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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA,

Plaintiff,

v.

CITY OF SEATTLE,

Defendant.

CASE NO. C12-1282JLR

ORDER REGARDING
ACCOUNTABILITY
LEGISLATION

I. INTRODUCTION

Before the court is Defendant City of Seattle’s (“the City”) draft legislation concerning accountability systems for the Seattle Police Department (“SPD”). (Draft Leg. (Dkt. # 320-1, as amended by Dkt. # 328-1).) As directed by the court, both Amicus Curiae Community Police Commission (“the CPC”) and Plaintiff United States of America (“the Government”) filed responses to the City’s draft legislation. (CPC Resp. (Dkt. # 325); US Resp. (Dkt. # 331).) In addition, the CPC filed a reply to the Government’s response. (CPC Reply (Dkt. # 332-1).)

1 On July 11, 2016, the parties submitted a stipulation seeking court approval of a
2 process for submitting legislation to the City Council and, subsequently, to this court for
3 approval. (Joint Stip. (Dkt # 297).) The court approved the stipulation in large part, but
4 reversed the sequence in which the City would submit the draft legislation to the City
5 Council and the court. (8/9/16 Order (Dkt. # 305).) The court required the parties to
6 submit the proposed legislation to the court for its approval prior to the submitting the
7 legislation to the City Council. (*Id.* at 2-3.) The purpose of the court’s review is to
8 ensure that the proposed legislation “does not conflict with the terms or purpose of the
9 Consent Decree.”¹ (*Id.*)

10 II. BACKGROUND

11 On February 25, 2016, the court approved the City’s proposal to convene a
12 working group of City participants, along with the Monitor and counsel for the
13 Government, to engage in discussions concerning the optimal police accountability
14 system. (2/25/16 Order (Dkt. # 275).) On October 7, 2016, the City submitted its
15 proposed draft legislation to the court (*see* Draft Leg.),² along with a memorandum in
16 support of the court’s approval (City Mem. (Dkt. # 320).) The draft legislation contains
17 the following overarching elements: (1) an independent, civilian-led and -staffed Office
18 of Police Accountability (“OPA”) to conduct fair and timely investigations of complaints

20 ¹ The Consent Decree consists of the parties’ Settlement Agreement (Dkt # 3-1) with
21 modifications agreed to by the parties and approved by the court (Dkt. # 13) on September 21,
2012.

22 ² The court committed to completing its review of the draft legislation within 90 days or
by January 5, 2017. (*See* 8/9/16 Order at 3.)

1 of police misconduct; (2) an Office of Inspector General (“OIG”) to provide audits and
2 analyses of SPD policies, procedures, and practices and to act as permanent “Monitor” to
3 verify that SPD maintains its standard of constitutional and effective policing; and (3) a
4 permanent CPC to provide a formal role for community input to ensure that SPD delivers
5 services in a lawful and nondiscriminatory manner that aligns with the community’s
6 values and expectations. (*See generally* Draft Leg.; *see also id.* § 3.29.005.)

7 The City’s draft legislation, however, is not a unitary proposal. Instead, the draft
8 legislation is 53 pages long, and contains 23 provisions in which the City identified two
9 or more options that may be presented to or adopted by the City Council and the Mayor.
10 (*See* Draft Leg. §§ 3.29.015.D; 3.29.020.A.16; 3.29.020.A.17; 3.29.027.A; 3.29.027.F;
11 3.29.100.B; 3.29.105.C; 3.29.110.A.9; 3.29.110.A.10; 3.29.205.B; 3.29.206.A;
12 3.29.206.B; 3.29.206.C; 3.29.210.A; 3.29.215.A.9; 3.29.215.A.10; 3.29.215.C.4;
13 3.29.310.A.4; 3.29.310.A.5; 3.29.310.A.7.a; 3.29.310.A.8; 3.29.330.A; 3.29.335.B.) The
14 City says that the various options contained within these 23 provisions exist because “the
15 stakeholders” who were involved in drafting the legislation did not reach “complete
16 consensus.” (City Mem. at 3.) However, the City “believes that all of the potential
17 options, and the entirety of the draft legislative package, are consistent with the terms and
18 purposes of the Consent Decree.” (*Id.*)

19 On October 27, 2016, the CPC filed a memorandum in support of the court’s
20 approval of the draft legislation. (CPC Resp.) On November 4, 2016, the Government
21 submitted its memorandum in response to the draft legislation. (US Resp.) The
22 Government largely supports the draft legislation with a few exceptions that are discussed

1 below. (*See generally id.*) On November 15, 2016, the CPC filed a reply responding to
2 some of the Government's objections. (CPC Reply.) The court now addresses the City's
3 draft legislation and considers whether it is consistent with the Consent Decree

