IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL NO. C2-97-966
	)	
CITY OF STEUBENVILLE, et al.,	)	
	)	
Defendants.	)	
	)	

UNITED STATES' MEMORANDUM IN OPPOSITION TO INTERVENTION BY FRATERNAL ORDER OF POLICE, FORT STEUBEN LODGE NO. 1

INTRODUCTION AND SUMMARY

On August 28, 1997, the parties moved jointly for this Court to enter a Consent Decree in settlement of the United States' Complaint in this case. The Court entered the Decree on September 3, 1997. The Fraternal Order of Police, Fort Steuben Lodge No. 1 ("FOP" or "Union") now seeks pursuant to Fed. R. Civ. P. 24 to intervene in this action, presumably as a defendant, and, apparently, to vacate the Decree. The FOP moves for intervention as of right, or, alternatively, permissive intervention.[1/]

The United States respectfully requests this Court to deny the intervention motion. As set out in the parties' Joint Motion for Entry of the Consent Decree, filed concurrently with the Decree, and incorporated herein by reference, the Decree's entry and each of its terms were and are appropriate. The Decree resolves the allegations in the United States' Complaint that officers of the Steubenville Police Department ("SPD") have engaged in a pattern or practice of conduct that deprives persons of rights, privileges, or immunities secured and protected by the Constitution and the laws of the United States, and that the City of Steubenville, the Steubenville

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[1/] Exhibit D to the intervention motion is an unsigned "Third Party Complaint," not separately filed and not referred to in the motion. The "complaint" is improperly filed and in any event raises no issues separate from the motion.

Police Department, and the Steubenville City Manager (in his capacity as Director of Public Safety) have caused and condoned this conduct through inadequate policies and failure to train, monitor, supervise, and discipline police officers, and to investigate alleged misconduct, all in violation of 42 U.S.C. § 14141. The Decree was carefully drafted to help the Steubenville Police Department satisfy constitutional requirements by implementing a comprehensive system that enhances accountability and supervision of officers and managers of the Steubenville Police Department, and meets current standards in the law enforcement profession.

In opposition to this resolution reached by two governmental entities with shared concern for effective and constitutional law enforcement, the FOP asserts a set of vague and non-legal interests. Although the FOP purports not to oppose the entire Decree, it fails to identify specifically which provisions it considers unlawful (or even inadvisable). Because the Decree does not infringe a "significantly protectable interest" of the FOP, under either state or federal law, the Court should deny intervention.[2/]

ARGUMENT

I. THE APPROPRIATE FORUM.

Preliminarily, the United States agrees with the FOP that this Court is the most appropriate forum for assessment of the Union's rights and the relation of those rights to the Decree. See Local 1814 v. New York Shipping Ass'n, 965 F.2d 1224 (2d Cir.), cert. denied, 506 U.S. 953 (1992) (approving district court injunction against labor arbitration over whether employer's accession to consent decree with federal government infringed the union's collective bargaining rights). The assessment should, moreover, take place in the Court's decision regarding the motion to intervene. If the Court finds that, under state and federal law, the

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[2/] The only other court to have considered a similar motion in the context of a case brought under 42 U.S.C. § 14141 rejected the Pittsburgh FOP's motion to intervene, holding that the proposed Consent Decree in that case (which was very similar to this Decree) violated neither the FOP's Collective Bargaining Agreement nor state law governing collective bargaining agreements. See Transcript of Hearing in United States v. City of Pittsburgh (No. 97-354, W.D. Penn., Apr. 16, 1997) at 76, 77 (copy attached as Exhibit A).

Consent Decree infringes none of the asserted rights of the FOP and its members, it should deny intervention at this time.[3/]

II. INTERVENTION AS OF RIGHT

A. The Applicable Standard

The requirements for intervention as of right are set forth in Fed. R. Civ. P. 24(a), which states in pertinent part:

> Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Under Sixth Circuit authority, proposed Rule 24(a)(2) intervenors "must meet four criteria before intervention by right is permitted: (1) the application for intervention must be timely; (2) the applicant must have a substantial, legal interest in the subject matter of the pending litigation; (3) the applicant's ability to protect that interest must be impaired; and (4) the present parties do not adequately represent the applicant's interest. The proposed intervenor must prove each of the four factors; failure to meet one of the criteria will require that the motion to intervene be denied." Grubbs v. Norris, 870 F.2d 343, 344 (6th Cir. 1989).

In this case, the most important factor is the second one — the asserted interest of the FOP in this litigation. The procedural right to intervene depends on the assertion and the facial merits of an underlying substantive right possessed by the would-be intervenor; mere concern with the topic of the litigation, however sincere, does not suffice. Thus the Supreme Court has emphasized that to meet the requirement of Rule 24(a)(2) the asserted right must be "a significantly protectable interest." Donaldson v. United States, 400 U.S. 517, 530 (1971). In

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[3/] If at some point in the future, the FOP has some additional claim based on a new cognizable injury (for example, that implementation of the policies adopted pursuant to the Decree-mandated process would violate the Union's rights in a manner not currently in issue), it can always raise the claim later.

