



PN-OH-002-007

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

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U.S. DISTRICT COURT
SOUTHERN DIST. OHIO
EAST. DIV. COLUMBUS

Judge *bes*
Mag. Judge *DMC*
Docketed *pu*
7/23/98

UNITED STATES OF AMERICA,

Plaintiff,

vs.

Civil Action 2:97-CV-966
Judge Smith
Magistrate Judge King

CITY OF STEUBENVILLE, OHIO, et al.,

Defendants.

OPINION AND ORDER

This action was commenced on August 28, 1997 by the United States of America ["United States"] pursuant to 42 U.S.C. §14141 in connection with an alleged pattern or practice of conduct on the part of law enforcement officers of the City of Steubenville which conduct allegedly deprived persons of rights secured by the United States Constitution. The defendants in the action include: the City of Steubenville ["City"], the Steubenville Police Department ["SPD"], the Steubenville City Manager and the Steubenville Civil Service Commission. The parties entered into a consent decree ["decree"] resolving the subject matter of this action and the Court approved the decree on September 3, 1997. The Fraternal Order of Police, Fort Steuben Lodge No. 1 ["FOP"] now contests portions of the decree and seeks to intervene in the action as a third-party plaintiff. This matter is before the Court on the FOP's motion.

I. Background

The City and FOP are parties to a collective bargaining agreement ["CBA"] pursuant to

which the FOP is recognized as “the exclusive bargaining agent for all members of the Steubenville Police Department.” (*See Exhibit A* attached to *FOP’s Motion to Intervene*). The CBA provides for arbitration in the event of a dispute concerning application of the agreement. In its motion to intervene, the FOP states that arbitration involving its concerns with regard to the decree is pending but that the City has taken no action to bring arbitration forward. (*FOP’s Motion to Intervene* at 1).

The FOP contends that certain portions of the decree interfere with the right of police officers to collectively bargain and that, therefore, the decree violates the FOP’s contract with the City and the City charter. Specifically, the FOP seeks to challenge portions of the decree dealing with changes in working conditions, changes in disciplinary procedures and changes in the procedure for selection of chief of police. (*See Motion to Intervene* at 7-8). The FOP asserts that implementation of the consent decree deprives it of a property interest without due process of law. (*Id.*).

II. Discussion

A. Rule 24 Intervention

The FOP seeks to intervene as third party plaintiff in the instant action pursuant to Fed.

R. Civ. P. 24. This rule provides in relevant part:

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (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.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (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.

The FOP asserts that it is entitled to intervene in this action pursuant to Rule 24(a)(2) and/or (b)(2).

Rule 24 first requires that an application for intervention of right or for permissive intervention be timely. The United States Court of Appeals for the Sixth Circuit has identified five factors for consideration in assessing whether an application is timely:

(1) the point to which the suit has progressed; (2) the purpose for which intervention is sought; (3) the length of time preceding the application during which the proposed intervenor knew or reasonably should have known of his interest in the case; (4) the prejudice to the original parties due to the proposed intervenor's failure, after he or she knew or reasonably should have known of his or her interest in the case, to apply promptly for intervention; and (5) the existence of unusual circumstances militating against or in favor of intervention.

Grubbs v. Norris, 870 F.2d 343, 345 (6th Cir. 1989). The consent decree in the instant action was entered approximately one week after the action was filed. The FOP's motion to intervene was filed approximately six weeks thereafter. In light of the relevant factors, the Court concludes that the FOP's motion to intervene is timely. The Court will now proceed to the merits of the motion.

Intervention as a matter of right is proper when the proposed intervenors demonstrate, in addition to the timeliness of the motion, that they have a significant legal interest in the subject matter of the pending action; that disposition of the action may impair or impede their ability to protect the legal interest; and that the parties to the action cannot adequately protect the proposed

intervenors' interest. *Jansen v. City of Cincinnati*, 904 F.2d 336, 340 (6th Cir. 1990). As to the first requirement, the FOP asserts that it has a "significant legal interest" in the subject matter of this action because the police officers, by virtue of ORC §124.11(B)(1)¹, have a constitutionally protected property interest in their employment. *See Cleveland Board of Educ. v. Loudermill*, 470 U.S. 532 (1985). The FOP contends that implementation of the decree effectively alters the officers' interest in their jobs without having first afforded the officers, through the FOP, an opportunity to be heard. The provisions which allegedly alter the officers' employment are those related to the process for selection of chief of police, changes in working conditions and changes in disciplinary measures.

