

THE HONORABLE JAMES L. ROBERT

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

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8	UNITED STATES OF AMERICA,	)	Case No. 2:12-cv-01282-JLR
9		)	
10	Plaintiff,	)	<b>CITY OF SEATTLE’S SUPPLEMENTAL</b>
11		)	<b>BRIEF SUBMITTING THE</b>
12	v.	)	<b>ACCOUNTABILITY ORDINANCE FOR</b>
13		)	<b>FURTHER COURT REVIEW</b>
14	CITY OF SEATTLE,	)	
15		)	
16	Defendant.	)	
17		)	

**I. Introduction**

On July 18, the Court requested more information about the role of collective bargaining in the City’s implementation of its police accountability ordinance (“Ordinance”). Attached hereto is Exhibit 1 (“the List”), a list of those provisions in the Ordinance that the City will bargain further before implementing. With the List and another list the Court requested in the Court’s hands, the City asks the Court to rule as follows:

- 1) that the accountability system described in the enacted Ordinance, including the provisions on the List, is consistent with the Consent Decree;
- 2) that the City may continue implementing the provisions of the Ordinance that are not on the List and bargaining the provisions on the List; and
- 3) that, to the extent that bargaining or ancillary procedures for resolving bargaining disputes result in changes to the provisions of the Ordinance, the City must return to the Court for a determination that the accountability system with those changes is consistent with the Consent Decree.

## 1 II. “The List” and Relevant Factual Background

2 The City filed accountability legislation proposals for the Court’s review in October 2016.  
3 Dkt. # 328-1 (“Draft Legislation”). The Draft Legislation envisioned a tripartite accountability  
4 system consisting of an independent Office of Police Accountability (“OPA”) focused on  
5 investigating claims of police misconduct, an independent Office of the Inspector General focused  
6 on systemic auditing and oversight of the Seattle Police Department’s (“SPD’s”) policies and  
7 practices, and an independent Community Police Commission (“CPC”) to give the people of Seattle  
8 a voice in SPD’s policies and practices. After a January 4, 2017 status conference, the Court issued  
9 an order that “APPROVE[D] the draft legislation” with “limited caveats.” Jan. 6, 2017 Ord. (Dkt.  
10 # 357) at 12. One of those caveats was a mandate that the legislation not “require an enhanced  
11 burden of proof concerning an officer’s possible termination for dishonesty.” *Id.* at 8. The  
12 remaining caveats focused on the composition and duties of the CPC. *Id.* at 8-12.

13 The City Council passed the Ordinance less than five months later, preserving the tripartite  
14 structure of the Draft Legislation. After the Mayor signed the Ordinance on June 1, 2017, the City  
15 followed the Court’s order to submit the legislation “if it contains provisions that the court has not  
16 already approved or that the court has disapproved.” Jan. 6, 2017 Ord. (Dkt. # 357) at 5 n.3. The  
17 City submitted the Ordinance to the Court on June 21, highlighting the differences between it and  
18 the Draft Legislation. Jun. 21 Br. (Dkt. # 396).

19 The Ordinance, like the Draft Legislation, acknowledges that some provisions of the  
20 Ordinance are subject to collective bargaining with unions whose members are subject to the  
21 Ordinance. *Compare* Ordinance (Dkt. # 396-1) at 105 (§ 3.29.510(A)) *with* Draft Legislation (Dkt.  
22 # 328-1) at 52 (§ 3.29.400(B)). Provisions subject to bargaining do not take effect until the City’s  
23 “collective bargaining obligations are satisfied.” Ordinance at 106 (§ 3.29.510(C)).

1 The Court focused on the collective bargaining provision at the July 18 status conference:

2 [L]et me hypothetically suggest the following situation: There is a provision in the  
3 accountability package that sets out a certain procedure to be followed. In the course  
4 of negotiations with the various labor unions, there is a result which undermines some  
5 portion of that process or undermines some portion of the accountability effort, and  
6 then I'm going to have to go back and undo the provision in the ordinance, which no  
7 longer accurately ensures or procedurally ensures constitutionality in police practices.  
That's what my dilemma is. And it seems to me that there's little consideration on the  
part of, well, we're going to work all this out, let's get this stuff in place on some kind  
of provisional approval, and then, depending on what happens in contract negotiations  
that I'm not a party to and I don't influence, at least other than from the bully pulpit  
up here, having to undo things that have been created and are in effect.

8 Jul. 18 Transcript ("Tr.") (Dkt. # 407) at 9. The Court likened the collective bargaining process to a  
9 "black hole" whose impact on the accountability Ordinance could not be predicted. *Id.* at 22.