4 III. ANALYSIS

5 The court has identified the following test for reviewing the City's draft
6 legislation: Does the proposed legislation conflict with the terms or the purposes of the
7 Consent Decree? (*See* 8/9/16 Order at 3.) The purposes of the Consent Decree are set
8 forth in its opening paragraph, and include delivering to the people of Seattle: (1)
9 constitutional policing, (2) effective policing, and (3) policing in which the community
10 can have confidence. (Consent Decree at ¶ 1 (stating that the "goal" of the Consent
11 Decree is to "ensur[e] that police services are delivered to the people of Seattle in a
12 manner that fully complies with the Constitution and laws of the United States,
13 effectively ensures public and officer safety, and promotes public confidence in the
14 Seattle Police Department ("SPD") and its officers."); *see also* Aug. 25, 2015 Hr'g Tr.
15 (Dkt. # 229) at 12:9-20, 32:22-33:5 (in which the Government and the court acknowledge
16 these three goals for analyzing the draft legislation); CPC Reply at 2 (acknowledging
17 these goals comprise the three "levels of public scrutiny" that the court and parties should
18 apply in evaluating the draft legislation).)

19 Whether the proposed legislation fits within these terms and purposes of the
20 Consent Decree is a relatively easy standard to meet, and any number of legislative
21 options might fit within the parameters of the Consent Decree. As the Government
22 states: "There is simply no 'best way' to structure an accountability system." (US Resp.

1 at 7.) The citizens of Seattle must craft a system that works best for them, within the
2 parameters of the United States Constitution and the Consent Decree. (*Id.*)

3 The “stakeholders” involved in drafting the proposed legislation were able to
4 agree on the majority of the provisions in the draft legislation. (*See generally* Draft Leg.)
5 However, the draft legislation contains 23 sections with alternative language or
6 provisions for the court’s consideration. The court did not anticipate reviewing
7 alternative provisions when it issued its August 9, 2016, order requiring the City to
8 submit draft legislation concerning SPD’s accountability systems to the court for review.
9 (*See generally* 8/9/16 Order.) Nevertheless, by asking the court to review various
10 alternatives, which are likely to be raised during the legislative process anyway, the
11 parties may have circumvented the need for the court to conduct a second review of the
12 legislation after it is passed, or at least reduced the scope of any secondary review.
13 (8/9/16 Order at 3.)³ On balance, the City’s approach in presenting the court with the
14 various alternatives that the “stakeholders” could not resolve during their negotiations,
15 instead of a unitary legislative package, is sound.

16 The Government is the only party or entity to raise any objections to or concerns
17 about any aspect of the draft legislation. (*See* US Resp. at 8-11.) The Government raises
18 four objections, each of which the court addresses in turn.

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22 ³The parties are required to submit the legislation to the court after it is passed by the City Council and signed by the Mayor if it contains provisions that the court has not already approved or that the court has disapproved. (*See* 8/9/16 Order at 3.)

1 **A. The Standard for Terminating an Officer for Dishonesty**

2 The Government's first objection is to Section 3.29.027.F of the draft legislation.
3 (US Resp. at 9-10.) This section sets forth three alternative standards for terminating an
4 officer for dishonesty. (Draft Leg § 3.29.027.F.) Those alternative standards are:

- 5 • [Termination is the presumed discipline for a finding of material
6 dishonesty based on the same evidentiary standard as is used for any
7 other allegation of misconduct.]
- 8 • [Termination is the presumed discipline for a finding of dishonesty
9 based upon clear and convincing evidence. Should the circumstances
10 of a sustained finding of dishonesty result in discipline other than
11 termination, however, the standard of proof shall be by a
12 preponderance of the evidence.]
- 13 • [In the case of an officer receiving a sustained complaint involving
14 dishonesty, a presumption of termination shall apply. For purposes
15 of this presumption of termination, the Department must prove
16 dishonesty by clear and convincing evidence.]

17 (*Id.*) Two of the three alternatives impose a higher standard of proof for termination for
18 dishonesty—namely, “clear and convincing evidence,” rather than “by a preponderance
19 of the evidence.” (*Id.*) The Government contends that by imposing a burden of proof
20 that is higher than a “preponderance of the evidence,” two of the alternatives in this
21 section “undermine[] confidence in the disciplinary system without any clear basis.” (US
22 Resp. at 10.) The court agrees that this type of heightened legal protection for officers in
this context is inconsistent with the purposes of the Consent Decree as discussed below.