Donaldson, the applicant was not entitled to intervention in a proceeding to enforce an IRS summons issued to his former employer, because he had no right to suppress the government's acquisition of the materials with which he was concerned, though they contained details about his income. The Sixth Circuit has conducted similar inquiries — assessing the merits of the "right" asserted by the would-be-intervenor — to decide if the requirements of Rule 24 have been met. See, e.g., Purnell v. City of Akron, 925 F.2d 941, 945 (6th Cir. 1991) (whether intervention should be granted depends on the movants' right under state law to sue for damages in certain circumstances; if they "have no such rights, then [they have] no basis to intervene under Rule 24(a)(2)"); United States v. Kentucky Utilities Co., 927 F.2d 252 (6th Cir. 1991) (whether intervention should be granted depends on claimant's "strong claim of entitlement" under Freedom of Information Act to certain documents); Donovan v. Westside Local 174, 783 F.2d 616, 623 (6th Cir. 1986) (intervention as of right is appropriate where the intervenor "is the defeated candidate for union office who satisfactorily alleges violations" of labor election law). As discussed below, the Decree does not infringe any rights of the FOP, and, accordingly, the Union is not entitled to intervene.[4/]

B. The Asserted Rights

It is difficult to decipher the precise interests in this litigation asserted by the FOP. Apparently, the FOP objects to several provisions of the Decree that allegedly conflict with its current Collective Bargaining Agreement ("CBA"), and other provisions that allegedly infringe

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[4/] Even if the Decree did alter the state-law rights of the FOP in some way, such minor alterations are well within the remedial authority of this federal Court, asked to approve a consent decree that fairly and reasonably settles a case about systemic civil rights violations. See Brown v. Neeb, 644 F.2d 551, 563 (6th Cir. 1981) (remedial authority of federal court extends to abrogation of state law seniority rights in consent decree settling employment discrimination suit); Smith v. City of Cincinnati, 929 F.2d 702 (6th Cir. 1991) (table) (copy attached as Exhibit B) (under Supremacy Clause, federal consent decree settling employment discrimination suit defeats state law promotional rights). Cf. Local 1814, supra (approving district court injunction of labor arbitration premised on the court's acknowledgment that it might approve a settlement that violated state law bargaining rights of employees).

its right to bargain over terms and conditions of employment. Motion for Intervention of Right or Permissive Intervention (hereinafter "FOP Motion") ¶ 4; Memorandum in Support of the Motion for Intervention of Right or Permissible Intervention (hereinafter "FOP Mem.") at 2. Related to this second interest, the FOP argues that it should have been more fully included in the negotiation process that led to joint submission of the Decree by the parties. FOP Mem. at 2. In addition, the FOP argues that ¶ 80 of the Decree, which alters the selection process for the successor to the current Steubenville Chief of Police, is unlawful as a matter of state law. FOP Mem. at 8. And the FOP seems to state that it is entitled to a hearing on the underlying allegations in the United States' Complaint because its members have a due process right in continued employment. FOP Mem. at 5. Although the analysis of each of these alleged interests is different, none of the Consent Decree provisions infringes any right of the FOP, and accordingly none creates a right to intervene. We address the FOP's asserted interests in turn.

1. The Alleged Conflict With the Collective Bargaining Agreement.

The Decree in this case requires systemic reforms to the Steubenville Police Department addressing: (1) training of police officers and supervisors (Decree ¶¶ 12-20); (2) reporting and oversight of certain activities of police officers, including uses of force; stops, searches, and seizures, vehicular pursuits; certain types of arrests (Decree ¶¶ 20-27); (3) internal affairs investigations and civilian complaints (Decree ¶¶ 28-63); (4) management and supervision of police officers and supervisors, on the basis of specified sources of information, including the various activity reports required by the Decree, civilian complaints of misconduct, and civil and criminal findings by courts (Decree ¶¶ 65-77); (5) discipline of officers on the basis of sustained findings of misconduct (Decree ¶ 69); (6) performance evaluations of officers and supervisors (Decree ¶¶ 78-79); (7) selection of the best available candidate for Chief of Police, when a vacancy occurs, by a comprehensive search process, rather than written examination of inside candidates only (Decree ¶ 80). In each of these areas, the Decree does not set new policies and procedures for the Steubenville Police Department. Rather, implementation of the Decree

requires the City to develop and implement a number of new policies and procedures, subject to review by an independent auditor and approval by the United States. Moreover, the Decree does not attempt to state how supervisory issues should be resolved — it merely sets parameters for the process. For example, the Decree requires that "Whenever the disposition of an [internal affairs] investigation is 'sustained,' the City shall impose appropriate discipline and supervision," Decree ¶ 69(b), but does not purport to decide for the City what range of disciplinary options is appropriate for what offenses.