Whether the FOP's asserted interest is sufficient to warrant intervention as of right, depends upon whether it has a "significantly protectable" interest. *See Donaldson v. United States*, 400 U.S. 517, 532 (1971); *Jansen v. City of Cincinnati*, 904 F.2d 336, 341 (6th Cir. 1990). The proposed intervenors must have a "direct" and "substantial" interest in the litigation. *Meyer Goldberg, Inc. of Lorain v. Goldberg*, 717 F.2d 290, 292 (6th Cir. 1983). While these terms are not easily defined, the United States Court of Appeals for the Sixth Circuit has held that its view of an interest sufficient to warrant intervention as of right is "expansive." *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997); *Bradley v. Milliken*, 828 F.2d 1186, 1192 (6th Cir. 1987) ("interest" is to be liberally construed). Furthermore, the proposed intervenor need not possess the same standing as would be required to initiate a lawsuit. *Purnell v. City of Akron*, 925 F.2d 941, 948 (6th Cir. 1991).

¹This provision states that persons employed by civil service police departments which have ten or more full-time paid employees, are members of classified civil service.

Despite the apparent “expansive” view of an interest sufficient to warrant intervention as of right, this Court concludes that the FOP does not have a “significantly protectable” interest in this action. The Court finds the FOP’s asserted interest distinguishable from the type of interest which merits intervention pursuant to Rule 24(a). For example, in *Jansen v. City of Cincinnati*, *supra*, a group of black applicants for employment in the fire department sought to intervene in an action brought by a group of white applicants who challenged an earlier consent decree regarding minority hiring, to which the black applicants were a party. The proposed intervenors in that case held a significant legal interest in the action because of the impact the court’s ruling would have on the earlier consent decree and on their employment. Similarly, in *Grubbs v. Norris*, 870 F.2d 343 (6th Cir. 1989), a local government intervened as of right in an action concerning state prison conditions since a ruling regarding restrictions on the state prison population would necessarily affect the local government’s prison population. In contrast, the FOP’s asserted interest in preserving its ability to collectively bargain and to uphold the city charter is unaffected by this Court’s adoption of the consent decree at issue. As explained, *infra*, the Court finds that the changes in working conditions, changes in disciplinary measures, and changes in the process for selection of chief of police to be implemented pursuant to the decree do not alter the officers’ interest in their employment or the ability of the FOP to collectively bargain on the officers’ behalf.

First, while it is undisputed that the FOP is the exclusive bargaining agent for the officers, the Court finds that the provisions of the decree related to the officers’ “working conditions” do not affect the FOP’s ability to bargain. The decree provides for the adoption of policies related to the areas of officer training; uses of force; stops, searches and seizures; internal affairs; officer

supervision and officer performance. The CBA provides that “all benefits, whether monetary or otherwise conferred by ordinance or law . . . shall not be changed nor modified.” (*Exhibit A* attached to *Motion to Intervene*). While the adoption of policies pursuant to the decree can be interpreted as a change in the officers’ working conditions, or “benefits,” in light of Ohio R.C. §4711.08 and the CBA, the Court finds that, such changes are not subjects for collective bargaining. §4711.08(A) states that all matters relating to “wages, hours, or terms and other conditions of employment . . . are subject to collective bargaining between the public employer and the exclusive representative” However, §4711.08(C) provides that unless otherwise agreed to in the relevant collective bargaining agreement, nothing in §4711 impairs the right of the public employer to determine, *inter alia*, matters of “inherent managerial policy;” to “improve the efficiency and effectiveness of governmental operations;” and to “[e]ffectively manage the work force.” R.C. §4711.08(C)(1), (3), (8). The terms of the CBA entered into between the City and the FOP do not require bargaining on the various policy issues embodied in the decree. Therefore, the Court finds that the decree does not change the officers’ interests in their employment, nor does it hinder the FOP’s ability to bargain on the officers’ behalf.² Moreover, the decree specifically states that “[n]othing in this Decree is intended to alter the collective bargaining agreement between the City and the [FOP].” (*Consent Decree* at ¶6).

For these same reasons, the Court finds that changes in disciplinary measures (*Consent Decree* at ¶¶64-77) to be implemented pursuant to the decree are not subject to collective

²To the extent that implementation of the policies eventually leads to changes in aspects of employment which pursuant to the CBA, are subject to bargaining between the City and the FOP, the FOP must then be allowed to bargain on the officers’ behalf. The United States acknowledges this possibility. (*Memorandum contra* at 10 n.6).

bargaining and therefore do not impact upon the FOP's bargaining right. In addition, the proposed changes in disciplinary measures do not affect the officers' interest in their employment.

Finally, the Court concludes that the provisions regarding the change in the process for the selection of chief of police do not infringe upon any employment interest of the officers, nor do they infringe upon the FOP's collective bargaining interest. The decree provides that in the event of a vacancy in the position of chief of police, the City is to suspend its current method of selection of the chief, pursuant to R.C. §124.01, *et seq.*, in favor of the process outlined in the decree. (*Consent Decree* at ¶80). However, the decree provides that a written and/or oral competitive examination may be part of the selection process. (*Id.* at ¶80a). The decree outlines mandatory qualifications for the position of chief of police, including a four year college degree, appropriate administrative experience, and a demonstrated commitment to police excellence. (*Id.* at ¶80d). The decree contemplates a search for chief from outside the ranks of the SPD, however, the decree states that officers employed on the effective date of the decree, who are otherwise eligible to take an examination, are exempt from the educational requirement and shall receive preference in the selection process. (*Id.* at ¶80b, c).

