

06cv2779c-ord(ContemptRuling).wpd

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

WILLIAM HOWE, et al.,

Plaintiffs,

v.

THE CITY OF AKRON,

Defendant

:
:
: Case No. 5:06-CV-2779
:
: DAVID R. COHEN
: COURT MONITOR
:
:
: RULING ON MOTION
: FOR RECOMMENDATION
: OF CONTEMPT

On October 20, 2014, Plaintiffs filed a Motion for Recommendation of Contempt (docket no. 729). The motion asks the Court Monitor to recommend to the Court that it should hold defendant City of Akron in contempt for defying the Court’s Order entered on March 27, 2014 (docket no. 643) (“*Permanent Injunction Order*”). For the reasons set forth below, the Monitor **DENIES** Plaintiffs’ Motion for Recommendation of Contempt.

* * * * *

This Court’s *Permanent Injunction Order*: (1) permanently enjoined the City from using its December, 2004 promotional examination to effectuate its “fire department promotion process,” because the examination produced discriminatory results, *Order* at 5 & 7, ¶1; (2) indicated the Court would appoint the undersigned to “oversee[] and develop[] a [new,] valid promotion procedure,” *id.* at 10; and (3) noted the “Plaintiffs must be made a part of any new process to even approach a make

whole remedy,” *id.* at 6.

For the last six months, the parties and the Court Monitor have worked cooperatively to pursue creation of a new promotional examination. Specifically: (1) the City has hired an expert in design and administration of public sector promotional tests, Dr. David Morris; (2) plaintiffs have hired their own expert, Dr. Kyle Brink (who has worked with Dr. Morris before in adversary cases, like this one); and (3) the parties, their experts, and the undersigned have engaged in numerous conferences to discuss and negotiate the building blocks for new firefighter promotional tests – including (a) selection of subject matter experts (SMEs), (b) job analyses, (c) determination of which knowledges, skills, and abilities (“KSAs”) will be tested, and (d) creation of a reading reference list for candidates. This process has advanced to the point that there now exist tentative dates for conducting the actual tests in February of 2015. There remains much to be done before the final tests can be administered, and there will be substantial post-administration obligations, so the parties and their experts have a lot to do before actual firefighter promotions will occur. But it is clear Plaintiffs have been, and will continue to be, intimately involved in the process of creating and scrutinizing the new promotional tests.

Recently, however, circumstances arose leading Plaintiffs to believe the City “has attempted to do an end-around of Plaintiffs’ right[] . . . [to] ‘be made a part of any new [promotional] process.’” Motion at 2 (quoting *Permanent Injunction Order* at 6). These circumstances are summarized below.

The firefighter plaintiffs in this case, along with all other firefighters employed by the City, are members of the Akron Firefighters Association, Local No. 330 (“the Firefighters Union”). The Firefighters Union and the City are parties to a Collective Bargaining Agreement (“CBA”), which

mandates certain staffing levels by the City. Because the firefighter promotional process has been delayed by, among other things, this lawsuit, the Union filed a grievance. The grievance was set for arbitration on October 27, 2014.

Shortly before the arbitration date, the City and the Firefighters Union reached a tentative settlement agreement. The principal terms of the settlement agreement were: (1) by January 1, 2015, the City would promote Union members to fill certain, defined vacancies; (2) these promotions would be based almost entirely on seniority, and would not depend on any promotional test results; and (3) the entire settlement agreement, including the fact of any promotions, was "subject to the approval of the Court Monitor." See draft settlement agreement at 1 (docket no. 730-1).

In their motion for contempt, Plaintiffs focus almost exclusively on the second term noted above, which provides that firefighter promotions will be made without conducting any promotional examination. This provision would make moot the cooperative work undertaken by Dr. Morris, Dr. Brink, and the parties over the last six months. Plaintiffs complain the City's settlement with the Firefighters Union thus works to *exclude* them from a new promotional process, rather than making them a part of it, as the *Permanent Injunction Order* requires. Plaintiffs also claim the City purposely timed the tentative settlement agreement in order to distract Plaintiffs' counsel from meeting their October 28, 2014 deadline for filing an appellate brief in this case.

