articulated in Section 14.1 of the December 2002 Decree "merely requires more supervision and accountability, and helps assure officer safety, consistent with the City's management rights." (Id. (citing CBA Art. 2, § 2.2(d), (f), (j), and (l)).)

First, the Court finds that the City's adoption and implementation of a policy on backing fellow officers is not a new work rule because, according to Chief Been, the TPD already has an informal policy on backing officers. (1/21/03 Tr. at 224:13-17.) Second, the Court finds that implementing a backing policy and providing for its enforcement is within the power of the City under Article 2 of the CBA. (See CBA Art. 2, § 2.2(f) (granting the City power to "determine the safety, health, and property protection measures for the Police Department"); id. § 2.2(j) (granting the City right to "establish and enforce Police Department rules, regulations, and orders"); see also id. § 2.2(l) (granting the City the right to "determine the amount of supervision necessary").)

The Court further finds that nothing in Section 14.1 of the proposed decree provides a new basis for discipline or alters the "just cause" disciplinary standard under Section 2.2(d) of the CBA. (Compare December 2002 Decree § 14.1 with CBA Art. 2, § 2.2(d); see also 1/27/03 Tr. at 501:6-11.)[56] The Court rejects the FOP's argument that Section 14.1 pre-supposes that

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[56] FOP witness Sergeant David M. Brockman testified at the fairness hearings that officers may currently be disciplined for failing to back another officer:

Q. Is it your job to back other officers?

some action be taken against the officer involved because the plain language of Section 14.1 requires only that the supervisor take appropriate action "if necessary" and then to report up the chain of command why action was or was not taken. (See December 2002 Decree § 14.1 (requiring supervisor to "take appropriate action, if necessary, and report the notice and all actions taken, or why no action was necessary, up the chain of command") (emphasis added).) For these reasons, the Court overrules the FOP's objections to Section 14.1 of the December 2002 Decree.

14. Section 15.1 – Evaluations

Section 15.1 of the December 2002 Decree provides, in its entirety, as follows:

> The City shall continue the past practice of providing officers who conclude that a cumulative rating of unsatisfactory or lower on their evaluation is unfair, the right to appeal either through their chain of command or where appropriate through the appeal process contained in the City's discrimination policy.

(December 2002 Decree § 15.1.)

The FOP objects to Section 15.1 of the December 2002 Decree, arguing that it "provides a special grievance system for evaluations that is unavailable for any other alleged violation of the CBA and disregards the CBA's existing grievance procedures." (FOP's Objections, Ex. A at

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A. That's part of, yes, sir.
Q. Can you be disciplined if you don't back other officers?
A. I think I probably can.
Q. Even though there's no written rule to that effect?
A. That's correct.

(Id.)

21.) The FOP contends that Section 15.1 directly conflicts with Article 7 of the CBA, which provides that grievances shall be filed with the Grievance Committee, because Section 15.1 purports to implement a new grievance process with the right to appeal through the chain of command.

Plaintiffs and the City argue that the FOP mischaracterizes Section 15.1 of the proposed decree because it does not alter current TPD practice. Plaintiffs and the City note that the following language in the proposed decree supports their contention: "City shall continue the past practice of providing officers . . . the right to appeal . . . through their chain of command." (December 2002 Decree § 15.1.)

The Court finds that, based upon the testimony of Chief Been at the fairness hearings, it is current TPD practice for officers to be afforded the right to appeal unsatisfactory performance evaluations directly through their chain of command. (1/21/03 at 228:8-11.)[57] The Court further finds that the language in the December 2002 Decree makes clear that it is not intended to change any TPD practices. (See December 2002 Decree § 15.1; see also id. § 1.5 (providing that proposed decree shall be read to be in accordance with language in the CBA).) For these reasons, the Court overrules the FOP's objections to Section 15.1 of the December 2002 Decree.

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[57] With respect to this question, Chief Been testified as follows:

> Q. Looking at 15.1, would you identify whether that is in fact the past practice?
> A. Certainly, the first part of it is a past practice, where you appeal through the chain of command.

(Id.)

15. Section 17.1 – Partnership in Policing

Section 17.1 of the proposed decree requires the City to "adopt and implement specific policies which promote the creation of a partnership between police officers and citizens in order to provide for proactive problem solving between the police, individual citizens, other government agencies and the community." (December 2002 Decree § 17.1.)

The FOP objects to Section 17.1 on the following grounds:

> The Decree mandates the creation of new, non-bargained for, polices [sic] to "create the promotion of a partnership between police officers and citizens . . . ." Presumably, if the officer violates these new polices, [sic] he/she is subject to discipline. Thus, these policies are mandatory subjects of bargaining. Moreover, while the Decree recognizes that implementation of CALEA[58] standards will comply with § 17.1, the standards are not provided. Hence, the FOP cannot make a more definite objection without more information.

(FOP's Objections, Ex. A at 23 (footnote not in original).)

Plaintiffs and the City argue that developing a "partnership in policing" is simply a "new, improved . . . method[] and technique[] of Police Department Operation," and therefore a permissible exercise of the City's management rights under Article 2 of the CBA. (Pls.' & City's Joint Resp. to FOP's Mot., Ex. A at 13 (citing CBA Art. 2, § 2.2(k)).) Plaintiffs and the City further argue that, because the FOP "does not allege that policies to promote partnership in

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[58] CALEA is the "private, nonprofit corporation, the Commission on Accreditation for Law Enforcement Agencies, Inc. ("CALEA"), which was founded in 1979 by the International Association of Chiefs of Police ("IACP"), the National Organization of Black Law Enforcement Executives ("NOBLE"), the National Sheriffs' Association ("NSA") and the Police Executive Research Forum ("PERF")." (December 2002 Decree § 2.1.) According to the December 2002 Decree, "CALEA accreditation embodies the only comprehensive standards for law enforcement agencies in North America." (Id.)

policing would be unfair or discriminatory to any officer," the FOP has no substantive objection to Section 17.1 of the December 2002 Decree. (Id.)

The Court finds that Section 17.1's requirement that the City develop and implement a "partnership in policing" policy is within the City's enumerated rights under Article 2 of the CBA to "determine Police Department policy" and to "introduce new, improved, or different methods and techniques of Police Department operation or change existing methods and techniques." (See CBA Art. 2, § 2.2(a) and (b).) The Court further finds that, for the same reasons discussed with respect to Sections 3.1 and 13.4 above, nothing in Section 17.1 provides a new basis for discipline or changes the "just cause" disciplinary standard set forth in Section 2.2(d) of the CBA. (Compare December 2002 Decree § 17.1 with CBA Art. 2, § 2.2(d).)[59] Accordingly, the Court overrules the FOP's objections to Section 17.1 of the December 2002 Decree.

16. Section 18.3 – Documenting Citizen Complaints

Section 18.3 of the December 2002 Decree requires that, when a supervisor is called to respond to a complaint by a citizen about an officer's conduct, the supervisor is required to document the complaint and file a written report concerning the matter. (December 2002 Decree § 18.3.) The reports prepared by the supervisor are to be forwarded through the chain of command and a record thereof maintained in Internal Affairs. (Id.) The obligation to assure that the complaints are handled appropriately falls on each person in the chain of command. (Id.)

[59] Once again, the Court observes that nothing in the proposed decree prevents the FOP or any of its members from grieving any unjust discipline in the future.

The FOP objects to Section 18.3 of the December 2002 Decree, arguing that, because the complaint process set out in Section 18.3 is different from current methods of operation, it involves a subject of mandatory bargaining that must be negotiated with the FOP. (FOP's Objections, Ex. A at 23-24.) The FOP argues that the language in Section 18.3 providing that "[e]ach person in the chain of command shall be obligated to assure that such complaints were handled appropriately" subjects every officer in the chain of command to new work rules. (Id.) The FOP also asserts that this language provides a new basis for discipline and contradicts the "just cause" standard in Section 2.2(d) of the CBA:

> This subjects every officer in the chain of command to new work rules and contravenes the basic established chain of command structure by requiring that an officer lower on the chain ensure that an officer higher on the chain respond "appropriately" to the complaint or be subject to discipline. This is a violation of Article 2.2 of the CBA, prohibiting disciplinary action against one person based upon the actions of another, particularly a higher ranking officer over whom the person has no control. This section also seemingly establishes a strict liability standard for discipline in direct contradiction to the "just cause" standard of CBA Article 2.2(d).

(Id. at 24.)[60]

Plaintiffs and the City maintain that, "[r]equiring written documentation of citizen complaints and that complaints are handled properly up the chain of command, falls squarely under the City's Management Right to 'determine the amount of supervision necessary' . . . [and to implement] a 'change in existing methods or techniques.'" (Pls.' & City's Joint Resp. to

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[60] The FOP further argues that Section 18.3 is in direct contradiction to "other complaint procedures as provided in the CBA." (Id.) However, the FOP has failed to specifically identify any of these "other complaint procedures." Accordingly, the Court overrules the FOP's objection on this ground.

FOP's Mot., Ex. A at 13 (citing CBA Art. 2, § 2.2(l) and (k)).) Plaintiffs and the City further maintain that the FOP mischaracterizes the proposed decree, asserting that Section 18.3 does not require inferior officers to be responsible for the actions of supervisors.[61]

The Court finds that the City has the authority, pursuant to the management rights provision of the CBA, to establish the complaint process contained in Section 18.3 of the December 2002 Decree. Specifically, the Court finds that the establishment of this system falls within the City's enumerated rights under Article 2 of the CBA to "introduce new, improved, or different methods and techniques of Police Department operation or change existing techniques" and to "determine the amount of supervision necessary." (See CBA Art. 2, § 2.2(k) and (l) (emphasis added).) Therefore, because the Court finds that Section 18.3 is a valid exercise of the City's management rights powers, the Court concludes that Section 18.3 does not, as the FOP asserts, set forth a new work rule or otherwise involve a subject of mandatory bargaining. The Court notes that, because Section 18.3 of the December 2002 Decree must be read to be in accordance with the CBA, Section 18.3 shall not be construed to mean that officers are responsible for the actions of their superiors. (December 2002 Decree § 1.5.)[62] For these

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[61] Plaintiffs and the City assert that the FOP has no substantive objection to Section 18.3 of the proposed decree and that the "[f]rivolousness of [their] objection is evident by FOP claiming that whether the Decree proposes the 'best' procedure is 'irrelevant.'" (Id. (citing FOP's Objections, Ex. A at 23 ("Whether this is the 'best' procedure is irrelevant; it is the current procedure.")).)

[62] The Court observes that, like many other sections of the proposed decree, Section 18.3 does not contain any new disciplinary rules or change the "just cause" disciplinary standard set forth in Section 2.2 of the CBA. (Compare December 2002 Decree § 18.3 with CBA Art. 2, § 2.2(d).)

reasons, the Court overrules the FOP's objections to Section 18.3 of the December 2002 Decree.

