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United States District Court, S.D. New York.

Ahmed SHEPPARD, et al., Plaintiffs,
v.
Andrew PHOENIX, et al., Defendants.

No. 91 Civ. 4148(RPP). | July 16, 1998.

Attorneys and Law Firms

The Legal Aid Society, New York, NY, By: Sarah Kerr, Jonathan S. Chasan, Dale A. Wilker, for Plaintiffs.

Michael Hess, Corporation Counsel, The City of New York, New York, NY, By: Jonathan Pines, Martha Calhoun, for Defendants.

Garber & Nelson, P.C., Lake Success, NY, By: Mitchell Garber, for Intervenors.

Opinion

OPINION AND ORDER

PATTERSON, J.

***1** Peter D. Meringolo ("Meringolo"), individually and on behalf of members of the Correction Captains Association of the New York City Department of Corrections, Inc. ("CCA"), and Joseph Ferramosca ("Ferramosca"), move pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure to intervene in this class action brought by fifteen named plaintiffs on behalf of all current and future inmates who would be confined in the Central Punitive Segregation Unit ("CPSU") maintained by the City of New York Department of Corrections (the "Department") at Rikers Island. Norman Seabrook, individually and on behalf of the Correction Officers' Benevolent Association ("COBA"), also moves to intervene in the class action. In May 1993 the Court certified the class defined in the amended class complaint which charged that defendants had permitted and were continuing to permit a pattern of unnecessary and excessive force by Department personnel in violation of the constitutional rights of inmates in the CSPU and that misuses of force were covered up by falsification of documents and, in some cases, by the withholding of medical care by officers and supervisors. The City declined to represent a number of individual captains and correction officers named in this action as defendants pursuant to New York General Municipal Law § 50–k and they were represented by counsel for the respective unions. On April 18, 1996, the compensatory damage claims of the fifteen named plaintiffs were settled. Plaintiffs' claims for declaratory and injunctive relief, however, remained pending.

On May 26, 1998, the parties entered into a Stipulation of Settlement (the "Stipulation") and on June 9, 1998, this Court ordered that the notice to the class of the proposed settlement be provided in English and Spanish to each inmate confined in the CPSU on June 15, 1998 and each inmate admitted to the CPSU between June 16, 1998 and July 6, 1998. The notice served on each inmate provided a synopsis of the terms of the 48–page Stipulation.

The applicants assert that they have a "direct, substantial and legally protectable" interest in the class action; that absent their intervention, protection of that interest may, as a practical matter, be impaired and that their interests are no longer being adequately represented by defendant City of New York.

Applicant Meringolo is the President of the CCA, the duly certified collective bargaining representative of the captains employed by the Department. He brings this motion individually and in a representative capacity on behalf of all members of the CCA who may or will be bound by any stipulation of settlement in this action Applicant Ferramosca is a corrections captain employed by the Department and assigned to the Otis Bantum Correctional Center ("OBCC"), the facility presently housing the CPSU, who may or will be bound by any stipulation of settlement in this action. Applicant Seabrook is President of COBA, the duly certified collective bargaining representative of the correction officers of the Department.

***2** Federal Rules of Civil Procedure 24(a) and (b) require application for intervention to be timely. If it is untimely, intervention must be denied. *See NAACP v. New York,* 413 U.S. 345, 365, 93 S.Ct. 2591, 37 L.Ed.2d 648 (1973). The Second Circuit has articulated several factors to determine whether a motion to intervene is timely: "(a) the length of time the applicant knew or should have known of his [or her] interest before making the motion; (b) prejudice to existing parties resulting from the applicant's delay; (c) prejudice to applicant if the motion is denied; and (d) presence of unusual circumstances militating for or against a finding of timeliness." *United States v. New York,* 820 F.2d 554, 557 (2d Cir.1987).