The FOP attached its collective bargaining agreement to its motion, as FOP Exhibit A. Examination of the terms of the agreement reveals unmistakably that no provision of the Decree creates even a colorable conflict with the CBA, whose scope is extremely limited. See also Decree ¶ 6 ("Nothing in this Decree is intended to alter the collective bargaining agreement between the City and the Fraternal Order of Police, Fort Steuben Lodge No. 1."). The CBA primarily covers salary and other monetary and fringe benefits (e.g., clothing allowance, "longevity fringe benefit," bonuses, overtime, holidays and holiday pay, vacations, funeral leave, personal days, life insurance). The Decree does not conflict with these terms — indeed, the Decree does not contain any provision setting or altering police officers' wages or other benefits. In addition, the CBA has terms relating to: recognition of the FOP as the bargaining agent for officers; union dues; strikes; the life of the agreement; arbitration of any "dispute concerning the application and interpretation of a violation of this agreement"; and provision of safety equipment. The only provision of the CBA that relates to management of officers is Item 27, which requires assignment of a minimum of four patrol officers to the shift of 4:00 to midnight, subject to certain limitations. Again, nothing in the Decree poses any conflict with these bargained-for items.

The final provision of the CBA, Item 28, states "Unless specifically modified or changed herein, all benefits, whether monetary or otherwise conferred by ordinance or law, presently enjoyed by the parties to this Agreement shall not be changed nor modified." The FOP appears

to argue that this provision marks a contractual agreement to leave unaltered not simply the types of provisions ordinarily classified as "benefits," but "rules of conduct, policies and procedures." FOP Mem. at 6. Such a reading defies the actual meaning of the term "benefits," in both ordinary usage, and state and federal law.[5/] It is even more untenable in light of the CBA's focus on traditional benefits — wages and other elements of compensation. Moreover, it would mark a very significant departure from the rule under Ohio law, discussed in this brief's next section, that the collective bargaining rights of public employees coexist and are defined with reference to the managerial prerogatives of employers.

Because the Decree does not infringe the asserted interest of the FOP in preserving its current CBA, intervention premised on that interest should be denied.

2. The Alleged Conflict With the Right to Bargain.

Next, the FOP asserts that the Decree infringes on its right to bargain collectively with its employer. As a matter of state law, this assertion is clearly incorrect, and accordingly, does not give the FOP a grounds for intervention in this action.

Under Ohio law, there are three categories of work-related issues, for purposes of public employees' collective bargaining rights — mandatory, permissive, and impermissible subjects of bargaining. The delineations between the three are the subject of Ohio Rev. Code § 4117.08, which provides:

> (A) All matters pertaining to wages, hours, or terms and other conditions of employment and the continuation, modification, or deletion of an existing provision of a collective bargaining agreement are subject to collective bargaining between the public employer and the exclusive representative, except as otherwise specified in this section.
> (B) The conduct and grading of civil service examinations, the rating of candidates, the establishment of eligible lists from the examinations, and the original appointments from the eligible lists are not appropriate subjects for collective bargaining.

[5/] See, e.g., Ohio Rev. Code §§ 3307.01(L)(1); 3309.01(O(1); 4141.01(C) (each defining "benefits" to mean money payments related to employment rights); 29 U.S.C. § 1002(1) (defining "employee welfare benefit plan" under ERISA).

> (C) Unless a public employer agrees otherwise in a collective bargaining agreement, nothing in Chapter 4117 of the Revised Code impairs the right and responsibility of each public employer to:
> (1) Determine matters of inherent managerial policy which include, but are not limited to areas of discretion or policy such as the functions and programs of the public employer, standards of services, its overall budget, utilization of technology, and organizational structure;
> (2) Direct, supervise, evaluate, or hire employees;
> (3) Maintain and improve the efficiency and effectiveness of governmental operations;
> (4) Determine the overall methods, process, means, or personnel by which governmental operations are to be conducted;
> (5) Suspend, discipline, demote, or discharge for just cause, or lay off, transfer, assign, schedule, promote, or retain employees;
> (6) Determine the adequacy of the work force;
> (7) Determine the overall mission of the employer as a unit of government;
> (8) Effectively manage the work force:
> (9) Take actions to carry out the mission of the public employer as a governmental unit.
> The employer is not required to bargain on subjects reserved to the management and direction of the governmental unit except as affect wages, hours, terms and conditions of employment, and the continuation, modification, or deletion of an existing provision of a collective bargaining agreement.

Thus Ohio law imposes on public employees and employers a mutual duty to bargain on "wages, hours, or terms and other conditions of employment," but defines "terms and conditions" subject under § 4117.08(A) to mandatory bargaining by reference to § 4117.08(C)'s exclusion. See United Black Firefighters Ass'n v. City of Akron, 976 F.2d 999, 1005-06 (6th Cir. 1992) (subjects enumerated in §4117.08(C) are permissive not mandatory subjects for bargaining). The Decree fits squarely in the category of "permissive" subjects of bargaining, under § 4117.08(C): it deals with the "functions and programs" of the Steubenville Police Department, the "direct[ion], supervis[ion], [and] evaluat[ion]" of employees; it is aimed at "maintain[ing] and improv[ing] the efficiency and effectiveness of [police] operations"; it sets out the requirement that employees be "disciplin[ed] for just cause"; and it is required for the City to "effectively manage" the police department.