17. Section 18.6 – Complaint Process

Section 18.6 of the proposed decree sets standards for the assessment of credibility by supervisors taking disciplinary actions and states, in pertinent part, as follows:

> There shall be no automatic preference of an officer's statement over a complainant's statement in investigations. Credibility determinations shall include, but not be limited to, consideration of the officer's history of complaints and disciplinary records and the complainant's criminal history for crimes involving truth and veracity . . . .

(December 2002 Decree § 18.6 (emphasis added).)

The FOP argues that this provision is "glaringly contradictory to Article 11.2 of the CBA" because it "makes no distinction for complaints that have been sustained, not sustained or deemed utterly unfounded." (FOP's Objections, Ex. A at 25.) Article 11, Section 11.2 of the CBA provides, in pertinent part:

> Complaints that were investigated and determined to be unfounded, exonerated or not sustained shall not be considered, utilized, or compiled in any report to determine disciplinary action that might be taken in regards to an investigation.

(CBA Art. 11, § 11.2.)

Plaintiffs and the City argue that, to the extent the Court finds an actual conflict between the December 2002 Decree and the CBA, this conflict may be dealt with by Section 1.5 of the proposed decree, which requires the decree to be read to be in accordance with the CBA. (December 2002 Decree § 1.5.) Plaintiffs and the City maintain that the new policy contained in Section 18.6 of the proposed decree must be read not to include "unfounded, exonerated or not sustained" complaints in making determinations about an officer's credibility.

The Court finds that, on its face, the language of Section 18.6 of the proposed decree arguably conflicts with Section 11.2 of the CBA. The Court, however, believes that under the rule of construction contained in Section 1.5 of the December 2002 Decree, Section 18.6 should be read, as Plaintiffs and the City submit, not to include "unfounded, exonerated or not sustained" complaints. Therefore, the Court finds that Section 18.6 of the proposed decree can be construed in a manner that does not violate the FOP's contractual rights under the CBA. Specifically, the phrase "officer's history of complaints" should be construed so as to exclude "[c]omplaints that were investigated and determined to be unfounded, exonerated, or not sustained" for the purpose of making credibility determinations relevant to Section 18.6 of the proposed decree. Accordingly, the Court overrules the FOP's objections to Section 18.6.

18. Section 18.7 – Withdrawn Citizens' Complaints

Section 18.7 of the December 2002 Decree requires investigation and disposition of citizens' complaints of "racial discrimination, use of force, or harassment" that are withdrawn or as to which the complainant is unavailable to give a statement. Section 18.7 provides in its entirety as follows:

> Investigations of complaints of racial discrimination, use of force, or harassment shall not be closed without rendering a disposition and appropriate discipline, if necessary, because the complainant withdraws the complaint or is unavailable to give a statement. Such complaints shall be investigated to the fullest extent possible to determine whether the complaint is corroborated and the circumstances which lead to the withdrawal of the complaint.

(December 2002 Decree § 18.7.)

The FOP argues that Section 18.7 of the proposed decree "violates the officers'

constitutionally guaranteed rights to due process and violates the FOP's right to bargain and negotiate such issues that involve the discipline of officers." (FOP's Objections, Ex. A at 26-27.) First, the FOP argues that an individual officer's due process rights will be violated if the complainant is unavailable to give a statement (or has never given a statement), and the officer is disciplined without ever having the chance to challenge the complainant's version of events. (Id.)[63] Second, the FOP argues that Section 18.7 is a subject of mandatory bargaining because it "requires complaints to be investigated in accordance with the new standard of 'to the fullest extent possible,'" and that this "imposes a new work rule on Internal Affairs bargaining unit members upon which they are subject to potential discipline." (Id.)

In response to the FOP's due process argument, Plaintiffs and the City contend that the FOP mischaracterizes the December 2002 Decree in that Section 18.7 does not take away an officer's right to confront his or her accusers. (Pls.' & City's Joint Resp. to FOP's Mot., Ex. A at 14.) Plaintiffs and the City, instead, explain that the proposed decree "states that withdrawn complaints shall be investigated, including the circumstances which led to the withdrawal of the complaints." (Id.)[64] Plaintiffs and the City emphasize that "all complaints must be corroborated." (Id.)

In response to the FOP's argument that Section 18.7 concerns a subject of mandatory bargaining, Plaintiffs and the City further contend that Section 18.7 falls squarely under the

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[63] The FOP contends that "Due Process requires that the credibility of the complainant be addressed and the officer be given the opportunity to confront his accuser." (Id.)

[64] Plaintiffs and the City state that the purpose of Section 18.7 of the proposed decree "is to assure that citizens are not being intimidated into withdrawing complaints[.]" (Id.)

City's express management rights to "determine the amount of supervision necessary" and to "change existing methods or techniques." (Id. (citing CBA Art. 2, § 2.2(l) and (k)).) Moreover, Plaintiffs and the City argue that "with or without this policy, it would be just cause for the City to discipline an officer who intimidated a citizen into withdrawing a complaint." (Pls.' & City's Joint Resp. to FOP's Mot., Ex. A at 14.)

With respect to the FOP's due process argument, the Court finds that Section 18.7 of the December 2002 Decree prohibits only the closing of citizen complaints of racial discrimination, use of force, or harassment simply because the complainant withdraws the complaint or is unavailable to give a statement. (See December 2002 Decree § 18.7.) The Court further finds that Section 18.7 provides that withdrawn complaints shall be "investigated to the fullest extent possible to determine whether the complaint is corroborated and the circumstances which lead to the withdrawal of the complaint." (Id.) Thus, the Court finds no language in the proposed decree to support the FOP's assertion that officers will be deprived of the right to confront their accusers in violation of the Constitution. The Court is satisfied that the emphasis on corroboration of complaints and determination of the circumstances of withdrawals protect officers' due process rights to either question an accuser, or to have the complaint discounted. For these reasons, the Court overrules the FOP's objections to Section 18.7 on due process grounds.

The Court further finds that Section 18.7 of the proposed decree falls within the City's enumerated management rights under the CBA "[t]o determine the amount of supervision necessary" and "[t]o introduce new, improved, or different methods and techniques of Police

Department operation or to change existing methods and techniques." (See CBA Art. 2, § 2.2(l) and (k).) Moreover, the Court finds that any discipline of an officer who intimidates a citizen into withdrawing a complaint falls within the City's power to discipline officers for "just cause." (See CBA Art. 2, § 2.2(d).)[65] Accordingly, because the Court finds that Section 18.7 does not concern a mandatory subject of bargaining or impermissibly infringe upon the FOP's rights under the CBA and the FPAA, the Court overrules the FOP's objection that Section 18.7.

19. Section 18.8 – Investigating Multiple Withdrawn Complaints

Section 18.8 of the December 2002 Decree requires that the City adopt and implement a policy "providing that if within a three (3) year period the Department receives three (3) requests to withdraw complaints against any officer, upon receipt of the third request, the City shall refuse that request and proceed to investigate fully the present complaint as well as those which have been withdrawn." (December 2002 Decree § 18.8.)

First, the FOP objects to Section 18.8, claiming that it violates the CBA Preamble and Sections 1.1, 9.8, and 11.3 of the CBA, and the FPAA because it "requires the City, without FOP consent, to adopt and implement a policy regarding investigations." (FOP's Objections, Ex. A at 28.) Second, the FOP objects to Section 18.8 on the grounds that Section 11.2 of the CBA contains an expungement provision with respect to documents (including withdrawn complaints), and that disciplining an officer for a complaint filed three years ago would not constitute "just

[65] The Court notes that the phrase "to the fullest extent possible" shall be construed to be compatible with the "just cause" standard set forth in Section 2.2(d) of the CBA. (See December 2002 Decree § 1.5 (providing that proposed decree shall be read to be in accordance with language in the CBA).)

cause" as required by Section 2.2(d) of the CBA and would implicate constitutional due process issues.

Plaintiffs and the City contend that, requiring a "full investigation of withdrawn citizen complaints, falls squarely under the City's Management Right to 'determine the amount of supervision necessary' . . . and also a 'change in existing methods or techniques.'" (Pls.' & City's Joint Resp. to FOP's Mot., Ex. A at 14-15 (citing CBA Art. 2, § 2.2(l) and (k)).) Plaintiffs and the City further maintain that, "[i]f the FOP has a valid argument that an investigation of an officer's conduct is barred by applicable limitations period or the CBA, it can make those objections at the appropriate time." (Id. at 15.)

The Court finds that the City's adoption of a policy of investigating withdrawn complaints falls within the City's enumerated management rights under Article 2 of the CBA to "determine the amount of supervision necessary," to "determine Police Department policy," and to "change existing methods and techniques" of TPD operation. (See CBA Art. 2, § 2.2(l), (a), and (k).) The Court further finds that, as specifically provided for in Section 1.5 of the December 2002 Decree, Section 18.8 must be read in accordance with the CBA. Therefore, to the extent that the expungement provision of Section 11.2 of the CBA is implicated by Section 18.8 in a particular case, the language in Section 11.2 controls. Accordingly, the Court finds that there shall be no investigation with respect to withdrawn complaints that are required to be expunged pursuant to Section 11.2 of the CBA. (See December 2002 Decree § 1.5 (providing

that proposed decree shall be read to be in accordance with language in the CBA).)[66] For these reasons, the Court overrules the FOP's objections to Section 18.8 of the December 2002 Decree.

20. Section 19 – Field Training Officers

Section 19.1 of the proposed decree requires the City to develop and implement policies to govern the selection and removal of Field Training Officers ("FTOs"). (December 2002 Decree § 19.1.) The proposed decree requires that "[o]fficers and supervisors serving in the FTO program shall have a minimum of five (5) years experience on the Department." (Id.) "Officers or supervisors currently serving in the FTO program shall be exempt from this five (5) year requirement." (Id.) Under this section of the proposed decree, "[t]he City shall adopt valid criteria for the selection and evaluation of FTOs," and "[o]fficers who fail to maintain yearly performance evaluations with a cumulative rating of 'exceeds' shall be removed as FTOs." (Id.)

The FOP objects to Section 19.1, arguing that the proposed decree establishes, without negotiation with the union, new selection and removal criteria for FTOs, thereby violating the FOP's rights as exclusive bargaining agent under the CBA Preamble and Sections 1.1, 9.8, and 11.3 of the CBA. (FOP's Objections, Ex. A at 28-29.) The FOP further argues that Section 19.1 violates Section 21.6 of the CBA because: (1) the proposed decree unilaterally creates new selection requirements that are not contained in Section 21.6 of the CBA, which states simply

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[66] Therefore, although the Court finds that Section 18.8 of the December 2002 Decree does not infringe upon the FOP's rights under the CBA and the FPAA, the Court notes that nothing in the proposed decree prevents the FOP from filing a grievance if an officer's conduct, otherwise barred by applicable limitations period or Section 11.2 of the CBA, is subsequently investigated by the TPD.

that FTOs will be "designated;"[67] and (2) the proposed decree "implicates monetary losses for current FTOs . . . if an FTO is removed under the proposed new standards of removal." (Id.) Finally, the FOP argues that the proposed decree mandates a new policy for the removal of FTOs and that, under Section 2.2(d) of the CBA, removal of FTOs must be based on the "just cause" standard, and not any other non-negotiated standard. (Id.)