Length of Time

Clearly, the CCA and COBA had knowledge that this class action demanded declaratory injunctive relief of the sort granted by the Stipulation at the time when the

amended complaint was served on ten captains and forty correction officers, and by their providing counsel for a number of individual defendants in 1994 whom the City had declined to represent pursuant to General Municipal Law § 50–k,[1] or at the time the Stipulation of Settlement of the compensatory damages claims was entered into in March 1996, at which time it was stipulated that plaintiffs' equitable claims for declaratory relief and injunctive relief would remain *sub judice.*

Furthermore, Commissioner Kerik's declaration dated June 8, 1998[sic][2] demonstrates that CCA's President Meringolo was well aware of the type of injunctive relief sought by plaintiffs. (Declaration of Bernard B. Kerik ("Kerik Decl.") appended to Declaration of Martha A. Calhoun ("Calhoun Decl."), dated July 8, 1998; *see also* Declaration of Jonathon S. Chasan ("Chasan Decl."), dated July 7, 1998, ¶¶ 7–8 & Ex. 2 (quoting statements of Mr. Meringolo before the City Counsel in September 1996).) These parties have had clear notice of this action for four or more years. Accordingly, the applicants have been aware of the nature of the relief sought by plaintiffs for an unusually long time. *See NAACP,* 413 U.S. at 366–69 (four months untimely); *EEOC v. New York Times Co.,* 92 Civ. 6548(RPP), U.S. Dist. Lexis 3838, (S.D.N.Y. Mar. 24, 1995) (eight months untimely). *But see Werbungs und Commerz Union Austalt v. Collectors' Guild, Ltd.,* 782 F.Supp. 870 (S.D.N.Y.1991) (two years timely).

Prejudice to the Parties
This action has been pending seven years. After years of litigation and discovery, including production of tens of thousands of pages of document discovery, viewing of video films of a large number of use of force incidents, depositions of well over 100 present and former Department employees, and after long months of tenuous negotiations over both substantive terms and language to be used, the parties have reached agreement embodied in a Stipulation of some forty-eight pages, plus exhibits, for the Court's approval after a fairness hearing. The applicants ask the Court to stay its approval so that the applicants can appear in this action and be heard. To abort the Settlement at this process, at this late critical stage would prejudice the parties to this litigation.

Prejudice to the Applicants
***3** The Court may not approve the prospective relief contained in the Stipulation unless it finds that the relief is narrowly drawn, extends no further than is necessary, and is the least intrusive means necessary to correct the violation of plaintiffs' federal rights. *See* Prison Litigation Reform Act, 18 U.S.C. § 3626(a)(1)(A) ("PLRA"). The intervenors cannot claim prejudice under these circumstances because the Court order will be enforcing federally mandated prospective relief for the protection of inmates' constitutional rights only if that relief is in compliance with the PLRA.

Unusual Circumstances
The applicants have shown no unusual circumstances warranting a finding of timeliness for these motions.

The Objections Raised by the Applicants
The first objection of applicants is that procedures governing use of force are governed by statute, *i.e.,* Section 35.10(2) of the Penal Law and Section 137(5) of the Correction Law, and by Department Directive # 5005, and that the proposed Stipulation dated May 26, 1998 contains a use of force policy to be made applicable to the CPSU that is inconsistent with the Penal Law, Correction Law and existing Departmental use of force policies, and is, therefore, contrary to law. (Statement of Mitchell Garber dated June 30, 1998 ("Garber Statement") ¶¶ 7–12.)[3]

The applicants object to the use of force policy statement set out in paragraph 1 of the Stipulation on the grounds that "the limitation of the use of force to 'highly unusual circumstances' and the imposition of a subjective 'reasonableness' standard" are inconsistent with Section 35.10(2) of the Penal Law, Section 137(5) of the Correction Law, and Department Directive # 5005, and, accordingly, are contrary to law. (Garber Statement ¶ 12.)

The use of force policy set forth in the Stipulation does not contain language inconsistent with Section 137(5) of the Correction Law, Section 35.10(2) of the Penal Law, or Department Directive # 5005. Section 35.10(2) of the Penal Law merely states that "A warden or other authorized official of a ... correctional institution *may,* in order to maintain order and discipline, use such physical force as is authorized by the correction law." N.Y. Penal Law § 35.10(2) (McKinney 1997) (emphasis added).

