

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

DELPHINE ALLEN, and others,

Plaintiffs,

v.

CITY OF OAKLAND, and others,

Defendants.

Case No. 00-4599 TEH (NC)

(PROPOSED) ORDER

WHEREAS, The City of Oakland, the Oakland Police Department (OPD), the Oakland Police Officers Association (OPOA), and Plaintiffs desire to bring the City and OPD into compliance with the Negotiated Settlement Agreement (NSA), and are committed to OPD's delivery of quality and Constitutional policing to the community;

WHEREAS, On June 27, 2011 [DKT No. 620], the Court approved the Amended Memorandum of Understanding Re: Post NSA Terms and Conditions (AMOU) as an order of this Court, and the AMOU remains in effect until January 22, 2014; and

WHEREAS, On October 4, 2012 [DKT No. 752], Plaintiffs filed a Motion for Appointment of Receiver, the City opposed the Motion [DKT No. 850], and the OPOA intervened for the limited purpose of protecting collective bargaining and due process rights of its members [DKT. No. 194]; and

WHEREAS, on November 14, 2012 [Dkt. No. 861], the Court issued an order that (1) directed the Plaintiffs and Defendants to meet and confer to reach agreement regarding the receiver motion, and (2) offered to refer the parties to a magistrate judge to assist with the meet and confer process; and

WHEREAS, On November 15, 2012 [DKT No. 862] the City requested appointment of a magistrate judge to mediate the receiver motion and on November 16, 2012 [DKT No. 866] the Court referred the case to Magistrate Judge Nathanael Cousins for a settlement conference; and

WHEREAS, On November 21, 26, and 29, 2012, the parties and their counsel met and conferred and then jointly submitted this proposed order to resolve the disputed issues in the receiver motion;

WHEREAS, the City asserts that none of the statements contained in this proposed order should be considered as admissions;

The Court ORDERS as follows:

A. The Appointment of Compliance Director

1. A Compliance Director will be appointed by the Court and will report directly to the Court. The mission of the Compliance Director is to bring the City and OPD into compliance with the NSA and AMOU.

2. The parties will meet and confer and attempt to make a joint recommendation to the Court regarding the selection of the Compliance Director. If they are not able to agree, the parties will each nominate candidate(s) to the Court for consideration. It will

be solely within the Court's discretion as to the individual who will be appointed as the Compliance Director.

3. The Compliance Director will act as the agent of the Court and will not act as the agent of any party to this action. The Compliance Director will work closely with all stakeholders to ensure that OPD practices and reforms are both compliant with the NSA and AMOU, and are sustainable.

4. The Compliance Director will be a full-time, on-site position in Oakland for a minimum of one year. The Compliance Director will serve until the Court orders that the City is in compliance with the AMOU, or until otherwise ordered by the Court. Any party may petition the Court to remove the Compliance Director for good cause, subject to the attorneys' fees provisions set forth below in paragraph C.9.

5. The Compliance Director will engage in a collaborative, solution-oriented planning process with the Mayor, City Administrator, Chief of Police, and Plaintiffs to achieve compliance. The Compliance Director will be responsible for overseeing the City and OPD's implementation and compliance with the NSA and AMOU.

6. The Compliance Director will provide regular and timely reports to the Mayor, City Administrator, the Chief of Police, Plaintiffs, and the Independent Monitoring Team, regarding the status of implementation, as discussed herein in paragraph C.2.

7. The AMOU will remain in effect except to the extent it conflicts with the positions stated herein. All powers of the Compliance Director will be subject to paragraph C.8.

8. Subject to paragraphs C.1 and C.8 below, the City will pay the costs of the Compliance Director and all costs related to the Compliance Director's work, and will

provide support services and office space, commensurate with the Compliance Director position.

B. Relationship of the Compliance Director to the Independent Court Monitor

1. The Court Monitor and Independent Monitoring Team (together, IMT) will function as specified in the AMOU and ordered by the Court. Absent a further Court Order, the IMT's duties and responsibilities will stay in effect until compliance is achieved, including past the current termination date of January 22, 2014. The IMT and City shall meet and confer concerning compensation to be paid to the IMT for work performed after January 22, 2014. Any disputes about compensation to be paid to the IMT will be resolved by the Court after the parties and IMT meet and confer and attempt to resolve the dispute.

2. The Compliance Director will work closely with the IMT, but neither will be required to report to each other. Both will report to the Court. The Compliance Director will be independent and separate from the IMT. Nothing in this agreement prevents the IMT from consulting with the Compliance Director, and vice versa.

3. The IMT will prepare formal, quarterly reports for the Court, and copies or drafts of these reports must be provided to the Compliance Director and Plaintiffs as soon as they are available to any administrator of OPD or of the City.

4. Informal discussion of compliance, noncompliance or other informal progress reports or discussions of potential changes between the Monitor and OPD officials or City officials, should include the Compliance Director whenever possible.