With respect to the FOP's objection that Section 19.1 violates the union's rights as exclusive bargaining agent, Plaintiffs and the City maintain that the City has the power under Section 2.2(k) of the CBA to implement Section 19.1 of the proposed decree because Section 19.1 is simply a change in existing methods of TPD operation. (Pls.' & City's Joint Resp. to FOP's Mot., Ex. A at 15.) Plaintiffs and the City further maintain that Section 19.1 of the proposed decree does not touch upon the issue of discipline because the requirement that FTOs "exceed" expectations is simply a continuing job qualification. (Id.) Plaintiffs and the City argue that, for this reason, "removal would not constitute 'discipline.'" (Id.)

With respect to the FOP's objection to Section 19.1 of the proposed decree based on Section 21.6 of the CBA, Plaintiffs and the City contend that Section 21.6 does not set minimum

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[67] Section 21.6 of the CBA states, in pertinent part, as follows:

> Each Employee designated as a Field Training Officer shall be paid one (1) hour of overtime pay, per shift, at two times the Employee's regular rate of pay, while involved in actual training assignments with an Apprentice Police Officer. Corporal and Sergeant rank personnel designated as a Field Training Supervisor shall be paid one (1) hour of overtime pay, per shift, at two times the Employee's regular rate of pay, while involved in actual training assignments with newly promoted supervisors of a similar rank . . . .

(CBA Art. 21, § 21.6 (emphasis added).)

experience requirements for FTOs and that Section 21.6 does not limit the City's ability to determine the qualifications for FTOs. (Pls.' & City's Joint Resp. to FOP's Mot., Ex. A at 15.) Plaintiffs and the City, therefore, argue that Section 19.1 of the proposed decree does not conflict with Section 21.6 or any other provision of the CBA.

The Court finds that Section 19.1 of the December 2002 Decree is a valid exercise of the City's power under Section 2.2(k) of the CBA "[t]o introduce new, improved, or different methods and techniques of Police Department operation or change existing methods and techniques." (See CBA Art. 2, § 2.2(k).) The Court further finds that Section 19.1 does not violate Section 21.6 of the CBA because Section 21.6 does not set minimum experience requirements for FTOs, nor does it limit the City's ability to determine those qualifications. (See CBA Art. 21, § 21.6 (describing FTOs as "designated" but not identifying the manner in which they are designated).) Finally, the Court rejects the FOP's argument that Section 19.1 involves discipline and is therefore a mandatory subject of bargaining. Instead, the Court finds that the requirement that FTOs are to "maintain yearly performance evaluations with a cumulative rating of 'exceeds'" is simply a continuing job qualification and, therefore, not a basis for discipline. For these reasons, the Court overrules the FOP's objections that Section 19.1 of the proposed decree infringes on the FOP's rights as exclusive bargaining agent under the CBA and the FPAA.

Section 19.2 of the proposed decree requires the City to increase supervision of FTOs, and provides that "APOs,[68] FTO supervisors, and FTO peers shall be required to evaluate FTOs."

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[68] As defined in Section 10.2 of the December 2002 Decree, an "APO" is an Apprentice Police Officer. (December 2002 Decree § 10.2.)

(Id. § 19.2 (footnote not in original).) The FOP objects to Section 19.2, arguing that it "implements a new FTO evaluation process not currently in existence and violates the FOP's right to bargain and negotiate mandatory subjects of bargaining [under] Article 11.3 of the CBA." (Id. at 29.) In response to this objection, Plaintiffs and the City argue that this section falls directly under the City's express management right "[t]o determine the amount of supervision necessary[.]" (Id. (citing CBA Art. 2, § 2.2(l)).)

The Court finds that Section 19.2 of the December 2002 Decree, which mandates that "[t]he City shall increase supervision of field training," fits squarely within the City's enumerated right under Section 2.2(l) of the CBA to "determine the amount of supervision necessary." Accordingly, the Court finds that Section 19.2 is a valid exercise of the City's management rights under Article 2 of the CBA and overrules the FOP's objection to this provision.

Section 19.3 of the December 2002 Decree provides that "[o]fficers who use racial or gender related epithets or demonstrate racial or gender bias in their job performance shall be disqualified from serving as FTOs and subject to disciplinary review." (Id. § 19.3.) The FOP objects to Section 19.3 of the proposed decree, arguing that it "explicitly violates Article 2.2(d) of the CBA by pre-determining, regardless of the facts or circumstances, the level of discipline to be imposed for such conduct – removal from the FTO program." (Id.)[69] In response to this objection, Plaintiffs and the City argue: (1) that it is "[a]lready the practice of TPD to remove

[69] In its objections, the FOP notes that it objects to Section 19.3 of the December 2002 Decree, even though "the Tulsa FOP does not condone gender or racial epithets or bias." (Id.)

officers from [the] FTO program who use racial epitaphs [sic];" and (2) that, regardless of the policy contained in Section 19.3, there would be "just cause" to remove an FTO if it were proven that he or she had used racial epithets or had demonstrated racial bias.

The Court finds that Section 19.3 of the December 2002 Decree, which requires "[o]fficers who use racial or gender related epithets or demonstrate racial or gender bias in their job performance" to be "disqualified from serving as FTOs and subject to disciplinary review," is a permissible exercise of the City's authority under Article 2 of the CBA. As described above, Section 2.2(d) of the CBA provides the City the right "[t]o discipline, suspend or terminate any employee for good and sufficient cause." (CBA Art. 2, § 2.2(d).) The Court finds that Section 19.3 of the proposed decree does not change the "just cause" disciplinary standard set forth in the CBA. Accordingly, the Court finds that Section 19.3 is a permissible exercise of the City's management rights under Article 2 of the CBA and thus overrules the FOP's objections to this provision.

21. Section 27 – Reporting by the City

Section 27.2 of the proposed decree requires that the City maintain, consistent with the Oklahoma Open Records Act, OKLA. STAT. tit. 51, § 24A.1, et seq., the records necessary to document its compliance with the terms of the proposed decree and all records required by or developed under the proposed decree. (December 2002 Decree § 27.2.) Section 27.4 of the proposed decree provides that "[c]ounsel for Plaintiffs shall be provided access to the documents

and data listed in Paragraphs 26.5 and 27.3 upon reasonable request to the City." (Id. § 27.4.)[70] Under Section 27.4, "Plaintiffs may request that the City grant appropriate access to any other document or class of documents which are relevant to determining the City's compliance with this Decree which are otherwise considered open records under the Oklahoma Open Records Act." (Id.)

The FOP argues that Section 27.4 of the December 2002 Decree violates Section 11.2 of the CBA because of the possibility that data distributed to and maintained by counsel for Plaintiffs pursuant to Section 27.4 may not be purged in accordance with Section 11.2 of the CBA.[71] (FOP's Objections, Ex. A at 33-34.) The FOP argues that, by failing to restrict the

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[70] Section 26.5 of the December 2002 Decree provides that an independent auditor shall have access to: (1) the data collected pursuant to Section 3 of the proposed decree and any existing completed analysis thereof; and (2) "additional information and access to documents, data, or staff that the Independent Auditor may require to carry out the Independent Auditor's responsibilities under this Decree." (December 2002 Decree § 26.5.) Section 26.5 of the proposed decree specifically provides that Plaintiffs' counsel shall not have access to the City's reasons for rejecting certain applicants to the Academy, which is information that is available to the Independent Auditor under the proposed decree. (Id.)

Section 27.3 enumerates fifteen (15) categories of data that the Independent Auditor shall have access to under the proposed decree. (Id. § 27.3.) One category of data identified in Section 27.3 includes inter alia: "personnel orders transferring or reassigning officers; orders granting or denying discipline; orders granting or denying promotions; documents relating to the counseling of officers under [Section 11.4 of the proposed decree]; all Internal Affairs investigations; awards and commendations given to officers; documentation of the informal resolution of citizen complaints; run in reports; and synopsis and conclusion of after action reports." (Id. § 27.3.1.)

[71] Article 11, Section 11.2 of the CBA provides, in pertinent part:

> After the statute of limitations expires on civil or criminal matters, not sustained or unfounded allegations against an Employee shall be removed from the Employee's file, provided there have been no similar allegations during the

amount of time Plaintiffs' counsel may keep the data, Section 27.4 of the proposed decree violates Section 11.2 of the CBA. (Id.)

In response to the FOP's objection, Plaintiffs and the City maintain that data that is to be expunged pursuant to Section 11.2 of the CBA shall not be used against individual officers:

> Clearly, if [Section] 11.2 requires the expungement of certain data, then that data can not be held against the officer as an individual . . . . [T]he parties will not, and have not violated any specific portion of the CBA.

(Pls.' & City's Joint Resp. to FOP's Mot. at 17.)

As described above, Section 11.2 of the CBA provides that the City shall remove certain information from an employee's file, refrain from considering certain information with respect to disciplinary issues, and "purge and expunge[]" certain documents after the passage of time as enumerated in that section. The FOP has not alerted the Court to any provision in the CBA requiring the application of Section 11.2 to third parties, nor has the Court located one. Therefore, the Court finds that Section 11.2 of the CBA does not require counsel for Plaintiffs to

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> above-mentioned period. However, disciplinary actions listed below may not be considered, utilized, or be the basis of future disciplinary decisions, in part or whole after the times identified below expire.
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> 1. Counseling documentation shall be purged and expunged after the passage of one (1) year.
> 2. Division Letters of Reprimand shall be purged and expunged after the passage of one (1) year.
> 3. Department Letters of Reprimand shall be purged and expunged after the passage of three (3) years.
> 4. Suspensions and Orders of Demotion shall be purged and expunged after the passage of five (5) years.

(CBA Art. 11, § 11.2.)

purge any documents provided under the December 2002 Decree.[72] Of course, the Court notes that, pursuant to Section 1.5 of the proposed decree, any information obtained by Plaintiffs' counsel pursuant to Section 27.4 of the proposed decree, shall not be used as a basis for discipline by the TPD after the date for expungement has passed.[73] For these reasons, the Court overrules the FOP's objections to Section 27 of the proposed decree.

22. Section 29.1 – Remedies for Denial of Promotions

Section 29.1 of the December 2002 Decree provides in its entirety as follows:

> Claimants who are found to have been denied a promotion shall be entitled to all Title VII relief where justified by the evidence, law and equities. The total amount of back pay for all claimants for claims of a discriminatory denial of promotion shall be limited to $200,000. Punitive damages shall not be sought or awarded.

(December 2002 Decree § 29.1)[74]

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[72] The inapplicability of Section 11.2 of the CBA to third parties, in this case, Plaintiffs' counsel, is supported by the fact that third parties generally do not have control over documents contained in the TPD's files and also lack the power to discipline any officer.