Section 137(5) of the Correction Law states "[N]o officer or other employee of the department shall inflict any blows whatever upon any inmate, unless in self defense.... When any inmate ... shall offer any violence to any person, or do or attempt to do any injury to property, or attempt to escape, or resist or disobey any lawful direction, the officers and employees shall use all *suitable* means to defend themselves, to maintain order, to enforce observation of discipline, to secure the persons of the offenders and to prevent any such attempt or escape." N.Y. Correct. Law § 137(5) (McKinney 1987) (emphasis added).

The specific language of the Stipulation at issue is not inconsistent with the statute. The applicants' reading of the Stipulation (Garber Statement ¶ 12), to restrict the use of all types of force to highly unusual circumstances, is a misconstruction. The Stipulation would not prohibit punches, kicks or strikes to vital areas of the body used in self defense. The language in the Stipulation addresses a particular type of force used, specifically blows to the vital areas of the body, and requires that type of force be used only when necessary by an officer in defense of himself or others, or under other circumstances coming within the definition of "highly unusual." (Stipulation ¶ 1).[4]

***4** The Stipulation is directed at the use of potentially *deadly* force as defined in the Department's Directive # 5005 at (IV)(G) as "force which, under the circumstances in which it is used, is readily capable of causing serious physical injury, or death." (Chasen Decl., Ex. 8.) The Stipulation requirement that "[e]xcept in highly unusual circumstances, [CPSU] staff will be expected to utilize appropriate force that is designed to control and immobilize the inmate without the use of tactics that carry a high risk of injury to staff and inmates, *e.g.,* punches, kicks, strikes to vital areas of the body," goes no further than present directives. (*Id.*). "Highly unusual circumstances" are defined as "those where the facts and circumstances known to the staff member would warrant a person using sound correctional judgment, to reasonably believe" that blows need to be directed to an inmate's vital areas. (*Id.*). This is not inconsistent with the Penal Law, Correction Law or Departmental use of force policies. The Stipulation thus employs an objective test of reasonableness, not a subjective test as claimed by the intervenors. Nothing in the Stipulation prohibits an officer from using force before he is under imminent assault.

Department Directive # 5005 is completely consistent with the Stipulation. Department Directive # 5005 prohibits Department staff from using deadly physical force except "as a last resort," and provides that "if there are any reasonable alternatives that can be employed short of using deadly physical force, those alternatives must be exhausted." Moreover, it provides that a member of the uniformed force may use deadly physical force against an inmate:

> a. To defend him/herself or another person from what he/she *reasonably believes* to be the use or imminent use of Deadly Physical Force by the inmate.
>
> b. When there is *no other reasonable alternative* to prevent or terminate an escape of an inmate from a correctional facility or from custody while in transit thereto or therefrom.

(Department Directive # 5005(IV)(G) at p. 6 (emphasis added).) These tests of reasonableness are the same as contained in the Stipulation.

The Stipulation also is not inconsistent with other provisions of Department Directive # 5005 which "strictly prohibit[s]" staff from "[s]triking an inmate to discipline him/her for failing to obey an order" and from "striking an inmate when grasping the inmate to guide him/her, or a push, would achieve the desired result" (*id.* at (IV)(B)(1), (2)), and which requires that "[w]henever possible, alternative methods to resolve a conflict should be exhausted before force is used. For example, when an inmate refuses an order, force should never be the first response." (*Id.* at (IV)(D).)

Existing Department policy requires that staff use force only in proportion to the threat presented by the inmate:

> The Department recognizes that there are occasions when the use of force is necessary. When alternatives to force are not feasible, for example, when staff is attacked or faces the immediate threat of an attack, one or more of the following techniques should be used in order, if possible, with the response escalating in proportion to the threat encountered. The amount of force shall be only that which is necessary in the circumstances to restrain the inmate and control the situation. For example, blows should not be struck if control holds would be adequate to restrain the inmate. Multiple blows should not be employed if a single blow is adequate to stop the inmate's attack. Unless unavoidable, blows should be directed away from the head and kicks should not be used.

***5** (Department Directive # 5005(IV)(E) (emphasis added).)[5]

The applicants also object to the section of the Stipulation (¶ 6) that, consistent with Department Directive # 451ORR (Chasen Decl., Ex. 14), requires uniformed staff in the CPSU, all of whom now carry a hand-held aerosol gas dispenser, to notify medical staff to learn if a prospective inmate on whom gas is to be used is suffering from a cardiac or respiratory condition that might lead to death or severe injury if the chemical agents are used on him or her.