Ohio law emphasizes that, notwithstanding the collective bargaining rights of police officers, "[t]he responsibility and authority to control all police department employees therefore remains squarely with the city." City of Kettering v. State Emp. Relations Bd., 26 Ohio St. 3d 50, 53, 496 N.E.2d 983, 986 (1986). See also In re State Emp. Relations Bd v. City of Canton, SERB 94-011, 11 Ohio Pub. Employee Rep. ¶ 1433 (June 29, 1994) (copy attached as Exhibit C) (managerial discretion is given particularly broad scope where the affected jobs are "safety-sensitive" because in such circumstances many management problems can "require[] immediate action by the City in the interest of public safety or in furtherance of the City's overall mission"). A governmental entity's ability to manage and supervise its police force is required by federal law as well. See 42 U.S.C. § 14141(a); Monell v. Department of Social Services, 436 U.S. 658 (1978) (42 U.S.C. § 1983 makes governmental entities liable where "execution of a government's policy or custom" causes violation of federal rights).

As the Ohio State Employment Relations Board, which speaks authoritatively on such issues, has explained, Ohio law dictates that many changes proposed by management are fairly easily assigned as managerial prerogatives, and therefore as permissive but not mandatory subjects of bargaining — for example, "the tape recording of a pre-disciplinary hearing by an employer . . . does not affect wages, hours, terms and other conditions of employment." In re State Emp. Relations Bd. v. Youngstown City School District Bd. of Educ., SERB 95-101 (12 Ohio Pub. Employee Rep. ¶ 1543 (June 30, 1995) (copy attached as Exhibit D) (hereinafter Youngstown). Moreover, even where a proposed exercise of managerial prerogative has a "material influence on" wages, hours, terms and other conditions of employment, state law compels bargaining over "how the decision affects wages, hours, terms and other conditions of employment," id. (emphasis added), but not over the decision itself, unless the outcome of a balancing test favors mandatory bargaining of the entire issue.[6/]

[6/] Thus to the extent that implementation of any term of the Decree eventually affects (continued...)

The balancing test examines:

> 1) The extent to which the subject is logically and reasonably related to wages, hours, terms and conditions of employment;
> 2) The extent to which the employer's obligation to negotiate may significantly abridge its freedom to exercise those managerial prerogatives set forth in and anticipated by O.R.C. 4117.08(C), including an examination of the type of employer involved and whether inherent discretion on the subject matter at issue is necessary to achieve the employer's essential mission and its obligations to the general public; and
> 3) The extent to which the mediatory influence of collective bargaining and, when necessary, any impasse resolution mechanism available to the parties are the appropriate means of resolving conflicts over the subject matter.

Id.

Thus Ohio case law, from the Ohio Supreme Court to the opinions issued by the State Employment Relations Board, dictates that the FOP's argument that the Decree infringes its collective bargaining rights is incorrect. For example, in Jurcisin v. Cuyahoga County Bd. of Elections, 35 Ohio St. 3d 137, 145, 519 N.E.2d 347, 354 (Ohio 1988), the Ohio Supreme Court held that police officers had no right to bargain prior to imposition of civilian review of allegations of police misconduct, and creation of an Office of Professional Standards that would receive, investigate, and recommend resolution of complaints. These changes were rather a "proper exercise of management powers." Similarly, in In re State Emp. Relations Bd. v. City of Cincinnati, SERB 93-010, 10 Ohio Pub. Employee Rep. ¶ 1358 (June 10, 1993) (copy attached as Exhibit E), the Employment Relations Board held that the City could unilaterally implement a new policy of taping pre-disciplinary hearings and using the tapes "in furtherance of the [Cincinnati Police Department's] right to 'suspend, discipline, demote or discharge for just cause, or lay off, transfer, assign, schedule, promote, or retain employees.'" In State Emp. Relations Bd. v. City of Canton, 1991 WL 643135, 1991 SERB 4-69 (Ohio Com. Pl. June 18, 1991) (copy

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[6/] (...continued)
wages, hours, or terms or conditions of employment, the FOP will be entitled to bargain about such effects. For example, once policy and procedure is developed to implement the Decree's new training requirements, it may be that the new policy will impact working hours for some officers. The FOP would certainly be entitled to bargain over any changes in working hours caused by implementation.