[73] The Court observes that the intent of the parties, as explained in Plaintiffs' and the City's response to the FOP's objections, is that data required to be expunged pursuant to Section 11.2 of the CBA shall not be "held against the officer as an individual." (See Pls.' & City's Joint Resp. to FOP's Mot. at 17.) In this regard, the Court notes that nothing in the December 2002 Decree prevents the FOP from filing a grievance over whether the City has improperly used information that should have been expunged against an individual officer.

[74] Section 29.1 of the proposed decree must be read in tandem with Section 28.1 of the proposed decree, which provides in its entirety as follows:

> Except as otherwise provided herein, any class member who wishes to assert an individual claim of race discrimination, retaliation, wrongful discharge, or harassment in employment arising before August 1, 2001 may do so by filing with the Court a sworn, detailed statement of claim(s) within sixty (60) days of the Court's entry of this Decree. Such statement shall, at a minimum, set forth the specific facts upon which it is based, the date of each challenged occurrence, the

The FOP objects to Section 29.1 of the proposed decree because it "seems to include retroactive seniority and would violate the existing seniority rights of officers in their rank." (FOP's Objections, Ex. A at 34 (citing CBA Art. 6, § 6.1(b) and 42 U.S.C. 2000e-2(h)).)[75] The FOP's objection in this regard is as follows:

> Rank seniority is used to select shifts, days off, and leave. CBA Art. 6.1(b); 42 USCA §2000e-2(h). Such seniority would be granted after a magistrate trial without right of appeal. Other current officers would have their seniority rights effected [sic] without waiving a trial before a jury or an Article III judge and without complete judicial determination of whether actual discrimination had occurred. Moreover, the effected [sic] officers would be denied their right to intervene and contest the factual predicate, discrimination, used to deny then [sic] their seniority rights, all of which are in violation of the CBA.

(Id.) The FOP further objects to Section 29.1 of the proposed decree, arguing that it "directly contradicts the CBA's dispute resolution process set out in Article 7 of the CBA." (Id. at 35.)

Plaintiffs and the City urge the Court to overrule the FOP's objection to Section 29.1,

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> identity, address and telephone number of all known witnesses and documentary evidence, and the specific monetary harm claimed . . . . An answer shall be filed within thirty (30) days of the claim filing setting forth the specific facts upon which the answer is based, the identity, and the address and telephone number of all known witnesses and documentary evidence. . . . Reasonable limited and expedited discovery shall be allowed. Claims which are not resolved by agreement shall be heard and ruled upon by a magistrate judge appointed by the Court. The claimant retains the burden of proof. The City retains its legal and factual defenses. Motions to dismiss and for complete or partial summary judgment are permitted by either the claimant or defendant. There shall be no appeal from a decision of the magistrate judge.

(Id. § 28.1.) The FOP does not object to Section 28.1 of the proposed decree.

[75] Section 6.1(b) of the CBA provides in its entirety as follows: "Subsequent seniority dates for Employees shall commence on the effective date of promotion to a higher rank or classification."

arguing that the FOP cannot prevent officers from obtaining relief under Title VII. Plaintiffs and the City note that an "individual officer could only conceivably be granted retroactive seniority after proving the merits of his racial discrimination in promotions claim." (Pls.' & City's Joint Resp. to FOP's Mot., Ex. A at 17.)

The Court notes that, under the plain language of Section 29.1, only "[c]laimants who are found to have been denied a promotion shall be entitled to all Title VII relief." (December 2002 Decree § 29.1.)[76] The fact that Section 29.1 limits the award of equitable relief to those persons who are found to have been denied a promotion under Title VII is significant because courts have the plenary power "to issue injunctive relief and to order such affirmative action as may be appropriate to remedy the effects of unlawful employment practices." Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974) (citing 42 U.S.C. § 2000-5(f) and (g)).[77]

Even though it is the exclusive bargaining agent for TPD employees, the FOP may not prevent Plaintiffs from obtaining equitable relief to redress acts of discrimination in violation of federal civil rights laws. In this regard, the Court of Appeals for the Tenth Circuit has recognized a distinction between statutory rights "accorded by Congress" and collective bargaining rights, McAlester v. United Air Lines, Inc., 851 F.2d 1249, 1254 (10th Cir. 1988),

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[76] As explained above, this determination would be made by a United States Magistrate Judge appointed by the Court. (See December 2002 Decree § 28.1.)

[77] See id. at 47 ("Title VII does not speak expressly to the relationship between federal courts and the grievance-arbitration machinery of collective-bargaining agreements. It does, however, vest federal courts with plenary powers to enforce the statutory requirements . . . .") "Arbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII." Id. at 57.

and has stated that causes of action under Title VII "emanate" from a source independent of a collective bargaining agreement," Adams v. Am. Airlines, Inc., 202 F.3d 281, 2000 WL 14399, *7 (10th Cir. Jan. 10, 2000) (unpublished decision). "Of necessity, the rights conferred [under Title VII] can form no part of the collective-bargaining process since waiver of those rights would defeat the paramount congressional purpose behind Title VII." Alexander, 415 U.S. at 51.[78] For these reasons, the Court overrules the FOP's objections to Section 29.1 of the December 2002 Decree.

23. Section 35.1 – Modifications

Section 35.1 of the proposed decree provides that "[n]o changes, modifications, or amendments of this Decree shall be effective unless they are ordered by the Court." (December 2002 Decree § 35.1.)

The FOP objects to Section 35.1 of the December 2002 Decree on the stated basis that it "specifically eliminates the FOP's contractual and legal right to freely negotiate terms covered by the CBA or mandatory subjects of bargaining that are also found in the decree, and eliminates the agreed upon dispute resolution procedure." (FOP's Objections, Ex. A at 35.) As the basis for its argument, the FOP contends that, under the CBA, the FOP and the City do not need the Court's approval to make final decisions after negotiations, and that any dispute over bargaining

[78] The Court rejects the FOP's retroactive seniority objection on the ground that it is purely speculative. Section 29.1 of the proposed decree specifically provides for equitable relief only if a federal magistrate judge determines that it is "justified by the evidence, law, and equities." (See December 2002 Decree § 29.1.) Moreover, the Court observes that, even if an individual were awarded retroactive seniority under Title VII, such relief would not be achieved in usurpation of the CBA's bona fide seniority system.

is to be settled by an arbitrator under the guidelines set forth in the CBA. (Id.)

In response to this argument, Plaintiffs and the City maintain that the proposed decree is not a collective bargaining agreement. (Pls.' & City's Joint Resp. to FOP's Mot., Ex. A at 17.) "Only the Court should have the ability to approve changes to this resolution of a Title VII discrimination case; labor arbitrators have no such authority." (Id.)

The Court finds that, because the December 2002 Decree is a settlement agreement between Plaintiffs and the City that will be a judicially approved consent decree resolving a Title VII discrimination case, the proposed decree "places the power of the court behind the compromise struck by the parties." United States v. Colo., 937 F.2d at 509; see also Rufo v. Inmates of the Suffolk County Jail, 502 U.S. 367, 378 (1992) (describing consent decree as "a judicial decree that is subject to the rules generally applicable to other judgments and decrees"). Accordingly, the December 2002 Decree may not be changed, modified, or amended without this Court's approval. See id.; Williams, 720 F.2d at 920. Thus, the Court finds that the limitation contained in the December 2002 Decree providing that only the Court may effectuate any such revisions to the proposed decree is simply a restatement of existing law, which does not in any way impair the FOP's contractual or legal rights under the CBA or the FPAA. Accordingly, the Court overrules the FOP's objection to Section 35.1 of the proposed decree.

B. The December 2002 Decree Does Not Substitute This Court for the Arbitration Process Provided By the FPAA and the CBA

Section 21 of the December 2002 Decree establishes, as a committee of the U.S. District Court for the Northern District of Oklahoma, the Dispute Avoidance and Resolution Committee (the "Committee"). The Committee is to be "composed of nine (9) members, three of whom

shall be selected by the Court from lists of citizens proposed by the Parties, two members selected by the Plaintiff class, two senior members of the Department selected by the City, and two members selected by the FOP." (December 2002 Decree § 21.)[79] The primary objectives of the Committee are as follows:

> [to] collect and review information regarding compliance from the Independent Auditor and the City and then provide the Parties an opportunity to discuss issues concerning the requirements of this Decree, assist in the resolution of issues relevant to this Decree, and assist the Parties in avoiding future litigation over these matters.

(Id. § 22.1.) Section 22.1 further explains the duties of the Committee:

> The Committee is not authorized to make policy and shall not issue orders or directions to any Party or any agent, representative or employee of the City. This Committee shall assist the Parties in making the changes and resolving issues related to the policies and practices required by this Decree. When called upon to do so, the Committee shall address disputes over compliance acting as an alternative dispute resolution tool pursuant to the local rules of the United States District Court for the Northern District of Oklahoma.

(Id.)[80]

Sections 24 and 25 of the proposed decree address the adoption of the plans and policies called for by the proposed decree and issues relating to compliance with the proposed decree. (Id. §§ 24, 25.) Section 24.1 requires the City to present to the Committee drafts of any plans and policies in advance of their adoption "in order to receive the views of the Committee and

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[79] The Court construes Section 21 of the December 2002 Decree such that it does not require the FOP to participate in the Committee. (See December 2002 Decree §§ 1.5, 21.)

[80] Pursuant to Section 23.1.d of the proposed decree, "[t]he Committee shall have the authority to function as an adjunct settlement process under N.D. L.R. 16.2." (December 2002 Decree § 23.1.d.)

inform the City of issues which might arise concerning such matters." (Id. § 24.1.) Section 25.1 provides that the Committee shall be "kept informed concerning the status of compliance and issues related thereto," and Section 25.2 provides a mechanism for Plaintiffs and the City to resolve any issues relating to compliance with the proposed decree through the Committee or otherwise, prior to the initiation of any court proceeding. (Id. § 25.)[81]

First, the FOP objects to Sections 21 through 24 of the proposed decree and the formation of the Committee, arguing that the Committee itself "is contrary to one of the principal reasons for the execution of the CBA in the first place: to bargain and negotiate the 'grievance procedures.'" (FOP's Objections, Ex. A at 30 (citing CBA Preamble).) The FOP argues, generally, that "[g]rievance and arbitration systems are mandatory subjects of bargaining." (Id., Ex. A at 30-31 (citing Bethlehem Steel Co., 136 N.L.R.B. 1500 (1962); United States Gypsum Co., 94 N.L.R.B. 112 (1951)).) The FOP argues that "[a] party cannot circumvent grievance arbitration by direct court action to resolve disputes arising from the interpretation or enforcement of a collective bargaining agreement." (FOP's Objections at 5.)

Specifically, the FOP contends that the creation of the Committee "violates Article 7 of

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[81] Section 25.2 of the December 2002 Decree provides in its entirety as follows:

> In the event Plaintiffs contend the City has failed to fulfill any obligation under this Agreement, Plaintiffs shall, prior to initiating any court proceeding to remedy such contention, give written notice of the failure to the City and the Committee. The City shall have forty-five (45) days from receipt of such notice to resolve the issue through the Committee or otherwise. The Court may hear such a matter on an expedited basis, prior to review of the matter by the Committee, if the Plaintiffs establish that circumstances exist requiring such expedited review.