10 After articulating its concerns, the Court directed the City to submit two supplements: the  
11 list the City offered at footnote 78 of its June 21 brief and a "full list of provisions which are subject  
12 to collective bargaining." Jul. 18 Tr. at 13. Those are distinct lists. Footnote 78 offered a list of  
13 provisions that are "unchanged from the [Draft] Legislation, were previously reviewed and  
14 approved, and do not require collective bargaining," which is a list of provisions that the City  
15 believes do not need to be bargained to agreement or impasse before implementing. Jun. 21 Br.  
16 (Dkt. # 396) at 24-25 & n.78. The City understood that those provisions would take effect 30 days  
17 after the Mayor signed the Ordinance. *Id.*

18 On July 28, the City Attorney filed a letter to the Court addressing the request for a list of  
19 provisions "subject to collective bargaining," responding that "every provision of the Ordinance is  
20 at least subject to a demand for bargaining." Jul. 28 ltr. (Dkt. # 408) at 2. That answer is legally  
21 accurate, but may be of little assistance to the Court. The City expects it would be scarcely more  
22 helpful to offer a list with its assessment of which provisions are categorically exempt from  
23 bargaining, which provisions cover permissive subjects but are subject to effects bargaining, and

1 which provisions cover mandatory subjects that must be bargained to agreement or impasse before  
 2 implementing.<sup>1</sup> As the City Attorney noted in the July 28 letter, those assessments are subject to  
 3 disputes by the unions impacted by the Ordinance, disputes that will be addressed at least in the first  
 4 instance in forums other than this Court. The City's predictions about outcome of those disputes are  
 5 not only likely to be of little value to the Court, they may be inconsistent with the City's legal  
 6 obligations as a partner in collective bargaining.

7 To that end, the City offers what it hopes will be of value to the Court: "the List" of those  
 8 provisions that the City will bargain further before implementing. It is attached as Exhibit 1. The  
 9 List is not long. Almost all of the provisions on it are those that would change the body of work that  
 10 a union's members currently perform (*e.g.*, the mandate that at least some portion of OPA's  
 11 investigators be civilians rather than police officers, and the mandate that OPA's investigative  
 12 supervisors be civilians),<sup>2</sup> and provisions that change the procedures for investigating officer  
 13 misconduct and imposing discipline (*e.g.*, expanded authority to SPD's Chief to place officers on  
 14 leave without pay pending misconduct investigations).<sup>3</sup> The List also contains a few provisions that  
 15 would change the working conditions or compensation of union members.

16 As to every provision not on the List – most of the Ordinance – the City will begin or  
 17 continue implementing<sup>4</sup> those provisions without awaiting further bargaining, although it will  
 18 (where necessary) provide prior notice to the unions of its implementation plan and discharge any

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19 <sup>1</sup> The July 28 letter summarizes a public employer's right to unilaterally implement changes impacting employees,  
 20 the obligation to bargain over the effects of certain unilateral changes, the distinction between mandatory and  
 21 permissive subjects, and the balancing test that applies to the many subjects that "defy easy classification as  
 22 mandatory or permissive subjects." Jul. 28 ltr. at 2 (second paragraph). The City incorporates that summary by  
 23 reference rather than repeating it here.

<sup>2</sup> Ordinance at 36 (§ 3.29.140(A)-(C)).

<sup>3</sup> Ordinance at 86 (§ 3.29.420(A)(4)).

<sup>4</sup> The only provisions of the Ordinance that the City has begun to implement are those that govern the selection of  
 the Inspector General and OPA Director, which the City addressed in its July 28 letter. Jul. 28 ltr. (Dkt. # 401) at 1.

1 obligation to bargain effects. But, unless a union convinces the City that a provision not on the List  
2 is a mandatory subject, additional bargaining of provisions not on the List should not significantly  
3 delay their implementation.

4 The City also provides, at Exhibit 2, the list it offered in footnote 78 of its June 21 brief. As  
5 noted above, that list consists of provisions with no material changes from the Draft Legislation that  
6 do not require bargaining to agreement or impasse before implementation. Jun. 21 Br. (Dkt. # 396)  
7 at 24-25 & n.78. In the City's view, those provisions took effect on July 1, 30 days after the Mayor  
8 signed the Ordinance. *Id.*

9 **III. The City Should, With the Benefit of the Court's Ruling that the Ordinance is**  
10 **Consistent with the Consent Decree, Continue to Implement the Provisions of the**  
11 **Ordinance that Are Not on the List and Bargain Provisions on the List.**

12 The Ordinance, as enacted, is consistent with the Consent Decree. The City explained that  
13 assertion in its June 21 brief, and incorporates that explanation here in the interest of brevity. To  
14 summarize, the Court already "APPROVE[D] the draft legislation" with "limited caveats." Jan. 6,  
15 2017 Ord. (Dkt. # 357) at 12, and the differences between the Draft Legislation and the Ordinance  
16 do not weaken the City's accountability system. When the Court reviewed the Draft Legislation to  
17 determine whether it "conflict[ed] with the terms or purposes of the Consent Decree," it observed  
18 that this was a "relatively easy standard to meet, and [that] any number of legislative options might  
19 fit within the parameters of the Consent Decree." *Id.* at 4. The United States has informed the Court  
20 that it believes the Ordinance is consistent with the Consent Decree. Dkt. # 401.