attached as Exhibit F), the Court of Common Pleas upheld the Employment Relations Board's decision that the city could unilaterally impose new rules expanding and supervising police officers' traffic enforcement duties, without collective bargaining. (Standards described in State Emp. Relations Bd. v. City of Canton, 7 Ohio Pub. Employee Rep. ¶ 7908 (Sept. 14, 1990) (copy attached as Exhibit G).) And in State Emp. Relations Bd. v. City of Mansfield, 6 Ohio Pub. Employee Rep. ¶ 6708 (SERB, Oct. 4, 1989) (affirming 6 Ohio Pub. Employee Rep. ¶ 6228 (Feb. 22, 1989)) (copies of both opinions attached as Exhibit H), the Employment Relations Board held that there was no duty to bargain over a reorganization of the police department that eliminated numerous supervisory positions as they became vacant. See also State Emp. Relations Bd. v. Akron City School District Bd. of Educ., 13 Ohio Pub. Employee Rep. ¶ 1428 (May 28, 1996) (non-police case holding that elimination of one employee position and replacement with another, with different job duties, comes within managerial prerogatives and is not a mandatory subject of bargaining), aff'd on other grounds, SERB 96-013, 14 Ohio Pub. Employee Rep. ¶ 1114 (Dec. 30, 1996) (copies of both opinions attached as Exhibit I).

The FOP has not sharpened its challenge sufficiently for the United States even to know which provisions it objects to on the basis of failure to bargain — the only specific request in the FOP's "Third Party Complaint", see note 1, supra, that seems applicable is the prayer for invalidation of the "record keeping requirements of the Consent Decree . . . as they apply to officer promotion, discipline, or other aspects of employment."[7/] But the City's Decree-related record-keeping obligations are simply a way of maintaining accurate information with which to fulfil its nondelegable federal and state law obligation to manage the police force in a way that minimizes misconduct. City of Kettering v. State Emp. Relations Bd., 26 Ohio St. 3d 50, 53,

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[7/] The FOP also seems to ask for the entire Decree to be declared invalid. FOP Complaint at 2. But earlier in its filings, the FOP states "it should be observed from the outset that it is not the desire of the FOP to challenge the Consent Decree in its entirety." FOP Mem. at 2. The United States cannot reconcile these conflicting statements, and accordingly deals only with the specific requests discussed in text.

496 N.E.2d 983, 986 (1986) ("The responsibility and authority to control all police department employees therefore remains squarely with the city."). Like tape-recording of pre-disciplinary hearings, record-keeping does not even affect terms or conditions of employment, and is therefore easily categorized as a permissive but not mandatory subject of bargaining. See Youngstown, supra.

Even if this or any other provision of the Decree could be seen as somehow influencing terms and conditions of employment, it is clear under the Ohio precedents set out above that "inherent discretion on the subject matter at issue is necessary to achieve the employer's essential mission and its obligations to the general public," Youngstown, supra, and therefore that the balancing test weighs against mandatory bargaining. The centrality of the provisions in the Decree to effective management and supervision of a police force was the very subject of the parties' joint motion to this Court to enter the Decree. Rather than repeat, we refer the Court to the declaration of Professor James Fyfe, a former police officer and leading authority on police administration, which was attached to that filing. Professor Fyfe's expert opinion is that the types of management strategies mandated by the Decree are required for effective management and supervision of a police department. Moreover, in this context — where the changes are, in the opinion of the United States, necessary to remedy a current pattern or practice of police misconduct that violates the civil rights of persons in Steubenville — the "mediatory influence of collective bargaining" is a completely inappropriate "means of resolving conflicts over the subject matter." Youngstown, supra. See In Re State Emp. Relations Bd. v. Ohio Dep't of Transportation, SERB 93-005, 10 Ohio Pub. Employee Rep. ¶ 1262 (April 29, 1993) (copy attached as Exhibit J) (the "mediatory influence of collective bargaining" is inappropriate means of conflict-resolution where "the employer . . . must assume the liability for potential . . . claims" based on failure to adopt challenged managerial decision), aff'd sub nom. Ohio Civil Service Employees Ass'n. Local 11 v. Ohio Dept. of Transportation, 93-CVF-04-3413 (Oh. Com. Pl., Aug. 9, 1994), vacated as moot, 94-APE-08-1252 (Ct. App. July 1, 1995); test reaffirmed and

procedural history discussed in Youngstown, supra. Moreover, the public interest in resolution and progress in this area also counsels against imposition of a duty to bargain. Cf. In re State Emp. Relations Bd v. City of Canton, supra (Exhibit C) (finding "the mediatory influence of collective bargaining" an inappropriate method of resolution where a decision is justified by "broad public health and safety concerns").