(Id. § 25.2.)

the CBA which explicitly provides the only dispute resolution process for issues covered by the CBA." (FOP's Objections, Ex. A at 31.)[82] In this regard, the FOP argues:

> [M]any (if not most) of the issues "concerning the Decree" are, in fact, inextricably bound up within the sole province of the CBA and are solely subject to the grievance and arbitration procedures of the CBA. They are not subjects for discussion or resolution by the Court, the parties, or a combination thereof – even with the exclusive bargaining representative of the members of the TPD as a minority member of such committee. Moreover, under the FPAA, 11 O.S. § 51-108, the FOP is entitled to have all impasse arbitration decisions rendered by a neutral arbitrator, rather than by a committee of interested parties, an auditor or, it is respectfully submitted, in the absence of an adjudicated finding of liability, this Court. As such the Committee is contradictory to and interferes with the CBA's grievance and arbitration process.

(Id.) The FOP also argues that Oklahoma law requires specific binding arbitration procedures to resolve disputes and that the City cannot waive those requirements. (FOP's Objections at 5 ("[T]he FPAA mandates that every collective bargaining agreement with a municipality contain a clause establishing arbitration to resolve 'any dispute which may arise involving the interpretation or application of any of the provisions' of the collective bargaining agreement.")

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[82] Section 7.1 of Article 7 of the CBA provides that "[t]he Lodge or any member(s) of the bargaining unit may file a grievance concerning the meaning, interpretation, application, or alleged violation of the terms and provisions of this Agreement . . . ." Section 7.9 of Article 7 provides, in pertinent part, as follows:

> With respect to the interpretation, enforcement or application of the provisions of the Agreement, the decisions, findings and recommendations of the arbitrator shall be final and binding on the parties to this Agreement. The arbitrator's authority shall be limited to the interpretation and application of the terms of this Agreement and/or any supplement thereto and shall not extend to those extra-contractual (i.e., Worker's Compensation, Unemployment Compensation issues, etc.) matters for which a forum and remedy is available pursuant to statute . . . .

(CBA Art. 7, § 7.9.)

(quoting OKLA. STAT. tit. 11, § 51-111).)[83]

Second, the FOP objects to Section 25.2 of the proposed decree, arguing that "it explicitly cuts out the FOP from negotiation and mandates the city negotiate with Plaintiff's [sic] to solve the dispute prior to summoning the Committee or the Court for help." (Id., Ex. A at 31-32.) The FOP repeats its arguments with respect to Sections 21 through 25, arguing that Section 25.2 "directly contradicts the dispute resolution process set out in Article 7 of the CBA" and "violates 11 O.S. § 51-111 which requires that every CBA have an arbitration clause for the resolution of all disputes involving the interpretation or application of any provision under a CBA." (Id., Ex. A at 32.)

Plaintiffs and the City maintain that the FOP mischaracterizes the proposed decree because the "Committee will not be deciding issues arising from the CBA; it will be deciding issues of compliance with the Decree, which is the remedy for the resolution of a Title VII class action." (Pls.' & City's Joint Resp. to FOP's Mot., Ex. A at 16.) Plaintiffs and the City further maintain that the December 2002 Decree does not enjoin the FOP from grieving and arbitrating any valid issues that may arise under the CBA. (Id.) Plaintiffs and the City also contend that the rights asserted by Plaintiffs in this case arise under Title VII and are, therefore, independent of

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[83] With respect to arbitration clauses, Section 51-111 of the FPAA provides, in pertinent part, as follows:

> Every such agreement shall contain a clause establishing arbitration procedures for the immediate and speedy resolution and determination of any dispute which may arise involving the interpretation or application of any of the provisions of such agreement or the actions of any of the parties thereunder.

OKLA. STAT. tit. 11, § 51-111.

the CBA and form no part of the collective bargaining process. (Id.)

As discussed above, the question of whether the proposed agreement violates the contractual rights of others is a question of law for the Court. Hialeah, 140 F.3d at 973. By moving to intervene in this lawsuit and by presenting the Court with its objections to the December 2002 Decree, the FOP has vested the Court with the power to enter an order defining certain of its legal rights. Thus, upon careful consideration of the arguments of the parties and the applicable law, the Court finds that the implementation of the Committee as provided for in the proposed decree is not intended to, and will not, replace the compulsory arbitration process set forth in the CBA and the FPAA. Both the CBA and the FPAA specifically refer to the arbitration of issues under the CBA. (See CBA Art. 7, § 7.9 (directing that arbitrator's findings "[w]ith respect to the interpretation, enforcement or application of the provisions of this Agreement . . . shall be final and binding on the parties to this Agreement.") (emphasis added); OKLA. STAT. tit. 11, § 51-111 (requiring establishment of "arbitration procedures for the . . . resolution and determination of any dispute which may arise involving the interpretation or application of any of the provisions of [the collective bargaining agreement] or the actions of any of the parties thereunder").) In contrast, Section 22.1 of the December 2002 Decree makes it clear that the Committee's responsibilities relate solely to the proposed decree, and not to issues arising under the CBA. (Id. § 22.1 (requiring the Committee to "assist in the resolution of issues relevant to this Decree") (emphasis added).)[84]

[84] (See also id. ("The Committee shall have only the duties, responsibilities and authority conferred by this Decree.").)

Moreover, contrary to the FOP's assertions and the language in Plaintiffs' and the City's brief, the Committee to be established under Sections 21 through 24 of the proposed decree will not be "deciding" issues at all. (See December 2002 Decree §§ 21-24.) Rather, Section 22.1 of the proposed decree, which sets forth the primary objectives of the Committee, provides that the Committee is not to "decide" anything. (See id. § 22.1 (stating that the "Committee is not authorized to make policy and shall not issue orders or directions to any Party or any agent, representative or employee of the City.").) As described above, the Committee's powers are limited to assisting the parties in reviewing information and discussing issues relevant to the proposed decree in order to avoid future litigation. (See id. § 22.1.)

Thus, because the Court finds that the Committee created pursuant to the December 2002 Decree will not decide issues regarding the interpretation, enforcement, or application of the provisions of the CBA and because nothing prevents the FOP from grieving and arbitrating any valid issues that may arise under the CBA, the Court finds that the December 2002 Decree does not substitute the Court for the mandatory arbitration process required by the CBA and the FPAA. Accordingly, the Court overrules the FOP's objections to Sections 21 through 24 and Section 25.2 of the proposed decree.

C. The December 2002 Decree Does Not Violate Principles of Federalism

The FOP's final argument in opposition to the proposed decree is that the Court should reject the December 2002 Decree because it violates principles of federalism. The FOP argues that the proposed decree impermissibly circumvents state and local procedures enacted to protect the rights of police officers, and impermissibly interferes with the exercise of state enforcement

mechanisms that have been bargained for by the FOP and its members.[85] As further support for its argument that the proposed decree violates the principles of federalism, the FOP notes the lack of consent to the proposed decree from the following state entities: the future mayor of Tulsa, the PERB, the Tulsa Civil Service Commission, the FOP, and Tulsa police officers who object to the proposed decree. (See FOP's Objections at 24 and Reply at 19-20.)

In Rizzo v. Goode, 423 U.S. 362 (1976), the Supreme Court held that federalism principles apply where injunctive relief is sought "against those in charge of an executive branch of an agency of state or local governments." Id. at 380. The Supreme Court instructed federal courts to be mindful of the principles of federalism in granting equitable relief against state actors:

> Where, as here, the exercise of authority by state officials is attacked, federal courts must be constantly mindful of the 'special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law.'

Id. at 378 (quoting Stefanelli v. Minard, 342 U.S. 117, 120 (1951)).

At issue in Rizzo were the federalism concerns implicated by a district court's fashioning of an equitable remedy after a finding of liability against state officials. Since Rizzo, courts have also addressed the federalism concerns implicated by a district court's entry and/or enforcement

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[85] The enforcement mechanisms to which the FOP refers are the arbitration processes set forth in the CBA and established by the FPAA. The FOP also argues that the proposed decree violates Article 10, § 26 of the Oklahoma Constitution, which states that no city shall become indebted to an amount exceeding the income and revenue for that year without the assent of three-fifths of the voters. Okla. Const., Art. 10, § 26.

of a consent decree entered into by state officials pursuant to a settlement of claims.[86] Of the courts that have addressed federalism concerns in the context of a consent decree entered into voluntarily by state officials, some have concluded that the State's consent to the proposed decree obviates or minimizes any federalism concerns, while others have held that the principles of federalism must be considered, despite the state actor's consent to the proposed decree. Compare, e.g., Labor/Cmty. Strategy Ctr. v. Los Angeles Cty. Met. Transp. Auth., 263 F.3d 1041, 1050 (9th Cir. 2001) (stating that local agency's consent to remedial scheme in decree relieves many concerns of federalism); Allen v. Ala. State Bd. of Educ., 816 F.2d 575, 577 (11th Cir. 1987) ("It is, of course, right for United States Courts to be concerned about the vitality of our federal system; but we disagree that enforcing a settlement made by a state board undercuts important principles of federalism . . . ."); Duran v. Carruthers, 678 F. Supp. 839, 847 (D.N.M. 1988) ("It would be a bizarre perversion of the principle of comity to suggest that a federal court is required, in order to preserve state autonomy, to override the decisions of state officials and substitute its own judgments.") with Kasper v. Bd. of Election Comm'rs, 814 F.2d 332, 340 (7th Cir. 1987) ("The Board's willingness to transfer its responsibilities to the federal court does not oblige the court to accept it."); Lelsz v. Kavanaugh, 807 F.2d 1243, 1253 (5th Cir. 1987)

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[86] Although a federal court's discretion to enter or enforce a consent decree is not identical to a federal court's discretion to fashion an equitable remedy after a finding of liability, the two discretionary acts implicate similar federalism concerns. See Ragsdale v. Turnock, 941 F.2d 502, 515 (7th Cir. 1991) ("In entering a consent decree, a district court employs a remedy of the flexibility that has typically characterized equitable relief."); Note, Alan Effron, Federalism and Federal Consent Decrees Against State Governmental Entities, 88 Colum. L. Rev. 1796, 1800-01 (1988) (stating that, while not strictly identical to equitable discretion, discretion to enter or enforce a consent decree should be considered equitable at least where proposed decree consists of equitable measures) (hereinafter Federalism and Federal Consent Decrees).

(vacating consent decree that created "federal court remedy unfounded in federal law [that] intrudes into the governance of matters otherwise presided over by the states."); Georgevich v. Strauss, 772 F.2d 1078, 1085 (3d Cir. 1985) (stating that the district court's "legitimate concerns about federal-state relations" are good reasons not to approve a consent decree). See generally Federalism and Federal Consent Decrees at 1801-02; Note, Jeremy Wright, Federal Authority to Enforce Consent Decrees Against State Officials, 6 Tex. F. on C.L. & C.R. 401 (2002) (hereinafter Federal Authority to Enforce Consent Decrees).