21 At the July 18 status conference, the Court queried why it should review an Ordinance  
22 whose provisions might change after collective bargaining, given that the Court would have to  
23 "undo" those changes if they were not consistent with the Consent Decree. Jul. 18 Tr. at 9. The  
Court asked counsel for the United States about the "impact if the Court withholds approval [of the

1 Ordinance] until after the collective bargaining agreement is finalized or . . . collective bargaining  
 2 negotiations?” *Id.* at 36.

3 As the party responsible for implementing the Ordinance, the City answers the Court’s  
 4 question as follows: Withholding a determination that the Ordinance is consistent with the Consent  
 5 Decree pending collective bargaining would delay accountability reform and likely hobble the City  
 6 and the unions during bargaining.

7 The Court’s determination that the Ordinance is consistent with the Consent Decree pending  
 8 collective bargaining would not be an advisory opinion; it would have at least three immediate  
 9 impacts on collective bargaining. First, if there are provisions in the Ordinance that are not  
 10 consistent with the Consent Decree, the Court’s ruling announcing as much will keep the City from  
 11 bringing them to the bargaining table. Collective bargaining is complicated enough without the City  
 12 trying to negotiate approval of provisions that the Court finds inconsistent with the Consent Decree.  
 13 Second, although the Court has noted that “any number of legislative options might fit within the  
 14 parameters of the Consent Decree,”<sup>5</sup> to the extent that the Court’s ruling identifies additional  
 15 provisions of the Ordinance that are *necessary* for consistency with the Consent Decree (as opposed  
 16 to merely consistent with the Decree), that ruling will guide the City during bargaining.<sup>6</sup> Absent that  
 17 guidance, the City can only guess as to when its interest in consistency with the Consent Decree  
 18 should influence its bargaining positions. Third, unless the Court directs otherwise, the City will

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 20 <sup>5</sup> Jan. 6, 2017 Ord. (Dkt. # 357) at 4.

21 <sup>6</sup> For example, the Court previously ruled that the accountability legislation could not “require an enhanced burden  
 22 of proof concerning an officer’s possible termination for dishonesty.” Jan. 6, 2017 ord. (Dkt. # 357) at 8. The  
 23 Ordinance contains a provision complying with that ruling. Ordinance (Dkt. # 396-1) at 36 (§ 3.29.135(F)). Because  
 that provision directly impacts officer discipline, it is on the List, and the City will bargain it further. If bargaining  
 does not lead to an agreement to implement that provision, the City will be forced to weigh its options, including the  
 possibility that a compromise on that provision would not meet with Court approval, and to reassess whether its  
 interest in complying with the Court’s orders, among other factors, transforms what would otherwise be a mandatory  
 subject of bargaining into a permissive subject.

1 move forward with implementing the provisions not on the List, thereby obligating any union that  
2 objects to that implementation to raise its objections or forfeit them. Delay, by contrast, means that  
3 neither the City nor the Court will know which aspects of the Ordinance will draw objections (or a  
4 complaint asserting an unfair labor practice, as was the case with the City's implementation of a  
5 body-worn video program for patrol officers).<sup>7</sup> The process of resolving those objections or  
6 complaints would be delayed as well.

7 Putting aside the immediate impacts on bargaining, the Court's determination that the  
8 Ordinance is consistent with the Consent Decree will allow the City to continue to implement an  
9 accountability system that, even without the provisions on the List, is significantly improved over its  
10 predecessor. Implementing that system, even in part, will help ensure that the Seattle Police  
11 Department ("SPD"), from its line officers to its Chief and her command staff, will continue  
12 building on the wide-ranging reforms they have achieved under the Consent Decree. For example,  
13 the Court on July 18 lauded the creation of the Office of the Inspector General for Public Safety  
14 ("OIG") as a "tremendous improvement," Jul. 18 Tr. at 22, and asked counsel for the United States  
15 if bargaining would lead to "an objection to the inspector-general process," a process that the Court  
16 "fully supports," Jul. 28 Tr. at 34.