The FOP asserts that this change in the selection process violates both the City charter and the Ohio Revised Code, and that it operates to deprive officers of the expectation of becoming chief of police. (*Motion to Intervene* at 8). The Court concludes that the selection provisions, although a departure from the current method of selection, do not deprive the officers of a constitutionally protected property interest in their employment. Neither do the provisions infringe on the FOP's bargaining interest. The provisions are not in violation of the Revised

Code, as the decree does not completely dispense with competitive examination and current officers are to receive preference in the selection process without having to meet the educational requirement. (*Consent Decree* at ¶80b,c). R.C. §124.30(B) specifically allows for a departure from the competitive appointment requirements of §§124.01-124.64 under the following circumstances:

[W]here 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, the director may suspend the provisions of sections 124.01 to 124.64 of the Revised Code, requiring competition in such case, but no suspension shall be general in its application, and all such cases of suspension shall be reported in the annual report of the director with the reasons for the suspension.

R.C. §124.30(B). The United States asserts, and this Court agrees that, pursuant to this section, suspension of the normal selection procedure is justified in light of the investigation into alleged wrongdoing in the operation of the SPD.³

Moreover, the City charter and collective bargaining agreement do not preclude a change in the process for selection of chief. Article 5, section 5 paragraph D of the City charter provides that, when a vacancy in the position occurs, the Chief is to be selected by competitive examination pursuant to Article 6, section 1. Article 6 section 1 provides that the general law applicable to civil service positions, *i.e.* R.C. §124.01, *et seq.*, is to remain in effect. Since the selection provisions are within the parameters of the Revised Code, the Court finds no violation

³The Court cautions however, that, pursuant to §124.30(B), the suspension of §§124.01-124.64 cannot be generally applied. However, in light of the decree's reference to competitive examination and to consideration of promotion of officers to the position of chief, the Court assumes that the suspension of R.C. §§124.01-64 is not a general suspension.

of the City charter. Furthermore, as the CBA makes no reference to the method for selection of the chief of police, the Court finds that the provisions are not in violation of the CBA.

In sum, the Court finds that the provisions of the decree which the FOP seeks to challenge do not impact upon the officers' interest in their employment or upon the FOP's bargaining status.⁴ Therefore, the FOP does not possess a significantly protectable interest in the subject matter of this action sufficient to warrant intervention as of right. In light of this conclusion, the Court need not address the remaining requirements for intervention pursuant to Rule 24(a).

The FOP also asserts that permissive intervention pursuant to Rule 24(b) is appropriate. Even if intervention is unavailable as a matter of right, the Court has discretion to permit an applicant to intervene in an action when the "applicant's claim or defense and the main action have a question of law or fact in common," as long as intervention will not "unduly delay or prejudice the adjudication of the rights of the original parties." Rule 24(b). The Court finds intervention by the FOP on this basis to be inappropriate in light of the fact that the consent decree resolving this case was entered prior to the filing of the motion for leave to intervene.

B. Rule 19 Joinder

The FOP also seeks to enter the instant action by asserting that it should have been joined as a party pursuant to Rule 19(a). This rule provides for joinder of a party to an action if:

⁴The Court finds the FOP's interest distinguishable from situations in which unions have been permitted to intervene and challenge consent decrees. See *e.g.*, *EEOC v. AT&T*, 506 F.2d 735 (3rd Cir. 1974).

(1) in the person's absence complete relief cannot be accorded among those already parties, or

(2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may

(i) as a practical matter impair or impede the person's ability to protect that interest or

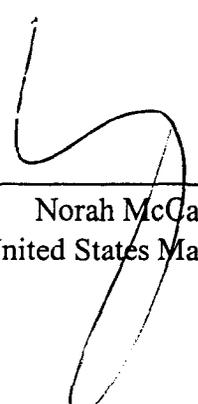
(ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

Fed. R. Civ. P. 19(a). The Court finds that complete relief can be afforded in the absence of the FOP, and as previously stated, the Court finds that the FOP does not have a significant legal interest in the subject matter of this action.

III. Conclusion

In light of the foregoing, the FOP's motion to intervene in the instant action is DENIED.

If any party seeks reconsideration of this Order, that party may, within ten (10) days, file and serve on all parties a motion for reconsideration by the Court, specifically designating this *Opinion and Order*, and the part thereof in question, as well as the basis for objection thereto. 28 U.S.C. §636(b)(1); Rule 72(a); Fed. R. Civ. P.; Eastern Division Order 91-3 (I)(F)(5).



Norah McCann King
United States Magistrate Judge