As described in previous sections of this order, the City and its elected officials, by and through Mayor LaFortune, have unequivocally consented to the proposed decree, have urged that it is in the best interest of the City, and have stated that it is a satisfactory conclusion to nine years of divisive litigation. (1/21/03 Tr. at 24:8-27:12.) Thus, to the extent that federalism concerns are minimized or obviated by the consent of the state actor, as held by some courts, the FOP's federalism argument is not persuasive in this case because City officials not only agreed to the proposed decree but were also actively involved in fashioning the decree. Further, the Court rejects the FOP's argument that the lack of consent from some future mayor of Tulsa disrupts the balance of federalism. If this were this the case, a state or municipality would never be able to enter a consent decree containing enforcement schemes with life spans exceeding the current official's term of office.[87]

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[87] The FOP also urges that the lack of "consent" from various local and state agencies, such as the PERB and the Tulsa Civil Service Commission, mandates rejection of the proposed decree. Based on the Court's finding that the proposed decree does not attempt to modify or supplant any existing state schemes, such as the FPAA, the Court finds that this argument is without merit.

Assuming, without deciding, that consent to a settlement by a state actor does not obviate the need for the federalism inquiry, the Court will address the FOP's argument that the proposed decree sets up a remedial scheme that impermissibly intrudes upon the autonomy of state and local government.[88] In its objections to the proposed decree, the FOP attempts to align the facts in this case with the facts in cases in which consent decrees have been rejected, or not enforced, on grounds that the proposed decree or enforcement of the proposed decree violated federal-state relations. The Court will address each of these cases in turn.

In Kasper, the Court of Appeals for the Seventh Circuit upheld a district court's refusal to enter a consent decree, entered into by the Republican Party of Chicago and the Board of Election Commissioners of Chicago, that would have changed the entire system of canvassing voters in the Chicago area. Kasper, 814 F.2d at 338-39. In upholding the rejection of the decree, the Court of Appeals identified several considerations that supported the district court's

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[88] In Kasper, the Court of Appeals for the Seventh Circuit offered the following explanation for its conclusion that the consent of a state entity does not obviate the need for the court to conduct a federalism inquiry:

> Finding the authority to impose obligations is not the only objective of the federal court, though. A judge has obligations to other litigants . . . and to members of the public whose interest may not be represented by the litigants. A district judge need not lend the aid of the federal court to whatever strikes two parties' fancy . . . . Before entering a consent decree, the judge must satisfy himself that the decree is consistent with the Constitution and laws, does not undermine the rightful interests of third parties, and is an appropriate commitment of the court's limited resources.

Kasper, 814 F.2d at 338; see also Federalism and Federal Consent Decrees (arguing that "consent theory" is flawed because consent of the parties cannot broaden the scope of a federal court's power). In consideration of this authority, the Court will address the FOP's federalism arguments, despite the City's consent to the proposed decree.

refusal to enter the decree: (1) the court did not have time to evaluate the complaint or the consent decree with care; (2) the complaint, and concessions by the board, concerned only past canvasses; (3) the proposed decree potentially threatened the interests of an intervening party who asserted that the new system would remove certain voters from voting rolls; (4) the decree appointed "United States District Court Observers" to oversee the elections, borrowing the name and prestige of the district court; (5) the decree had potential to "propel the court into the minutiae of the Board's functions, a whopping reallocation of authority from state to federal government, from political to judicial actors;" (6) the complaint did not make a substantial showing of a violation of federal law and wasted federal judicial resources; (7) the decree excused the board from complying with Illinois law and actually encouraged violations of Illinois law; and (8) the decree altered the state statutory scheme, and could be viewed as an attempt by a state agency to "liberate" itself from state statutes. Id. at 339-42.

In Georgevich, the district court revoked its initial approval of a consent decree entered into by a plaintiff class of inmates serving sentences in state institutions and a defendant class of Pennsylvania Common Pleas judges. Plaintiffs' claim was an equal protection challenge to the parole procedures governing state prisoners in Pennsylvania, which plaintiffs alleged gave county prisoners more favorable treatment than similarly situated state prisoners. The parties initially agreed to a consent decree providing for corrective procedures. However, objections were filed to the decree on grounds that federal judicial oversight of 300 state court judges was unnecessary and disrupted the principles of federalism. The district court did not enter the decree, and granted summary judgment to defendants. The court of appeals remanded the case

and ordered that the district court abstain from resolution of the state law issue until the state judiciary had an opportunity to attempt to resolve the claim, holding that abstention was proper because it was "almost certain that resolution of the state law issue [would] obviate the need for a federal court to decide a constitutional issue." Georgevich, 772 F.2d at 1089.

In Lelsz, the Court of Appeals for the Fifth Circuit vacated a district court order enforcing a consent decree entered into by a plaintiff class consisting of 2400 residents of schools for the mentally retarded in Texas and the Texas Department of Health and Mental Health. The district court had attempted to enforce the consent decree by ordering the state, against its consent, to create community facilities for 279 class members. Lelsz, 807 F.2d at 1245. The court reasoned that, even under Local No. 93, 478 U.S. 501, which allows a federal court to enter a consent decree that provides broader relief than the court could have awarded after trial, the district court did not have power to impose this remedy because the right to a "least restrictive alternative" environment, which created the need for the remedy of additional facilities, arose solely from Texas law. Id. at 1253. The court of appeals stated that if "a federal court may take almost any action against a state to endorse a consent decree so long as it is consistent with the spirit of the applicable constitutional law and the decree itself, there is no limitation on the scope of the court's power." Id.[89]

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[89] All other circuits that have considered issues arising with the enforcement of a consent decree have rejected the court's reasoning in Lelsz. See Komyatti v. Bayh, 96 F.3d 955 (7th Cir. 1996); United States v. Michigan, 62 F.3d 1418, slip op. (6th Cir. Aug. 7, 1995); Kozlowski v. Coughlin, 871 F.2d 241 (2d Cir. 1989). Although the issue presented in this case is entry of the proposed decree, rather than enforcement of the proposed decree, the federalism analysis is similar in both instances.

These three cases, as well as all other cases cited by the FOP in support of its federalism argument,[90] are distinguishable from the instant case. First, the second amended complaint in this case alleges violations of only federal civil rights laws, thereby significantly diminishing the federalism concerns articulated in cases cited by the FOP. The causes of action in this lawsuit arise under Title VII and other federal civil rights laws, which expressly subject local governments to suit. Although the absence of a state law cause of action does not entirely assuage federalism concerns, it puts the instant case in a different category from those cited by the FOP, in which there were state law issues that presented special concerns. Because the claims in this case arise solely under federal law, this dispute is not one that "belongs" in state court, see Kasper, 814 F.2d at 342 (rejecting decree, in part, because it appeared the parties may have "delivered the complaint in this case to the wrong court"), and, thus, there is no need to give a state court the "first crack" at the entry of any consent decree, see Federalism and Federal Consent Decrees at 1814 (asserting that whether an appropriate state court could enter a similar consent decree is a factor to consider in the federalism analysis).[91] The Court, therefore, finds that the fact that there are no causes of action arising under state law militates against federalism

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[90] The Court has addressed the cases that best support the FOP's position. Other cases cited by the FOP are less persuasive. For example, in Armco, Inc. v. United Steelworkers of Am., 280 F.3d 669 (6th Cir. 2002), the appellate court held that the district court had entered a consent decree in violation of abstention principles where the federal consent decree "addresse[d] substantially the same issues that [were] addressed in [a] state court injunction." Id. at 682. Significantly, in the instant case, there is no pending state court proceeding requiring abstention by this Court.

[91] In Kasper, the district court found that the complaint did not even allege a violation of federal law. Kasper, 814 F.2d at 342.

concerns in this case.

Second, the Court finds that this decree does not significantly or unnecessarily intrude on the sovereignty of the state government. The decree does not infringe upon any complex state administrative scheme or significant state function, such as a city's election process, as in Kasper, or an entire state judiciary, as in Georgevich. Indeed, for the reasons explained in detail in previous sections of this order, the Court finds that the proposed decree does not infringe upon the state law procedures set forth in the FPAA and administered by the PERB. See supra Section III.B. Accordingly, the Court finds that the proposed decree is narrowly tailored to address the alleged federal violations giving rise to this lawsuit, without impinging upon state sovereignty. The FOP's arguments regarding the decree's alleged "intrusions" into state law simply do not rise to the level of such a significant disruption of federal-state relations as to warrant rejection of a settlement of the claims in this lawsuit. See, e.g., Kasper, 814 F.2d at 340 (rejecting decree, in part, because it potentially involved a "whopping reallocation of authority from state to federal government, from political to judicial actors.") (emphasis added).

As to the FOP's objections based on the proposed decree's potential conflicts with Article 10, § 26 of the Oklahoma Constitution, which prohibits the City from becoming indebted in an amount exceeding the income and revenue for that year without the assent of three-fifths of the voters, the Court finds that an analysis of the terms of the proposed decree minimizes any federalism concerns. The expenses to be incurred for implementation of the December 2002 Decree are heavily front-loaded, and have already been included in the City's budget for this fiscal year. (Pls.' & City's Joint Resp. to Objections at 28.) In addition, within three years, the

proposed decree contemplates that the City will be in full compliance.

Third, the Court finds that there is nothing in the proposed decree that suggests Mayor LaFortune or other City officials have entered the consent decree in an attempt to circumvent any local or state laws. In Dunn v. Carey, 808 F.2d 555 (7th Cir. 1986), the court cautioned that "courts must be alert to the possibility that the consent decree is a ploy in some other struggle." Id. at 560; see also Kasper, 814 F.2d at 340 (district judges should be on lookout for attempts to use consent decrees to make end runs around the legislature); Federalism and Federal Consent Decrees at 1813 (stating that courts should be hesitant to enter a consent decree when a "strong possibility exists that the state entity would thereby evade traditional routes of political accountability"). The FOP argues that "the Mayor is trying to circumvent the above state and local procedures for political benefit"; however, the FOP cites, and the Court finds, nothing in this record to suggest that Mayor LaFortune, in settling this lawsuit, is motivated by anything other than the best interest of the City of Tulsa.[92] For these reasons, the Court finds that the December 2002 Decree does not violate principles of federalism.

D. The FOP's Objections to the December 2002 Decree Do Not Operate As a Bar To Its Approval

For the reasons set forth above, the Court finds that the December 2002 Decree does not

[92] The Court observes that the nine-year time span that has elapsed since the filing of this lawsuit, as well as the hard-fought nature of this litigation, also minimizes federalism concerns. In this late stage of the litigation, it is clear that the Plaintiffs and the City have contemplated the scope and nature of relief that would be available after a trial on the merits in reaching settlement of the claims. Accordingly, the concerns raised in other cases regarding the entry into a consent decree where such entry is either premature or will ultimately be a waste of judicial resources, are not present in this case.

require the FOP to act or to refrain from acting. Specifically, the Court finds that the December 2002 Decree does not erode or infringe upon the union's contractual or legal rights under either the CBA or the FPAA. The Court further finds that the December 2002 Decree does not impose any legal duties or obligations on the FOP. Only the parties to the December 2002 Decree can be held in contempt of court for failure to comply with its terms.