Related to its claim of a right to bargain, the FOP argues that it should have been more fully included in the negotiation process that led to joint submission of the Decree by the parties. FOP Mem. at 2. Because the Decree does not trigger the FOP's collective bargaining rights, there was no requirement that the Union be included in any negotiations. Nonetheless, in an effort to be inclusive and cooperative, the parties did, in fact, invite the FOP's participation in negotiations. The FOP's submissions on this point are contradictory and misleading.[8/] As supported by the attached declarations of counsel for the City of Steubenville (attached as Exhibit K) and of undersigned counsel for the United States, along with the latter declaration's exhibits (correspondence between counsel for the United States and for the FOP) (attached as Exhibit L), the FOP asked for an opportunity to be included in negotiations over the terms of the Decree, and was indeed included. The City had three meetings with the FOP's president and lawyer, in which the FOP's concerns were discussed. Negotiations over the language of the Decree proceeded by telephone, prior to finalization of the Decree. During those negotiations, counsel for the FOP raised just three concerns, seeking: clarification of the scope of the res judicata effects of the Decree; elimination of the possibility of discipline and/or negative impact

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[8/] The FOP's filings state that it was "precluded from any substantive input into the Consent Decree language and was not allowed . . . to participate in the negotiations which led up to the Consent Decree." FOP Mem. at 1. Although the FOP's memorandum directs the Court to an affidavit, purportedly attached, "which reflects continuing attempts on the part of the FOP to be included in the process which led to the adoption of the Consent Decree," no such affidavit was submitted. At the same time, the FOP acknowledges that it was included in "a few meetings," and given an opportunity to make "suggestions." It complains, however, that "no substantive changes were made." FOP Mem. at 4. This description of events is inaccurate and is rebutted in the text.

on promotion from anonymous complaints;[9/] and alteration of ¶ 80 of the Decree, governing future selection of a Chief of Police.[10/] As set out in the attachments, the FOP was offered substantive alterations on each of these points. Counsel for the United States followed up the letter with repeated phone calls to the FOP's counsel, to conduct further negotiations — but the calls were not returned. As a result, the parties themselves conducted further negotiations on the areas of concern of the FOP. Indeed, three of the four modifications offered to the FOP were included in the final version of the Decree submitted and entered by this Court.

As already argued, the FOP is not entitled to bargain over management prerogatives such as those in the Decree. But in any event, the FOP has received all that it was due, when it was offered the chance to negotiate, and walked away after a good faith proposal was placed on the table.

3. The Alleged Violation of Ohio Rev. Code § 124.44.

The FOP argues that ¶ 80 of the Decree, which alters the selection criteria for the successor to the current Steubenville Chief of Police, is unlawful as a matter of state law. This claim is incorrect.

Preliminarily, ¶ 80 does not have the sweeping impact the FOP claims for it. Certainly it does not "operate[] so as to effectively preclude virtually all the officers from ever becoming the chief of police." FOP Mem. at 8. The Decree simply provides that, if there is a vacancy in the position during the life of the Decree, selection of a new Chief of Police will not necessarily be by written competitive exam, and that outside candidates will be searched out and considered.

[9/] Under Decree ¶ 36, the Police Department is obligated to accept and investigate anonymous complaints. Unless such complaints are corroborated on investigation, however, ¶¶ 69 and 78 state that anonymous complaints may not be the basis of discipline or denial of promotion of any officer. Thus anonymous complaints are to serve as tips to the police department about potential misconduct by its officers, which are then investigated, like crime-related tips, to determine if there has been wrongdoing.

[10/] The rationale for Decree ¶ 80 is set out in Professor Fyfe's Declaration, attached to the parties' Joint Motion for Entry of the Consent Decree, at ¶¶ 29-30. The relationship of ¶ 80 to state law is discussed in the next section of this brief.

The actual search and selection process is not yet developed; like other new policies, it is to be proposed by the City, subject to the review of the Decree auditor and the approval of the United States. Certain limitations on the process, protecting the interests of current Steubenville police officers, are, however, set out. The Decree expressly states: "Candidates who are already employed by the SPD at the time of the search shall receive preference in the hiring process for Chief of Police." Moreover, although the Decree sets minimum educational requirements for outside candidates, inside candidates "who are employed by the SPD on the effective date of this Decree and who would otherwise be eligible to sit for a competitive exam for the position of Chief of Police, at the time of selection, need not meet the education qualification." Apart from this educational requirement (which the FOP cannot complain about since its members are not affected), the only additional "mandatory qualifications" for applicants for the Chief's position are "appropriate administrative experience, and a demonstrated commitment to police excellence." A person without such qualifications is obviously unfit to serve as Chief of Police, supervising 50 officers and a large budget.

It is true that under Steubenville's pre-Decree custom, the Chief of Police is a member of the classified civil service, promoted from within on the basis of competitive exam. See Ohio Rev. Code § 124.31(A) ("vacancies in the classified service shall be filled insofar as practicable by promotions"). But under Ohio Rev. Code § 124.30(B), the Civil Service Commission of a city is authorized to alter the method of selection of high ranking civil servants, under certain circumstances:

> In case of a vacancy in a position in the classified service where peculiar and exceptional qualifications of a scientific, managerial, professional, or educational character are required, and upon satisfactory evidence that for specified reasons competition in such special case is impracticable and that the position can best be filled by a selection of some designated person of high and recognized attainments in such qualities.[11/]

[11/] Nor does Decree ¶ 80 contradict the Steubenville City Charter (which is Exhibit B to (continued...)