The Court Monitor concludes Plaintiffs' motion is not well-taken. First, and most important, the settlement agreement states explicitly that all of its terms are subject to the approval of the Court Monitor. The City's inclusion of this provision makes certain that Plaintiffs' rights will not be contravened; rather, the promotional process embodied in the settlement agreement will only be adopted to the extent the Monitor approves it, and the Monitor's approval is necessarily contingent

on ensuring the Plaintiffs' interests are protected, as mandated by this Court.

Second, it is notable that, to at least some extent, some of the named plaintiffs in this lawsuit are in *favor* of the promotional process set forth in the settlement agreement between the City and the Union. Indeed, the City asserts the idea for a seniority-based promotional process, as contained in the settlement agreement, originated with one or more of the plaintiff firefighters in this case. Plaintiffs' reply brief disputes this contention, but it appears likely that, regardless of where the idea came from, some of the plaintiffs do support it. This is proved by the fact that, on November 14, 2014 (that is, three days ago), over 77% of the Firefighter Union membership voted in favor of a "Memorandum of Agreement," which is a revised settlement agreement containing a similar, seniority-based promotional process.¹

And third, the Court Monitor rejects Plaintiffs' contention that the City timed the negotiation and release of its settlement agreement with the Union in order to disrupt Plaintiffs' counsel's appellate briefing efforts. The arbitration between the City and Union was scheduled for October 27, 2014; it is only natural that settlement would be discussed shortly beforehand. Moreover, Plaintiffs asked for and obtained from the Sixth Circuit Court of Appeals a second extension of time, so that their responsive appellate brief was due on November 12, 2014 instead of October 28, 2014. And this was after the City was granted three different extensions of time to file its initial appellate brief. That Plaintiffs' appellate brief once had a due date near to the same time the City negotiated

¹ Indeed, it is quite possible that some of the firefighter plaintiffs who are candidates for promotion would obtain their desired higher rank more quickly through the process set out in the revised settlement agreement, as compared with the promotional testing process being designed and negotiated by Dr. Morris and Dr. Brink. Of course, speed of promotion is only one interest with which the Court Monitor is concerned; another is non-discriminatory results. But it is easy to understand why many plaintiffs would be focused on the former, having filed this lawsuit eight years ago.

its settlement agreement with the Union was a coincidence.

The Court mandated in its *Permanent Injunction Order* that the City “shall not discriminate on the basis of race or age against its firefighter candidates in the development or implementation of its promotional process,” and the Court noted “the task of overseeing and developing a valid promotion procedure” to achieve this mandate is intricate and complex. Order at 7, 10. Further, “the existence of a collective bargaining agreement and pending arbitration matters related to the lack of a promotional process can only serve to further complicate the matter.” Order at 10. These complications are at the heart of Plaintiffs’ Motion for Recommendation of Contempt. Ultimately, the City has obligations to both the Firefighters Union and the Court. After the Union filed a grievance against the City, the City attempted to settle the grievance through an agreement that *respected* its obligations to the Court. This is not contemptuous behavior. Rather, it is a reasonable response to the complex and sometimes conflicting requirements the City faces. The City’s efforts to assuage and satisfy the Union are not tantamount to a rejection of Plaintiffs’ rights.

Accordingly, the Court Monitor denies Plaintiffs’ Motion. The Court Monitor will discuss with the parties the extent to which (if any) the provisions in the recent Memorandum of Agreement between the Union and the City can be folded into the promotional testing process that the parties and their experts are negotiating.

RESPECTFULLY SUBMITTED,

/s/ David R. Cohen

David R. Cohen

Court Monitor

DATED: November 17, 2014