There is no question that severe respiratory injuries can result from gasing in a confined space. *See* Ellenhorn and

Baceloux, *Medical Toxicology* at 883. The CPSU inmates are housed in individual cells so this provision is necessary to safeguard the lives and safety of class members who suffer from cardiac or respiratory conditions.

The Stipulation does not require staff to notify clinic staff in an emergency, "when a delay in the use of such agents would present an immediate threat of death or serious injury, or would severely threaten the safety or security of the facility."[6] (Stipulation ¶ 6.)

Similarly, Department Directive # 4510RR(IV)(6) ("Chemical Agents") states:

> Hand-held aerosols can be extremely dangerous to individuals (staff & inmates) known to have heart or respiratory ailments. Time permitting, members anticipating the use of aerosols shall make every attempt to obtain information regarding any existing medical condition of the subject, and remove all other persons not involved from [the] area. Medical staff should also be notified to provide immediate assistance, if requested.

The Stipulation adds operational rules to ensure that Department Directive # 451ORR(IV)(6) can be observed and efficiently administered, and also serves to avoid the unnecessary use of gas. Nothing in the Penal Law, the Correctional Law or the Department's policy directives forbids screening and medical clearance of use of chemical agents in non-emergency situations as articulated in the Stipulation. Furthermore, the Department's present chemical agent policy is unchanged by the Stipulation. Clarification of Department procedures is nothing which impinges on the applicants' interests.[7]

Next, the applicants claim that there are areas of the Stipulation which involve "mandatory subjects of collective bargaining." CCA objects to those provisions of the Stipulation which address use of force policy, investigation of use of force incidents, employee discipline, disciplinary penalty schedules, assignment/transfer of staff, use of chemical agents (referred to in their papers as "employee safety") and access to employee records by the expert consultants and plaintiffs' counsel. CCA claims that the Court's "enactment" of the proposed Stipulation would be contrary to law because the above areas would be altered without statutory collective bargaining.[8] (Garber Statement ¶¶ 19–21 .) COBA's objections are that the Stipulation does not define COBA's rights and makes no reference to the collective bargaining agreement. The applicants cite no cases or any other legal authority for their propositions. They refer to the New York City Board of Collective Bargaining and the State Public Employment Relations Board, but cite no provision of either. They neither refer to any specific provision of their labor contract with the City nor attach a copy of the contract, or any portions of it, to their papers. Their papers do not state whether the provisions of the Stipulation are consistent with or contrary to any provisions of their collective bargaining agreement.

***6** New York Civil Service Law § 200, *et seq.,* commonly known as "the Taylor Law," is the starting point for analysis of public employment labor relations law in New York State. Section 212 of this statute provides that localities may enact their own local public labor relations statutes and create their own administrative bodies to administer their statutes. The City of New York has exercised this option and created a tri-partite administrative body composed of labor, management, and impartial members, the New York City Board of Collective Bargaining ("BCB"), New York City Charter, Chapter 54, § 1171. BCB interprets and administers the City's local public labor relations statute, New York City Administrative Code, Title 12, Chapter 3, § 12–301, *et seq.,* commonly known as the "New York City Collective Bargaining Law," as well as applicable provisions of the Taylor Law.

New York City Administrative Code § 12–309(a)(2) authorizes BCB to determine whether a matter is within the scope of collective bargaining. BCB may find: (1) that the matter is a mandatory subject of collective bargaining, which means that the employer and union must bargain in good faith regarding the matter; (2) that the matter is a permissive subject of collective bargaining, which means that the parties can, but are not required to, negotiate concerning the matter; or (3) that the matter is a prohibited subject of collective bargaining, which means that the parties may not negotiate concerning the matter. *See Incorporated Village of Lynbrook v. New York State Public Employment Relations Bd.,* 48 N.Y.2d 398, 423 N.Y.S.2d 466, 467 n. 1, 399 N.E.2d 55 (1979). BCB, and not the courts, has exclusive, primary jurisdiction to make this determination as an initial matter, *see Uniformed Firefighters Ass'n of Greater New York v. City of New York,* 79 N.Y.2d 236, 581 N.Y.S.2d 734, 735, 590 N.E.2d 719 (1992), although BCB's determinations are subject to judicial review.