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C. Expanded Authority and Responsibilities of Compliance Director

1. The Compliance Director, with consultation of stakeholders including Plaintiffs, the Mayor, City Administrator, Chief of Police, the OPOA, and the IMT, will develop a Remedial Action Plan (Plan) during the first month of hire that will allow the City to reach compliance with the AMOU by December 2013 (with the exception being only those tasks that cannot be completed during that timeframe). The Plan will include a proposed budget that is mutually agreed on by the Compliance Director, Mayor, City Administrator, and Chief of Police for the fiscal year based on proposed expenditures for task compliance, and such budget will be within the OPD budget. Upon completion, this Plan will be provided to Plaintiffs, the Court, and the IMT. The Compliance Director will work closely and communicate regularly with the Chief of Police, the Chief's staff, and other relevant City personnel to implement this Plan. Any disputes regarding the Plan will be resolved under the procedure set forth in paragraph C.8.

2. In addition, within 60 days of his or her appointment, the Compliance Director, in consultation with subject matter experts and stakeholders, including Plaintiffs, the Mayor, City Administrator, Chief of Police, the OPOA, and the IMT, and in accord with national and/or contemporary professional law enforcement standards, will set benchmarks for the OPD to address, resolve, and reduce unjustified: 1) incidents of racial profiling and racially biased policing; 2) incidents involving the pointing of firearms at minority citizens; 3) citizen complaints; 4) incidents involving the use of force; 5) incidents involving the drawing and pointing of a firearm at a person; 6) officer involved shootings; and 7) high speed chases, particularly with those ending with the use of force and/or death. Within six months of the creation of these benchmarks, and every 90 days thereafter or as otherwise ordered by the Court, the Compliance Director will report to Plaintiffs, the City, IMT, and the Court whether the benchmarks set for reducing the aforementioned occurrences have been met.

3. In addition, the Compliance Director will produce monthly status reports for the parties, the IMT, and the Court. These reports will include any substantive changes to the original Plan and a report on progress toward meeting the benchmarks. If the OPD does not meet these benchmarks, the Compliance Director will inform the Court and certify whether the failure to meet these benchmarks was warranted by some adequate reason, and if not, the Compliance Director will take appropriate action with enforcement powers, subject to paragraph C.8.

4. If the City is found to be out of compliance with the AMOU, the Compliance Director may develop a corrective plan for each noncompliant AMOU task, including a determination of the nature and frequency of future compliance testing for that task. Such plan will be developed at the sole discretion of the Compliance Director. In addition to the specific tasks in the NSA and AMOU, the Compliance Director will be empowered to review, investigate and/or take corrective action with regard to OPD policies, procedures and practices that are related to the objectives of the NSA and the AMOU.

5. The Compliance Director will pay special attention to the following outstanding tasks that are related to collection of stop data, use of force, the personnel assessment system (IPAS), sound management practices, and the quality of investigations by the Internal Affairs Division (IAD). Both the City and Plaintiffs believe that these tasks are key to driving the sustained cultural change envisioned by the parties when agreeing to the NSA and the AMOU. Per this section, the Compliance Director will address these tasks in a clearly defined Plan that simultaneously addresses deficiencies that led to noncompliance and that will allow the OPD to reach and sustain compliance as it pertains to the following tasks:

- a. Stop Data;
- b. Use of Force Reporting;
- c. Use of Force Recommendations;

- d. Executive Force Review Board Requirements;
- e. Personnel Assessment System - The Compliance Director's Plan will include oversight, acquisition, and implementation of IPAS, so that the City will have a sustainable early warning system that is useful in identifying problems and trends at an early stage in order to manage risk. The Compliance Director will ensure that all parties to this agreement are fully informed about (1) the procurement of new technology, and (2) how the technology will be used to identify problems and trends to ensure that officers are provided the requisite assistance at the earliest stage possible;
- f. Consistency of Supervision;
- g. Field Training Program;
- h. Preponderance of Evidence- The Compliance Director's Plan will also include strategies to ensure that allegations made by citizens against the OPD are thoroughly and fairly investigated. The Compliance Director's corrective action plan will address strategies to decrease the number of police misconduct complaints, claims, and lawsuits.
- i. Internal Affairs Investigations- The Compliance Director will develop a plan to reduce the number of internal affairs investigations where improper findings are made. This would include instances such as where a complaint was disposed of as "unfounded," when there was, in fact, evidence supporting the complaint, or where a complaint was "not sustained," when there was sufficient evidence on which to sustain it. This would also include cases where an improper burden of proof was applied to resolve the complaint.

6. The Compliance Director has the authority to direct the City Administrator as it pertains to outstanding tasks and other issues related to compliance and the overall NSA and AMOU objectives. The Compliance Director has the authority to direct specific actions by the City to improve and/or attain or remedy compliance errors with respect to the priority tasks and other portions of the NSA and AMOU, including but not limited to, the following areas: (a) changes to policies, the manual of rules, or standard operating

procedures or practices; (b) personnel decisions including but not limited to promotions, engagement of consultants, assignments and disciplinary actions in misconduct cases; (c) tactical initiatives that may have a direct or indirect impact on the NSA and AMOU; (d) procurement of equipment, including software, or other resources intended for the purpose of NSA and AMOU compliance; and (e) OPD programs and/or initiatives related to NSA tasks or objectives. The City may appeal such actions to the court as set forth in paragraph C.8.