As the Court stated in its December 13, 2002 order rejecting the FOP's claim that it had a unilateral right to reject the proposed decree, the Court finds that the FOP has asserted no claims or causes of action in this litigation. Although the FOP contends in its objections to the proposed decree that it has not filed counterclaims or cross-claims because "the Court has made it clear that no party may add claims," the Court finds the FOP's current claim in this regard contrary to the record and in bad faith. (See FOP's Objections at 3.) At no time before filing its objections to the December 2002 Decree did the FOP move to amend the pleadings or even indicate a desire to assert claims or causes of action against either Plaintiffs or the City.[93] The Court notes that it

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[93] To the contrary, when urging the Court to grant its motion to intervene, the FOP expressly represented that "the FOP is ready for trial when the Court schedules the trial . . . ." (Reply of Lodge #93 of the Fraternal Order of Police to Mem. of Pls. in Opp. to Mot. to Intervene at 6.) In this regard, Magistrate Judge Frank H. McCarthy, in an order dated September 24, 2002, specifically found that the FOP had made misrepresentations regarding its ability to proceed to trial, without delay, if it were granted intervention. (9/24/02 Order of Magistrate Judge McCarthy at 4 (admonishing FOP for engaging in "sharp practices").) With respect to these misrepresentations, Magistrate Judge McCarthy stated:

> Any representations by the FOP contrary to these findings are simply untrue and interfere with the ability of this Magistrate Judge and the parties to develop a fair and expeditious schedule in this matter. Simply stated, when a party makes express representations to the Court, and the Court relies on such representations, that party cannot, at a later date, untruthfully claim that it never made such representations or that prejudice will result from the Court acting in accordance

was Plaintiffs who, objecting to the FOP's delayed request for intervention, suggested that parties and causes of action may have to be added. Specifically, Plaintiffs argued that intervention should be denied because it would prejudice their interests by requiring that Plaintiffs amend the complaint to add causes of action against the FOP for its failure to represent African-American police officers who have brought forth valid discrimination grievances. (Pls.' Add'l Resp. to Mot. to Intervene by Lodge #93 of the Fraternal Order of Police at 5-6.)[94] In response to Plaintiffs' assertion of prejudice, the Court, in its September 10, 2002 order granting intervention, stated the following:

> The Court finds that the intervention of the FOP will not necessitate further pleadings or additional discovery, as suggested by the Plaintiffs. To the contrary, the FOP is being granted intervenor status in this case as it is currently plead. As a result, the FOP will be a full participant and party to the proceedings, and it will be bound[95] by any adjudication resulting from the Plaintiffs claims for equitable

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with such representations. To do so undermines the integrity of the process.

(Id.; see also 11/19/02 Order (overruling FOP's objections to Magistrate Judge McCarthy's order).)

[94] Specifically, the Plaintiffs' brief in opposition to the FOP's motion to intervene stated:

> If the FOP becomes a party, Plaintiffs plan on making specific allegations against the FOP, so that it can defend its own wrongdoings, not just serve as second team for the City. For years, the FOP has turned a blind eye to issues of racial discrimination within the Tulsa Police Department, refusing to represent black officers who have brought forth valid discrimination grievances. This, of course, is not only a violation of the Collective Bargaining Agreement (CBA), but also a violation of federal non-discrimination laws.

(Id.)

[95] The Court's statement, in its September 10, 2002 order, that the FOP would be "bound" by any adjudication resulting from Plaintiffs' claims in this case, refers to the basic

> relief stated in its second amended complaint. At this time, the Court finds no basis in the record to support a motion to further amend the pleadings.

(9/10/02 Order at 14 n.8 (footnote not in original).) Therefore, the Court finds that the record does not support the FOP's assertion that its failure to assert claims or causes of action against the parties in this case was due to a limitation imposed by the Court.[96]

The Court further finds that the FOP has taken full advantage of the opportunity to participate in the fairness hearings on the December 2002 Decree. In this regard, the FOP filed sixty-four pages of objections to the December 2002 Decree, (FOP's Objections; FOP's Objections, Ex. A.), and, at the fairness hearings, the FOP called witnesses and introduced evidence in support of those objections. See Local No. 93, 478 U.S. at 528-29; see also Jones, 741 F.2d at 325 ("Appellant was afforded the full panoply of procedural due process when he

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principle that "if persons are improperly prevented from intervening as parties to the consent decree litigation, they should not be bound by its results." Edwards v. City of Houston, 78 F.3d 983, 998 n.19 (5th Cir. 1996). See also Sanguine, 798 F.2d at 329. Therefore, although the Court finds that this decision will preclude the FOP from later arguing that the entry of the proposed consent decree violates its rights under the CBA and Oklahoma law, the Court nevertheless finds, for the reasons articulated above, that the December 2002 Decree does not impose any legal duties or obligations on the FOP or bind the FOP to do or not to do anything.

[96] Moreover, the Court notes that, in its objections, the FOP claims that it "has both defenses and affirmative claims." (Id.) The FOP explains that its defenses to the proposed decree include its assertion that there has been "no finding of liability to justify imposing obligations on the FOP or its members." (Id. at 3 n.5.) The FOP explains that its "affirmative claims" include its contention that the proposed decree is a "violation of the CBA and federal, state and local law." (Id. at 3 n.6. (stating only that FOP has "affirmative claims" "[s]uch as violation of the CBA and federal, state and local law.") Therefore, even if the Court's September 10, 2002 order could have been construed as a prohibition on the filing of counterclaims or cross-claims by the FOP, the Court, nevertheless, finds that the FOP's "affirmative claims" are nothing more than its objections to the approval of the December 2002 Decree and are not separate causes of action asserted against either Plaintiffs or the City.

received adequate notice of the settlement hearing and had the significant opportunity to be heard by submitting an extensive memorandum to the court prior to the hearing detailing his objection to the settlement."); Rutter & Wilbanks Corp., 314 F.3d at 1187 ("The fundamental requirement of due process is the opportunity to be heard at a meaningful time in a meaningful manner.") (internal quotations and citations omitted).

Therefore, because the December 2002 Decree does not bind the FOP to act or to refrain from acting, does not impose any legal duties upon the FOP, and does not purport to resolve any claims asserted by the FOP, the Court finds that the facts of the instant case are virtually indistinguishable from the facts in Local No. 93 where the Supreme Court upheld the district court's approval of a consent decree over the objections of the non-consenting union. See Local No. 93, 478 U.S. at 528-29. The Court further finds that, because the FOP has had the opportunity to present its objections to the proposed decree and because the Court has throughly considered those objections, the FOP has been afforded "all the process that [it] was due." See id. Thus, the Court finds that it may approve the December 2002 Decree over the FOP's objections.

IV

Having found that the proposed decree satisfies the Gottlieb factors and that it does not violate the FOP's contractual or legal rights, the Court must next determine whether the proposed decree violates state or federal law. United States v. Colo., 937 F.2d at 509 ("[T]he district court must ensure that the agreement is not illegal, a product of collusion, or against the public interest."); Hialeah, 140 F.3d at 973 ("The district court has the responsibility to insure that a

consent decree is not unlawful, unreasonable, or inequitable.") (internal quotations and citations omitted).

The Court finds that the December 2002 Decree, for many of the reasons explained in the previous sections of this order, does not violate state or federal law and is not illegal. The Court finds that the December 2002 Decree is a prudent and balanced compromise between the parties and that its terms are appropriately related to the allegations contained in the second amended complaint. See Local No. 93, 478 U.S. at 525 (stating that consent decree must "come within the general scope of the case made by the pleadings, and must further the objectives of the law upon which the complaint was based") (internal quotations and citations omitted). The December 2002 Decree, unlike the challenged decree in Local No. 93, which contained an affirmative action and quota program to remedy the allegations of past discrimination, sets forth certain race-neutral policies and practices to be adopted by the City as a response to the claims of past discrimination in this case. Thus, the Court finds that, in addition to being lawful, the December 2002 Decree is also reasonable and equitable.

V

Finally, the Court must determine whether the adoption and approval of the proposed decree furthers the interests of the City and the community at large. See 7B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1979.1 (2d ed. 1986 & 2001 Supp.) (stating that district courts must ensure that the settlement of a class action is "in the best interests of those who will be affected by it."); United States v. Colo., 937 F.2d 505, 509 (10th Cir. 1991) (requiring district courts to ensure that settlement is not "against the public interest").

For the reasons set forth below, the Court finds that the December 2002 Decree is in the best interest of the Tulsa community. The record reflects that, during the nine years that this case has been litigated, it has bred divisiveness in the community. At the fairness hearings regarding the April 2002 decree, former Mayor Savage testified about the divisiveness of the lawsuit and about the increasing divisiveness created by its continued litigation:

> [The case at bar] was a very divisive lawsuit and over the period of time, six, seven, eight years that it has been underway has grown increasingly divisive. My experience with litigation involving the City of Tulsa is that if a settlement can occur then it is beneficial for all of the parties, and certainly in a case where there are heightened emotions where there is – there are disputes within a working environment, to settle those disputes by virtue of mutual agreement is preferable, in my view, to litigation.

(6/13/02 Tr. at 18:15-25.) Simiarly, Mayor LaFortune, noting the negative atmosphere created within the TPD during the fairness hearings themselves, testified that he believes the proposed decree is a "golden opportunity" to resolve this litigation and one that allows the City and the TPD to move forward. (1/21/03 Tr. at 26:12-27:5.)[97]

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[97] Mayor LaFortune articulated five distinct reasons that weigh in favor of support for the December 2002 Decree. First, Mayor LaFortune testified that he believes the proposed decree is cost effective. (See, e.g., 1/21/03 Tr. at 2:6.) Second, he testified that he believes the proposed decree is fair to all of the parties. (Id. at 25:7-15.) In this regard, Mayor LaFortune, noted "thirty-two substantive revisions" from the April 2002 Decree, explaining that he worked very hard to incorporate the FOP's objections articulated at the June and July 2002 fairness hearings into the December 2002 Decree. (Id.) Third, the mayor testified that he believes the decree is progressive because it "contain[s] a number of very positive policies and on the cutting edge type of policies such as the CALEA Accreditation [and] the establishment of a career development section in the department." (Id. at 25:16-21.) Fourth, Mayor LaFortune testified that he believes the proposed decree should be approved because Chief Been believes he can administer it. (Id. at 25:22-26:11.) Finally, the mayor testified, as noted above, that he believes that the proposed decree is a "golden opportunity to resolve this almost decade old piece of litigation" and allow the City and TPD to move forward. (Id. at 26:12-27:12.)