 The court recognizes that there are circumstances where police officers should
enjoy heightened protection from adverse legal consequences and that extending such
extraordinary legal protections to police officers represents sound public policy. For

1 example, courts extend qualified immunity to police officers when they face possible
2 civil liability in a court of law arising out of the performance of their duties. As the Ninth
3 Circuit has stated:

4 The qualified immunity doctrine rests on a balance between, on the one
5 hand, society's interest in promoting public officials' observance of
6 citizens' constitutional rights and, on the other, society's interest in assuring
7 that public officials carry out their duties and thereby advance the public
8 good. Without some room to make mistaken but reasonable decisions, the
9 fear of making an unforeseeable error and thereby incurring liability could
10 dissuade public officials from pursuing their duties with vigor. Police
11 officers charged with protecting public safety, for example, could become
12 bystanders rather than law enforcers whenever faced with any but the most
13 clear circumstances implicating constitutional rights. "The concept of
14 immunity . . . assume[s] that it is better to risk some error and possible
15 injury from such error than not to decide or act at all."

16 *Beier v. City of Lewiston*, 354 F.3d 1058, 1071 (9th Cir. 2004) (quoting *Scheuer v.*
17 *Rhodes*, 416 U.S. 232, 242 (1974)). Thus, the law rightly recognizes special protections
18 for police officers in some circumstances due to the role they play in protecting public
19 safety.

20 Although heightened legal protections, such as qualified immunity, may be
21 appropriate when an officer faces the threat of civil liability, such protections are not
22 appropriate in the context of an officer's possible employment termination for alleged
dishonesty. First, even in the context of threatened civil liability, a police officer's
dishonesty may vitiate the added protections that the law otherwise might afford. *See*
e.g., Branch v. Tunell, 937 F.2d 1382, 1387 (9th Cir. 1991), *overruled on other grounds*
by Galbraith v. Cty. of Santa Clara, 307 F.3d 1119 (9th Cir. 2002) (stating that a police
officer who recklessly or knowingly includes false information in, or omits material

1 information from, a search warrant “cannot be said to have acted in an objectively
2 reasonable manner, and the shield of qualified immunity is lost.”); *see also George v.*
3 *Edholm*, 752 F.3d 1206, 1220 (9th Cir. 2014) (holding that officers were not entitled to
4 qualified immunity on an arrestee’s § 1983 claim when they allegedly gave false
5 information to a physician to induce the physician to perform unconstitutionally intrusive
6 procedures that he would not have otherwise performed). In addition, the court sees no
7 reason to extend the kind of added legal protections provided to police officers facing the
8 imposition of civil liability to issues surrounding their continued employment as officers.
9 Section 3.29.027.F sets forth the expectation that Seattle’s police officers will conduct
10 themselves honestly. In order to build an effective police force that operates within the
11 parameters of the Constitution, SPD’s Chief of Police must be able to shape SPD’s
12 officer corps and, at a minimum, ensure that the corps consists of officers who are not
13 dishonest. The court, therefore, rejects the two alternative provisions in Section
14 3.29.027.F that require an enhanced burden of proof concerning an officer’s possible
15 termination for dishonesty. These alternative provisions are inconsistent with the
16 purposes of the Consent Decree.

17 **B. The Failure to Include SPD Representation on the CPC**

18 The Government’s second objection to the draft legislation involves the
19 composition of the CPC. (US Resp. at 10.) Section 3.29.215 of the draft legislation sets
20 out the composition, duties, and responsibilities of the CPC. (Draft Leg. § 3.29.215.)
21 Section 3.29.215.B.3 does not expressly require the inclusion of SPD Officers in the
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1 CPC's membership (*see id.* § 3.29.215.B.3), whereas the Consent Decree does (Consent
2 Decree ¶¶ 5-6). The two provisions are, therefore, inconsistent.

3 The Government believes that having SPD Officers on the CPC is the better
4 approach because it provides the CPC with “ready access to the expertise and
5 perspectives necessary to do their work effectively.” (US Resp. at 10.) The Government
6 may be right, but determining the “better approach” is not the standard by which the court
7 considers the draft legislation. As described above, the court’s review considers only
8 whether the draft legislation conforms to both the terms and purposes of the Consent
9 Decree. (*See* 8/9/16 Order at 3.) Removing SPD Officers from the CPC plainly does not
10 conform to the terms of the Consent Decree (*see* Consent Decree ¶¶ 5-6), but there is no
11 evidence that it does not conform to the purposes underlying the Consent Decree—
12 ensuring constitutional and effective policing and enhancing public confidence in the
13 SPD (*see id.* ¶ 1). Nevertheless, the parties bargained for all of the terms of the Consent
14 Decree, including the provision that membership of the CPC include SPD Officers, as
15 part of the settlement agreement that the court ultimately entered as the Consent Decree.
16 (*See* Consent Decree ¶¶ 5-6.) Because Section 3.29.215 violates the terms of the Consent
17 Decree, the parties would need to stipulate to an amendment of the Consent Decree,
18 which the court must then also approve, before the City could enact this provision into
19 law.⁴

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22 ⁴ Based on the Government’s briefing, it is unclear if the Government would stipulate to
such an amendment. (*See* US Resp. at 10.)