17 The City cannot predict what objection a union might make to the creation of the OIG, but  
18 the provisions of the Ordinance creating the OIG are not on the List, demonstrating that the City  
19 intends to create the OIG – the City's first fully independent police oversight body – and appoint its  
20 first Inspector General without awaiting bargaining. And although the List indicates that the City  
21 will bargain further those aspects of the Inspector General's powers that directly impact the

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22 <sup>7</sup> Jul. 28 ltr. (Dkt. # 408) at 2-3 (discussing implementation of body-worn video program, subsequent bargaining  
23 demand from the Seattle Police Management Association and unfair labor practice complaint from the Seattle Police  
Officers' Guild).

1 investigation of police officer misconduct, the Inspector General would play a critical role in police  
2 accountability even without exercising those powers. The OIG would begin its “oversight  
3 activities,” independently reviewing SPD’s processes and operations. Ordinance (Dkt. # 396-1) at  
4 43 (§ 3.29.200(D)). The OIG would begin its SPD “risk management reviews and performance  
5 audits,” review of OPA investigation and complaint-handling processes, audits of potential conflicts  
6 of interest, waste of resources, unethical practices, and other concerns impacting the public’s trust in  
7 OPA and SPD. *Id.* (§ 3.29.200(D)-(E)). The OIG could audit and review not only SPD’s process,  
8 but processes in other City departments “related to policing and criminal justice matters.” *Id.*  
9 (§ 3.29.200(H)). Even as those aspects of the Inspector General’s role that directly impact police  
10 officer discipline would await further bargaining, the Inspector General could begin performing its  
11 role as SPD’s “intelligence auditor,” create a workplan, review SPD investigatory findings unrelated  
12 to discipline, and work with City officials to carry out as much of his or her duties as possible while  
13 bargaining is ongoing. *Id.* at 55 (§ 3.29.240(E), (G)). Moreover, while waiting for the bargaining  
14 process to conclude, the OIG would continue to carry out the OPA investigation review and  
15 certification responsibilities that previously belonged to the OPA Auditor. *Id.* at 105-06  
16 (§ 3.29.510(B)) (declaring that “current accountability system shall remain in place” pending  
17 implementation of new system).

18 The City focuses on the OIG for illustrative purposes, but a Court ruling finding the  
19 Ordinance consistent with the Consent Decree would similarly allow the City to make critical  
20 accountability reforms in OPA and CPC. Moreover, allowing the City to begin implementing the  
21 accountability system would give the Court and the Monitor the opportunity to evaluate how  
22 effectively the system functions in practice, rather than in theory.

1           Delaying a ruling that the Ordinance is consistent with the Consent Decree (or delaying  
2 implementation of the Ordinance) will not eliminate the uncertainty inherent in collective  
3 bargaining and the complaint procedures surrounding bargaining and implementation of the  
4 Ordinance. To the contrary, the City believes that the ruling it requests is the most expedient path to  
5 allowing implementation, drawing out objections and complaints, and bringing disputes to a  
6 resolution, all guided by the Court's order finding the Ordinance consistent with the Consent Decree  
7 and identifying any provision that is necessary for consistency with the Consent Decree. As was the  
8 case with the City's recent implementation of a body-worn video program for SPD's patrol officers,  
9 events in this litigation are a significant factor informing the City's judgment about when to  
10 implement changes without further bargaining. Jul. 28 ltr. (Dkt. # 408) at 2-3. Although the List is  
11 the City's current best judgment about balancing its obligations as a partner in collective bargaining  
12 with its obligations to the people of Seattle and the Court, as events unfold and more information  
13 comes to light, the City may conclude that there is a basis for implementing one or more provisions  
14 on the List unilaterally consistent with its bargaining obligations under Washington law.

15           Finally, although the City expects that further bargaining over the provisions of the  
16 Ordinance will strengthen the accountability system, the Court will ultimately decide whether the  
17 City's expectation is well-founded. The City will return to the Court for a final review, including but  
18 not limited to review of any provisions that have changed as a result of bargaining.

#### 19 **IV. Conclusion**

20           For the reasons stated above, the City asks the Court to rule that the Ordinance, as enacted,  
21 is consistent with the Consent Decree, that the City may continue to implement the Ordinance,  
22 including meeting its bargaining obligations, and that the City must return to the Court for review of  
23 any changes to the provisions of the Ordinance and their impact on the accountability system as a

1 whole. The City also requests that the Court identify any provisions of the Ordinance that are  
2 necessary, as opposed to merely sufficient, for consistency with the Consent Decree.

3 DATED this 18th day of August, 2017.

4 For the CITY OF SEATTLE

5 s/Josh Johnson

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**CERTIFICATE OF SERVICE**

I hereby certify that on August 18, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system on the following counsel of record:

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DATED this 18th day of August, 2017, at Seattle, King County, Washington.

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