7. Limitation on the Authority of the Compliance Director:

a. Absent a further Court order to the contrary, members of OPD up to and including the rank of Captain will continue to be covered by the Meyers-Milias-Brown Act, the collective bargaining agreement, and OPOA members' rights to arbitrate discipline and appeal said discipline. Absent a further Court order to the contrary, the Compliance Director will have no authority to abridge, modify or rescind any portion of those rights for those members.

b. Absent a further Court order to the contrary, the Compliance Director will have no authority with regard to rescinding or otherwise modifying working conditions referenced in the labor agreements between the City and the OPOA as those contracts relate to any member up to and including the rank of Captain. "Working conditions" will be defined as the rights of the officers in paragraph 7.a above, as well as salary, hours, fringe benefits, holidays, days off, etc.

c. Absent a further Court order to the contrary, and subject to the provisions of this paragraph, the Compliance Director will have the power and discretion to discipline and demote OPD officers holding the rank of Deputy Chief and Assistant Chief. Subject to the provisions of this paragraph, the Compliance Director will have the power and discretion to discipline, demote, and remove the Chief of Police. The Compliance

Director may not remove the Chief of Police without providing written notice, reasons for the removal, and an opportunity for appeal to the Court. Similarly, if the Compliance Director determines to discipline or demote the Chief of Police or an Assistant Chief or Deputy Chief, the Compliance Director must provide written notice, reasons for the discipline or demotion, and an opportunity for appeal to the Court. The City, Plaintiffs, and the affected officer (including the Chief of Police) will have a right to oppose (or support) any such action, under applicable federal and state law, by filing a notice with the Court (U.S. District Court, NDCA) within seven calendar days, seeking an expedited briefing schedule and hearing. The affected individual (including the Chief of Police) will retain his or her employment and other rights. In the event of a dispute, this subsection is subject to paragraph C.8 below.

d. The Compliance Director will have expenditure authority up to \$250,000 for expenditures included in the Plan. This is not a cumulative limit. For expenditures greater than \$250,000, the Compliance Director must comply with public expenditure rules and regulations, including Oakland Municipal Code, article I, chapter 2.04. The City Administrator will seek authorization of these expenditures under expedited public procurement processes. Any disagreements as to expenditures by the Compliance Director will be resolved under paragraph C.8 below.

8. In any dispute between the City and the Compliance Director relating to this Order, the Compliance Director will consult with the Mayor, City Administrator, the Chief of Police, and Plaintiffs in hopes of reaching consensus. If, after consultation with the Mayor, City Administrator, Chief of Police, and Plaintiffs, the City and the Compliance Director are still in disagreement, the Compliance Director must provide written notice to the City of the dispute and the Compliance Director's proposed direction. After receiving such a notice, the City within seven days must provide notice to the Court (U.S. District Court, Northern District of California) and seek an expedited hearing to determine

whether the City should be excused from complying with the Compliance Director's direction. The City's right to make such motions must not be abused, and should generally be limited to matters related to employee discipline or expenditures in excess of \$250,000. At any hearing on a disputed issue, the City will bear the burden of persuading the Court that the City's failure to follow the Compliance Director's direction will not harm the City's compliance with the AMOU. In addition, Plaintiffs will be a party to any hearing and their counsel will be entitled to recover reasonable costs and attorneys' fees from the City, as set forth below in paragraph C.9.

9. The parties will meet and confer regarding reasonable costs and attorneys' fees relating to Plaintiffs' receiver motion and any other motion that may be filed pursuant to paragraph C.8. Should the parties be unable to resolve the issue of attorneys' fees and costs, they agree to submit the dispute to Magistrate Judge Cousins. This subsection does not change the right of Plaintiffs' counsel to receive previously agreed upon or previously earned fees and costs under the AMOU. In addition, Plaintiffs' counsel may seek reasonable costs and attorneys' fees for any work performed after January 22, 2014.

D. Role of the OPOA

Absent a Court order to the contrary, the OPOA will retain its Intervenor status until such time as the City has been deemed to be in compliance with the NSA and until such time as the Court and/or the parties dismiss the underlying action. The Compliance Director will establish regular and ongoing meetings, no less than once each quarter, with the president of the OPOA to gain insights into NSA compliance efforts from the perspective of rank and file police officers.

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E. Future Appearances

On or about June 1, 2013, and thereafter on dates determined by the Court, the Court will hold a status conference to examine OPD's progress toward compliance. If the Court determines that the City has not made acceptable progress toward achieving compliance, the Court may schedule a hearing to determine the appropriate remedy for a failure to obtain compliance. The Court may issue an order imposing any appropriate remedy for a failure to obtain compliance, including but not limited to contempt, monetary sanctions, additional powers to the Compliance Director, or receivership.

IT IS SO ORDERED.

Date:

THELTON E. HENDERSON
United States District Court Judge