1 C. Prioritization of the CPC's Duties

2 The Government also expresses concern that the additional responsibilities the
3 draft legislation gives to the CPC may negatively affect the CPC's ability to fulfill its role
4 under the Consent Decree. (US Resp. at 10-11.) Indeed, the CPC has struggled to timely
5 meet its obligations under the Consent Decree and has repeatedly asked the court for
6 extensions on various deadlines related to the Consent Decree. (*See, e.g.*, Dkt. ## 82, 85,
7 91, 97, 99, 283.) The Government objects to the CPC acquiring additional duties unless
8 the draft legislation is amended to "contain specific language requiring the CPC to
9 prioritize its obligations under the Consent Decree and reiterating the City's
10 obligations—via the CPC—to meet certain Consent Decree driven objectives." (US
11 Resp. at 11.) The Government asserts that absent such a prioritization, the additional
12 duties the CPC will acquire under the draft legislation will conflict with the terms and
13 purposes of the Consent Decree. (*Id.*)

14 The CPC responds that the draft legislation provides that one of its duties is "to
15 fulfill the responsibilities . . . as set forth in the Consent Decree and Memorandum of
16 Understanding in *United States of America v. City of Seattle*, No. 12 Civ. 1282 (JLR)
17 until such time as the Consent Decree ends." (CPC Reply (quoting Draft Leg.
18 § 3.29.215.A.20).) The CPC also agrees that "[t]he legislation could be revised to make
19 explicit the requirement that Consent Decree work take precedence." (*Id.*) Given the
20 Government's concerns and the CPC's concession, the court concludes that the draft
21 legislation should include a requirement that the CPC must prioritize the obligations the
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1 Consent Decree imposes on the CPC over any additional obligations imposed by the draft
2 legislation until such time as the court discharges the Consent Decree.

3 **D. The Role of the CPC with Respect to the OIG**

4 The Government also objects to one of two alternative provisions in Section
5 3.29.215.A.9 concerning the CPC's duties. The alternative provisions state:

- 6 • [Annually evaluate the performance of OIG and its management and
7 leadership, after soliciting public, Mayoral, City Attorney, City
8 Council, Chief of Police, and SPD employee perspectives.]
- 9 • [The evaluation of the functioning of accountability entities occurs
10 through other mechanisms established in this Chapter 3.29 and
11 elsewhere.]

12 (Draft Leg. § 3.29.215.A.9.) The Government objects to the alternative provision that
13 would allow the CPC to “evaluate the performance of OIG and its management and
14 leadership” because it might “confuse[] the role of the CPC with those responsible for the
15 functioning of the OIG.” (US Resp. at 11.) The draft legislation provides that the City
16 Council is ultimately responsible for removing the Inspector General, but only for cause
17 and after a hearing. (See Draft Leg. § 3.29.114.E.) The Government believes it is
18 improvident to blur the defined roles of the OPA, the OIG, and the CPC by providing for
19 overlapping responsibilities. (See US Resp. at 9, 11.) Although maintaining defined
20 roles may be the best approach, the Government does not assert that this provision
21 conflicts with any specific term of the Consent Decree or its underlying purposes. (See
22 *id.* at 11.)

23 The CPC, for its part, argues that the role of community boards with respect to
24 police department oversight varies from city to city across the country, and there are a

1 variety of roles that the CPC could play with respect to SPD oversight that would be
2 consistent with the Consent Decree. (CPC Reply at 3-4.) Further, the CPC argues that,
3 although its performance review of the OIG may be redundant, the draft legislation
4 provides for redundancies “as checks against system failures or weaknesses, particularly
5 should an office and its leadership perform poorly or without a commitment to or an
6 understanding of what makes policing legitimate in the eyes of the public.” (*Id.* at 5.)
7 The CPC asserts that there is no definitive “best approach” to civilian oversight and that
8 the City Council should have this option on the table as it chooses an accountability
9 system that fits this community’s needs. (*Id.* at 4.)

10 The court appreciates the Government’s concern, but allows this provision to go
11 forward to the City Council. The Government does not believe that CPC review of the
12 OIG is the best policy option, but the Government fails to establish that this provision
13 violates either the terms or the underlying purposes of the Consent Decree. The City
14 Council should make the policy decision on whether to adopt this provision or its
15 alternative.

16 IV. CONCLUSION

17 The court hereby APPROVES the draft legislation submitted by the City (Dkt.
18 # 320-1, as amended by Dkt. # 328-1) with the limited caveats set forth above.

19 Dated this 6th day of January, 2017.

20 
21 JAMES L. ROBART
22 United States District Judge