The Court witnessed the divisiveness created by this litigation during the fairness hearings conducted by the Court in June and July 2002. While the parties, in the well of the courtroom, contested the existence of racial divisiveness, witnesses noted that the gallery was distinctly divided along racial lines, with African-American officers sitting on one side and white officers on the other. (See 7/15/02 Tr. at 257:2-7.)[98]

The Court finds that subsequent litigation and a trial likely would exacerbate this division.[99] See, e.g., Williams, 720 F.2d at 923 ("Consent decrees minimize the delay, expense,

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The Court has the highest respect for Mayor LaFortune and the record makes clear his commitment to the improvement of the City and his desire to constructively address the issues raised by the instant lawsuit. The Court, therefore, gives great weight to Mayor LaFortune's analysis, reasoning, and conclusion that the proposed decree is in the best interest of the Tulsa community.

[98] The racial divide described by the witnesses in sworn testimony was also reported in the Tulsa World:

> As they had done during the June 13 and June 20 hearings concerning the proposed settlement of a racial discrimination suit against the city, black officers on Monday had gravitated to the rows in the gallery behind the plaintiffs' table while white officers sat across the aisle behind a table where Fraternal Order of Police attorneys were stationed.

David Harper, Racial Division Is Cited, TULSA WORLD, July 16, 2002, at A1.

[99] For example, in their second amended complaint, Plaintiffs allege that "African-American officers are subjected to harsher discipline and are more likely to be discharged than similarly situated white officers." (Second Am. Compl. at 9.) In order to prove this claim, Plaintiffs would have been required to adduce evidence at trial that white officers who engaged in arguably the same "wrongful conduct" as African-American officers were not disciplined or terminated, while African-American officers were. In other words, the testimony at trial would have largely consisted of comparisons of the bases for discipline of similarly-situated African-American and Caucasian officers. This specific testimony regarding individual officers' conduct would not only have been negative in nature but also highly personal, and such testimony would have undoubtedly generated adverse publicity for the City, the TPD, and officers of all races, in

psychological bitterness, and adverse publicity which frequently accompanies adjudicated guilt."). Indeed, during the recent fairness hearings, Mayor LaFortune testified that he believes a trial on the merits would be "very destructive" to both the TPD and the City. (1/21/03 Tr. at 26:16 – 27:5.)

In addition to adversely affecting the atmosphere of the community, continued prosecution of this case would also be financially destructive to the City. As described above, the taxpayers of the City of Tulsa have borne at least $2 million of fees and expenses incurred in defending this action. If the December 2002 Decree is rejected, the taxpayers will be called upon again to bear the costs of further litigation. To this end, Mayor LaFortune testified at the fairness hearings that, because the City is "struggling economically," a trial on the merits would be particularly damaging. (1/21/03 Tr. at 26:16 – 27:5.) He stated that he can "only imagine" what the amount of attorney fees incurred by the City would be if this case had proceeded to a trial on the merits. (1/21/03 Tr. at 51:6-14.)

For essentially the same reasons that the proposed decree is in the best interest of the City and the community in this case, it is settled law that voluntary settlement is the preferred method of eliminating employment discrimination. EEOC v. Courtwright, 611 F.2d 795, 799 (10th Cir. 1979); Hialeah, 140 F.3d at 974. "The Supreme Court has emphasized on several recent occasions that Congress has expressed a 'strong preference' for encouraging voluntary settlements of Title VII actions." Williams, 720 F.2d at 923 (cataloguing opinions regarding settlement as preferred method of resolution).

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particular those individual officers whose conduct was the subject of testimony.

Against this backdrop of a preference for voluntary settlement of discrimination actions, the Court has reviewed and considered the various objections and testimony of individual nonclass members both in opposition to, and in support of, the proposed decree in determining whether the December 2002 Decree is in the best interest of the City of Tulsa and the community at large.

First, the Court has considered the testimony of three prominent and respected leaders of the Tulsa community who testified at the fairness hearings before the Court in support of the proposed decree. Reverend Weldon Lewis Tisdale, pastor of Friendship Missionary Baptist Church, testified that the proposed decree "is a powerful instrument [and] vehicle to begin the reconciliation, the healing of deep-seated and open wounds that have been in this city for more than 80 years." (1/22/03 Tr. at 255:3-256:13.) Reverend Milford J. Carter, pastor of Sanctuary Evangelistic Church,[100] testified that the lawsuit has contributed to the City's polarization along racial lines. (Id. at 263:6-20.) Reverend Carter further testified that he believes the proposed decree will "serve as a catalyst to effect the change that [he] believe[s] most everybody in the city is ready for." (Id.) Finally, Nancy Day, the Executive Director of the Tulsa Region of the

[100] Reverend Carter testified that he is also involved with United Pastors for Community and Apostolic City Transformation. (1/22/03 Tr. at 261:14-263:2.) Reverend Carter testified that "United Pastors for Community is [a] group of some 30 plus pastors in and around the North Tulsa community who have rallied together to deal with issues that have separated our community and to stand for justice regarding the changes that we see necessary in the community." (Id. at 261:14-19.) He testified that Apostolic City Transformation is a group of four churches that work towards accomplishing points of unity in the City. (Id. at 262:18-263:2.)

National Conference for Community and Justice (the "NCCJ")[101] who has been involved during the last two years in Tulsa's racial reconciliation project, testified that the board of NCCJ believes a swift and equitable resolution to the case would help the community to move forward.[102]

Second, the Court has reviewed and given serious consideration to the individual objections to the proposed decree filed by 214 FOP members and three citizens on January 16, 2003.[103] Although nonclass members generally have no standing to object to the settlement of a class action, Howard B. Newberg and Alba Conte, Newberg on Class Actions § 11.55, at 11-134

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[101] Ms. Day testified that the "NCCJ is a national human relations organization founded in 1927 as the National Conference of Christians and Jews, [which is] now the National Conference for Community and Justice." (1/27/03 Tr. at 326:17-327:1.) Ms. Day explained that the NCCJ works "to fight bias, bigotry and racism in America, [and] to promote understanding and respect among all peoples of all races, religions, and cultures." (Id.)

[102] The FOP attempts to make much out of the fact that several witnesses testifying on behalf of Plaintiffs and the City had not read the objections filed by the individual officers. The Court, however, finds the FOP's argument unpersuasive. In this regard, the Court notes that the FOP's President, Robert Jackson, testified that he himself had read only one of the 214 individual objections. (1/28/03 Tr. at 643:3-4.)

[103] Plaintiffs and the City argue that less weight should be afforded to the individual officers' objections because many of those objections were either in substantially similar form or identical to objections found in a list developed by the FOP and distributed to its membership entitled "Reasons for Objecting to the Proposed Settlement and Consent Decree." In this regard, Plaintiffs elicited testimony at the fairness hearings from FOP President Robert Jackson that this list was distributed to the FOP membership in order to "[give] them ideas as to help them as to what to say, if they needed it." (1/28/03 Tr. at 704:13-16.)

The Court finds that the fact that many of the individual officers' objections were prepared pursuant to a form distributed to them by the FOP does not diminish the fact that these individuals took the time to communicate their views on this issue directly to the Court. Accordingly, the Court finds that, contrary to the suggestion of Plaintiffs and the City, this should not affect the serious consideration afforded these individual officers' objections.

(3d ed. 1992) (citing Gould v. Alleco, Inc., 883 F.2d 281, 284 (4th Cir. 1989)), the Court recognizes these officers' objections as evidence of their sincerity and concern regarding the proposed decree and, therefore, has carefully reviewed each objection in considering whether the proposed decree is in the public's interest.[104]

Upon review of the individual union members' objections, the Court finds that the overwhelming majority of the concerns expressed do not substantively differ from the objections presented in this case by the union itself. Therefore, to the extent that the objections raised by individual officers are the same as those identified by the union, which deal with contractual and legal rights under the CBA and the FPAA, the Court finds that those objections have been addressed in great detail throughout this order and that a separate analysis of each of these issues need not be rehearsed here.[105]

The Court has given exhaustive consideration to the good faith objections filed by the

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[104] The FOP, referring to the Court's comments at the hearing on January 21, 2003 that it would consider each written objection as if it were a "sworn good-faith statement," argues that more African-American officers testified against the proposed decree than in favor of it. The Court, however, rejects the FOP's argument in this regard. It is settled law that the number of witnesses is not controlling. Furthermore, the Court finds it significant that only two members of the Plaintiff class objected to the proposed decree.

[105] The predominant objection by the union members is that the allegations of discrimination in the second amended complaint are untrue. (See, e.g., D. Liedorff's Obj. to Proposed Settlement and Consent Decree; D. Brockman's Obj. to Proposed Settlement and Consent Decree; R. Mann's Obj. to Proposed Settlement and Consent Decree.) However, as discussed above, in assessing the adequacy of the settlement, district courts need not decide the merits of the case or perform their own independent investigation. See Gottlieb, 11 F.3d at 1015. Accordingly, because a decision on the merits of this case is inappropriate in determining whether the December 2002 is in the public's best interest, the Court finds that this objection is not a sufficient basis upon which to find that the proposed decree is not in the best interest of the City and the community at large.

FOP and its members. To the extent that those objections are not based on contractual rights under the CBA or legal rights under state law, however, they must be weighed against the clear gains and opportunities presented by the proposed decree.[106] For all of these reasons, the Court finds that the record supports the conclusion that approval of the December 2002 Decree is in the best interest of the City of Tulsa and the community at large.

VI

Based upon a careful review of the terms of the December 2002 Decree, the objections filed thereto, and the factors to be considered by the Court in determining the fairness of such a settlement, the Court finds that the December 2002 Decree is wise, fair, and fully supported by law.

The City and Plaintiffs have engaged in divisive litigation for over nine years. During this period, both individual law enforcement officers and City officials have been subjected to destructive allegations and recriminations. Many honorable men and women, the TPD, and the community at large have suffered as a result. The City and the Plaintiffs have now entered into a

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[106] The Court, in deciding that the proposed decree is in the best interest of the community, has also considered the opinions of those involved in the case for the past nine years. As noted above, it is evident by their submission of a proposed decree that Plaintiffs and the City have recognized the "value of a resolution by negotiated agreement between the parties." See Kauley v. United States, No. CIV-84-3306-T, 1991 WL 1281535, *3 (W.D. Okla. Dec. 6, 2001) (approving settlement agreement over third-party objections). This recognition is further evidenced by the many months Plaintiffs and the City have spent in settlement negotiations in an effort to craft such a resolution. The Court finds that the December 2002 Decree is a better resolution of this case than would have come from a trial on the merits and a subsequent appeal. Id. ("Being the efforts of especially knowledgeable persons, it offers improvements in forms substantially beyond the prospects of a litigated conclusion.").

proposed consent decree to end this lawsuit. This resolution was crafted in good faith and offers the parties and the community the opportunity to settle this case and move forward.

The Court hereby approves and adopts the December 2002 Decree as a reasonable, adequate, and just resolution of the claims raised in this action.

IT IS SO ORDERED.

This 12th day of May, 2003.

Sven Erik Holmes
United States District Judge