In determining whether a matter is a mandatory subject of bargaining, BCB must consider the "management rights" provision of the Administrative Code:

> a. Subject to the provisions of subdivision b of this section ... public employers and certified or designated

> employee organizations shall have the duty to bargain in good faith on wages ... hours ... working conditions and provisions [regarding union dues checkoff]....
>
> b. It is the right of the city, or any other public employer, acting through its agencies, to determine the standards of services to be offered by its agencies; determine the standards of selection for employment; direct its employees; take disciplinary action; relieve its employees from duty because of lack of work or for other legitimate reasons; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; determine the content of job classifications; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work. Decisions of the city or any other public employer on those matters are not within the scope of collective bargaining, but, notwithstanding the above, questions concerning the practical impact that decisions on the above matters have on employees, such as questions of workload or manning, are within the scope of collective bargaining.

***7** N.Y.C. Admin. Code § 12–307(a), (b).

Thus, matters covered by § 12–307(a) are generally mandatory subjects of collective bargaining, about which the parties must negotiate, whereas matters covered by the "management rights" provisions of § 12–307(b) are generally either permissive subjects (about which the parties may, but are not required to, negotiate) or prohibited subjects (about which the parties may not negotiate). As can be seen from the language of the statute, the contested provisions of the Stipulation (which concern the Department of Correction's operations), when viewed in isolation, are essentially covered by the management rights provisions of § 12–307(b), and thus are not mandatory subjects of collective bargaining.

However, the circumstances presented here also raise the issue of public policy transcending the general statutory collective bargaining scheme, an issue which has been developed in State case law. The New York courts have long recognized that there are prohibited subjects about which the parties may *not* negotiate, because to do so would be contrary to public policy, statute or decisional law. For example, in *Cohoes City Sch. Dist. v. Cohoes Teachers Ass'n,* 40 N.Y.2d 774, 390 N.Y.S.2d 53, 54, 358 N.E.2d 878 (1976), the Court of Appeals held that a provision of a collective bargaining agreement entered into by a Board of Education and its teachers' union was unenforceable as against public policy, because it effectively relinquished the Board's power and responsibility to make tenure decisions concerning its teacher employees. The court stated:

> The [NY] Education Law vests authority to make tenure decisions in the board of education....This responsibility, with the accompanying grant of enabling authority, ... must be exercised by the board for the benefit of the pupils and the school district and cannot be delegated or abnegated. Accordingly, it is beyond the power of the board to surrender this responsibility as part of any agreement reached in consequence of collective bargaining. "As a matter of educational policy, and in the interest of maintaining adequate standards in the classrooms, the dismissal of a probationary teacher is a matter vested by law in the board of education upon appropriate recommendation of the district superintendent of schools and not properly a matter for negotiation or the application of employee grievance procedures."

Id. at55 (citing *Matter of Marsh,* 8 Ed Dept Rep 165); *see also City of New York v. MacDonald,* 201 A.D.2d 258, 607 N.Y.S.2d 24, 25 (App.Div.1994) (police discipline is a matter committed to the Police Commissioner, who is responsible for the conduct of the officers, and the City cannot be forced to bargain on this subject).

In a more recent ruling in this area, *Blackburne v. Governor's Office of Employee Relations,* 87 N.Y.2d 660, 642 N.Y.S.2d 160, 664 N.E.2d 1222 (1996), the Court of Appeals made clear that public employers cannot be allowed, let alone compelled, to negotiate away through collective bargaining their powers and responsibilities as sovereign public entities.[9]

***8** There is no more compelling public policy than compliance with the mandates of the United States Constitution. It is self-evident that if, as a matter of public policy, under New York law, responsibilities conferred upon a public employer by the federal Hatch Act and the state Education Law cannot be delegated, abnegated or surrendered through collective bargaining, then clearly the responsibilities conferred upon the City of New York (and all other state and local governments), by the federal courts, for safeguarding the constitutional rights of incarcerated persons in their custody, cannot be delegated, abnegated or surrendered through collective bargaining.