As the Ohio Supreme Court explained in Moore v. Agin, 12 Ohio St. 3d 173, 175, 465 N.E. 2d 1293, 1294-95 (1984), this provision authorizes the Commission to have the otherwise "required competitive examination . . . dispensed with and the pool of candidates widened to include all qualified applicants." In Moore, the court approved invocation of the provision in a circumstance very similar to those here. In that case, outside investigation of the Zanesville Police Department led to accusations of wrongdoing against managerial level officers, and the resignation of the Chief. The situation justified invocation of the statute. Id. at 175, 465 N.E.2d at 1295 (also noting that "the qualities sought in the new appointee could not be accurately identified by such examination"). Here, the United States Department of Justice spent over a year investigating the operation of the Steubenville Police Department, and submitted allegations of wrongdoing against the Department in its Complaint. The City agreed in response that the current Chief's successor should "be qualified to implement this Decree and its objectives," and agreed to use the available state law procedures in order to "select a Chief with sufficient expertise." Decree ¶ 80.

The City chose to exercise its state-law discretion in this area by signing the Consent Decree. This is certainly permissible, under state and federal law. See DeVennish v. City of Columbus, 57 Ohio St. 3d 163, 566 N.E.2d 668 (Ohio 1991) (Civil Service Commission's discretion to set requirements for promotional examination eligibility may be bound by consent decree signed by the City in settlement of employment litigation); Lawyer v. Department of

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[11/] (...continued)
the FOP Mem.). The Charter provides that the Chief of Police is a classified civil servant. Charter Art. V, Sec. 5.D.1; Art. VI, Sec. 1.D.1.a. Paragraph 80 does not take the Chief's position out of the classified civil service; the next Chief will still have the removal and other protections of the Civil Service rules. See Moore v. Agin, 12 Ohio St. 3d 173, 465 N.E.2d 1293 (1984); Ohio Rev. Code § 124.271. In addition, Charter Art. V, Sec. 5.D.1. provides that the next Chief "shall be selected by competitive examination as set forth in Article 6, Section 1," and Article 6, Section 1 in turn provides that "the general law applying to civil service shall remain in full force and effect unless otherwise provide by this Charter." Ohio Rev. Code § 124.30(B), which authorizes selection of a high ranking civil servant by procedures other than promotion and competitive examination, is part of the general law applying to the civil service.

Justice, 117 S.Ct. 2186, 2193 (1997) (upholding entry of a consent decree signed by the state Attorney General, rather than approved by the state legislature, because "the State has selected its opportunity [to make its own decisions] by entering into the settlement agreement"). Thus, the Decree's alteration of the method for choosing the next Chief of Police, in the event of a vacancy during the life of the Decree, does not abrogate state law.

Moreover, although Ohio law empowers the City to eliminate completely the ability of current employees to apply for a given promotion "where peculiar and exceptional qualifications of a scientific, managerial, professional, or educational character are required," the Decree actually protects any expectations current Steubenville police officers have that they be allowed to apply to become the Chief of Police, on vacancy of that position. As already explained, any person currently employed by the Police Department, who would under pre-Decree rules have been allowed to sit for the competitive exam for the Chief's position, will be allowed to apply for that position in the event of vacancy — and will receive preference in that application. No more is required, under state or federal law.[12/]

C. The Alleged Right to a Hearing on the Underlying Allegations in the United States' Complaint.

Even where a third party has a significant legal right at stake in a litigation between two other parties, it is permitted to intervene only as to those parts of a litigation that affect its own rights. See FTC v. Owens-Corning Fiberglas Corp., 853 F.2d 458 (6th Cir. 1988) (denying intervenor's right to appeal decision adverse to plaintiff, where intervenor had no legal right at stake; intervention as of right was limited to other issues as to which intervenor did have a

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[12/] The federal Due Process Clause does not alter the analysis. The FOP's members have no definite non-contingent property right to the Chief's position, but rather a mere expectation that they may, someday, be eligible to apply for the job — an interest that is defeasible under state law itself. This type of unilateral expectation does not rise to the level of a protected property interest. See Board of Regents v. Roth, 408 U.S. 564, 569-70 (1972) ("To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it."); Perry v. Sindermann, 408 U.S. 593, 599 (1972); Banks v. Block, 700 F.2d 292, 295-96 (6th Cir.), cert. denied, 464 U.S. 934 (1983).

significant interest), cert. denied 489 U.S. 1015 (1989). Thus, where an applicant for intervention objects to a consent decree, the decree "may be challenged only on the ground that its substantive provisions unlawfully infringe upon the rights of the complainant." Vogel v. City of Cincinnati, 959 F.2d 594 (6th Cir.), cert. denied, 502 U.S. 827 (1992). Here, the FOP can challenge the Decree only insofar as it infringes the rights of the Union (which, as already explained, it does not). But even if the Decree did impact substantial legal rights of the Union, that impact would mean that the FOP could object to the relevant aspects of the Decree — not that it could object to settlement of the case altogether. Yet it appears the FOP seeks from this court "the fundamental right to be heard and to respond to the allegations that formed the basis of the Consent Decree." FOP Mem. at 5. If the FOP is indeed seeking to litigate this action, the Court should deny its request. There is no due process right to be heard on someone else's case. See Local 93 v. Cleveland, 478 U.S. 501, 528-29 (1986) ("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.").