A federal court faced with a pattern of constitutional violations has an obligation to remedy it. *See Milliken v. Bradley,* 433 U.S. 267, 282, 97 S.Ct. 2749, 53 L.Ed.2d 745 (1977). The City has acknowledged that the remedies set out in the Stipulation are narrowly drawn, extend no further than is necessary to correction the violations of the class's constitutional rights, and are the least intrusive means necessary to accomplish redress. *See* 18 U.S.C. § 3626(a)(1).

The final objection of the applicants is to the disclosure of "personnel records" to the parties' consultants and to plaintiffs' attorneys during the pendency of the Order.

They claim that such disclosure would violate New York State Civil Rights Law § 50–a. Section 50–a refers to "personnel records, used to evaluate performance toward continued employment or promotion." N.Y. Civ. Rights Law § 50–a(1) (McKinney 1992). In the context of this litigation, those records include not only the "personnel files" of uniformed staff members, but the use of force reports, Investigation Division records, disciplinary records and Directive # 5003 records, all of which are to be considered by the Department in connection with the assignment to and retention of staff in the CPSU. (Stipulation ¶¶ 8–15.)

It is by now well settled that Civil Rights Law § 50–a is not an obstacle to the disclosure of personnel and other records concerning individual law enforcement officers in discovery in civil rights cases. Indeed, in this litigation plaintiffs have reviewed personnel records of CPSU staff members pursuant to a protective order signed by the parties and approved by the Court in January, 1994. (Chasan Decl., Ex. 22) The parties will continue to be bound by the terms of that Order and have no objection to including the consultants within its scope. Accordingly it is ordered that all persons examining the personnel records of the Department staff do so subject to the terms of the confidentiality order herein.

Of more importance, the experts' continued access to personnel documents is required to carry out the terms of the Stipulation. In order to establish their claims that systemic deficiencies—in supervision, monitoring, investigating and discipline—caused the violation of plaintiffs' constitutional rights, plaintiffs' counsel have also reviewed approximately 626 facility use of force packages, approximately 678 Investigation Division files (which include the facility use of force packages), 67 files reflecting Department discipline of CPSU staff, documents generated pursuant to Directive # 5003 ("monitoring use of force") and videotapes of use of force incidents. None of these documents is a "personnel record" of the Department of Correction. The experts' and counsels' continued access to these documents to monitor compliance with the Stipulation is essential. The same categories of records have been subject to review in other systemic use of force cases against the New York City Department of Correction. *See Fisher v. Koehler,* 718 F.Supp. 1111, 1127–28 (S.D.N.Y.1989) (injunction), *aff'd.,* 902 F.2d 2 (2d Cir.1990), and the consent judgments in *Jackson v. Freckleton,* CV 85–2384(ADS) (E.D.N.Y.1991) at ¶ 29, and *Reynolds v. Ward,* 81 Civ. 101(PNL) (S.D.N.Y.1990) at ¶¶ 75, 77, 79. Accordingly, such documents are appropriately subject to the experts' review under the Stipulation.

***9** The issues raised by the applicants do not show that they have a direct, substantial and legally protectable interest in this action or in the relief requested to be ordered in the Stipulation. The applicants have failed to show how their jobs will be adversely affected by the relief requested in the Stipulation of Settlement. Their concerns relate to possible issues which may or may not arise in the future, and in all probability will relate to collective bargaining issues not properly raised in this Court. The current policies of the Department are carried out by the provisions of the Stipulation concerning the use of force and chemical agents, albeit with more specificity in certain respects, and the applicants have made no showing of any abrogation of their collective bargaining rights or any other rights or interests.

Furthermore, in view of the Stipulation's obvious objective of protection of the CPSU inmates from deprivation of their constitutional rights, the grounds for the application to intervene are insufficient. *See Eng v. Coughlin,* 865 F.2d 521 (2d Cir.1989):

> The conduct of the guards assigned to the SHU [the prison unit at issue] must be such as to ensure against any violations of the inmates' constitutional rights. This consideration must take precedence over any provision of the collective bargaining agreement to which Council 82 [a proposed intervenor] is a party. The inmates allege that the state officials sanction the guards' continuance of egregious practices that unconstitutionally deprive the inmates of their rights. If part of the relief fashioned by the court directs changes in the state's practices regarding staffing and training in the SHU, the constitutional necessity of effecting those changes will outweigh any burdens imposed on the collective bargaining agreement that such changes might require.

Id. at 526.

Rule 24(a)(2) of the Federal Rules of Civil Procedure requires that the intervening party's interest be "significantly protectable ." *Donaldson v. United States,* 400 U.S. 517, 531, 91 S.Ct. 534, 27 L.Ed.2d 580 (1971), and must be direct, as opposed to remote or contingent. *See Washington Elec. Coop., Inc. v. Massachusetts Mun. Wholesale Elec. Co.,* 922 F.2d 92, 96–97 (2d Cir.1990); *Restor–A–Dent Dental Lab ., Inc. v. Certified Alloy Products, Inc.,* 725 F.2d 871, 874 (2d Cir.1984). The applicants have made no such showing, nor have they shown that their interests are not being adequately protected by the defendant City of New York.

The motions to intervene are denied.

IT IS SO ORDERED.

Footnotes

1 General Municipal Law § 50–k(2) requires the City to represent its employees in civil actions "arising out of any alleged act or omission which the corporation counsel finds occurred while the employee was acting within the scope of his public employment and in the discharge of his duties and was not in violation of any rule or regulation of his agency at the time the alleged act or omission occurred." N.Y. Gen. Mun. Law § 50–k(2) (McKinney 1986).

2 While the Kerik Declaration is dated June 8, 1998, in actuality, it was executed on July 8, 1998.

3 The Garber Statement is appended as Exhibit A to the Declaration of Mitchell Garber dated June 30, 1998.

4 Furthermore, such relief appears to be required. Between 1990 and 1996, 346 CPSU inmates suffered severe facial and head injuries in "use of force" incidents.

5 The Stipulation requires the CPSU staff to be trained in control holds and other forms of self defense to permit them to carry out the current policy contained in Department Directive # 5005.

6 The Stipulation provides for medical staff to review an inmate's medical record upon admission to the CPSU for cardiac or respiratory illness so that there should be no delay in responding to inquiry by staff prior to the use of gas.

7 Departmental records discovered in this litigation document that many inmates have been gassed while locked in their cells, or while handcuffed behind their backs, and oral discovery developed that supervisors had conflicting perceptions of the Department's policy. In 1996 alone, forty-six use of force incidents were reported in which chemical agents and no other force was used, including at least one incident involving an inmate returning from hospital treatment for asthma.

8 With the exception of access to personnel files, the Department has over the years promulgated and revised various directives and orders which address all of the above aspects of its operation. Specifically, the Department has promulgated written policies concerning use of force (Directive # 5005), administration of chemical agents (Directive # 4510RR), investigation of use of force (Directives # 7001, # 7002), monitoring use of force (Directive # 5003), discipline of staff (Directive # 7502R) and disciplinary penalty schedules (# Directive 4257R). Operations Order 14/91 provides that "work performance" and "special skills" be considered, together with seniority and attendance, when filling job assignments in a jail. Operations Order 4/94 sets out a policy and procedure for screening candidates for assignment to the CPSU based on their use of force activity, and for monitoring their use of force history after assignment. (Chasen Decl. ¶ 39).

9 In *Blackburne,* a state employee was terminated when he ran for public office. The employee claimed that his termination was in violation of the disciplinary procedures contained in his collective bargaining agreement and sought arbitration, which was the contractual remedy for claimed violations of the agreement's provisions. The Court of Appeals held that public policy precluded arbitration because the state agency accepted federal funds and thus was subject to the provisions of the Hatch Act:

> The Hatch Act's mandate that the State employer either rid itself of politicians or lose Federal funds embodies an important public policy that can only be effectuated by a sovereign determination.... As a matter of law, violations of the Hatch Act are punishable by either the employee's removal from employment or the employer's loss of Federal funds.... To permit an arbitrator to elect between these two options would amount to an impermissible delegation of the sovereign authority to procure, allocate and disburse Federal funds invested in the [State] Commissioner.

Id. at 163–64 (citations omitted).