The FOP is not a defendant on the merits of the case before this court. Indeed, the United States does not contend that the FOP is liable under 42 U.S.C. § 14141; the statute holds only a "governmental authority, or any agent thereof, or any person acting on behalf of a governmental authority" liable for law enforcement officer misconduct. The proposed Decree "does not bind [the FOP] 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." Local 93, 478 U.S. at 530. The FOP is not entitled to assert the rights of the plaintiff, and seek to enforce the Decree. Vogel v. City of Cincinnati, 959 F.2d 594, 598 (1992) (citing Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 750 (1975)). See Decree ¶ 6 ("This Decree is enforceable only by the parties.") Nor may the FOP argue against adoption of the Decree on the grounds that it is "unfair" or "unreasonable," except insofar as the Decree infringes the Union's rights. United States v. City of Chicago, 908 F.2d 197, 200 (7th Cir. 1990), cert.

denied sub nom. Feldman v. United States, 498 U.S. 1067 (1991); EEOC v. Pan American World Airways, Inc., 897 F.2d 1499, 1509 (9th Cir.), cert. denied sub nom. Keith v. EEOC, 498 U.S. 815 (1990). Nor, finally, is the FOP entitled to assert the rights of a defendant and insist on litigation of the underlying cause of action. Harris v. Pernsley, 820 F.2d 592, 599-600 (3d Cir.), cert. denied sub nom. Castille v. Harris, 484 U.S. 947 (1987); Howard v. McLucas, 782 F.2d 956, 960 (11th Cir. 1986) (intervenors can challenge only those parts of a settlement that allegedly infringe their rights; they lack standing to contest "any . . . issue concerning the merits of the dispute"); Kirkland v. New York State Dept. of Correctional Services, 711 F.2d 1117, 1126 (2d Cir. 1983) (intervenors' rights "depends upon the nature of the intervenor's interest"; where their interest is in particular aspect of remedy, they cannot "force a trial" on the merits), cert. denied sub nom. Althiser v. New York State Dept. of Correctional Services, 465 U.S. 1005 (1984). Cf. Lawyer v. Justice, 117 S.Ct. at 2194 (petitioner could not "demand an adjudication that the [defendant] could indeed have demanded, but instead waived") (citation omitted).

Moreover, on this issue, the Court should deny intervention on the independent ground that the "present parties . . . adequately represent the applicant's interest." Grubbs v. Norris, 870 F.2d at 344. The City has a more than sufficient interest in defending itself against a claim of unconstitutional conduct; its representation on this point needs no supplementation. "Where official policies and practices are challenged, it seems unlikely that anyone could be better situated to defend than the governmental department involved and its officers." Commonwealth of Pennsylvania v. Rizzo, 530 F.2d 501, 505 (3d Cir.), cert. denied sub nom. Fire Officers Union v. Pennsylvania, 426 U.S. 921 (1976).

III. PERMISSIVE INTERVENTION

Permissive intervention is governed by Fed. R. Civ. P. 24(b), which states:

> Upon timely application, anyone may be permitted to intervene in an action: . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

For much the same reasons as it should deny intervention as of right, this Court should deny permissive intervention. Simply put, the FOP has no viable "claim or defense" — and certainly not one that shares a question of law or fact with the main action. Moreover, allowing intervention would "unduly delay or prejudice" the parties' effort to resolve the managerial problems that have plagued the Steubenville Police Department. The Decree requires development of a host of new policies and procedures over the next six months. See ¶ 85 ("[w]ithin eight months of the effective date of this Decree, the City shall provide the auditor and the United States with its preliminary policies, manuals, and forms required to be developed under this Decree"). The FOP has no rights at stake, and its appearance in this case would serve only to obstruct the negotiated solution.

CONCLUSION

For the foregoing reasons, the Court should deny the FOP's motion to intervene in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing, United States' Memorandum in Opposition to Intervention by Fraternal Order of Police, Fort Steuben Lodge No. 1, with attachments, was served upon each counsel listed below, by U.S. Mail, first class, postage prepaid, on this 1st day of December, 1997:

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EXHIBITS TO UNITED STATES' MEMORANDUM
IN OPPOSITION TO INTERVENTION

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November 12, 1997

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RE: United States v. City of Steubenville, et al.
Case No. C2-97-966

Dear Ms. Schlanger:

Enclosed please find a copy of the United States Memorandum in Opposition to Intervention regarding the above-captioned case.

Please contact me, if you have any questions or concerns.

Sincerely yours,

SHARON J. ZEALEY
United States Attorney

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Enclosure