

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

**State of Minnesota by Rebecca Lucero,
Commissioner of the Minnesota
Department of Human Rights,**

Plaintiff,

**AMICUS BRIEF
COMMUNITIES UNITED AGAINST
POLICE BRUTALITY**

vs.

City of Minneapolis,

Defendant.

Court File No: 27-CV-23-4177
Case Type: Discrimination
Judge: Karen Janisch

Communities United Against Police Brutality (CUAPB) respectfully submits this Brief in opposition to the approval of the Settlement Agreement between the parties.

INTRODUCTION

The proposed settlement agreement in this matter will fail for lack of consideration because the agreement is subject to future collective bargaining agreements. Under this arrangement, the City of Minneapolis may abrogate any portion of the settlement agreement by entering into a later agreement with a collective bargaining unit which agreement contradicts the settlement agreement. This creates an illusory promise and failure of consideration. The settlement agreement covers areas that are likely to be subjects of later collective bargaining agreements. The law disfavors illusory contracts and oft uses theories of estoppel to give such contracts the force of law. Here, the settlement contract language regarding limitations on such theories, the settlement contract's clearly negotiated nature, and complication by state labor law once a labor contract has been struck will likely prevent such corrective action. The settlement

agreement should not be entered until the language regarding collective bargaining agreements, and specifically future collective bargaining agreements is excised.

The Settlement Agreement also defines discipline or disciplinary action to exclude coaching. Disciplinary action is a term of art under the Minnesota Government Data Practices Act and the nature of coaching as disciplinary action is the subject of ongoing litigation. The court should not ratify this definition which argues against public availability of discipline records while it is the subject of an intensive civil action to determine the legal meaning under the Act.

The Settlement Agreement encompasses the current status quo as to working hours restrictions on Minneapolis Police Officers. The status quo is unhealthy for officers and unsafe for the public considering scientific studies. The court should not ensconce this unhealthy provision in a court order when it lends nothing to the meaning of the agreement.

ARGUMENT

“Because settlement agreements are contractual in nature, their validity is evaluated using basic principles of contract law.” Beach v. Anderson, 417 N.W.2d 709, 711 (Minn. App. 1988), review denied (Minn. Mar. 23, 1988)(quoted in Benigni v. Tammaro, No. A03-1523, 2004 Minn. App. LEXIS 777, at *3 (Ct. App. June 29, 2004), also Clausen v. Kemper Ins. Co., No. A03-463, 2003 Minn. App. LEXIS 1484, at *5 (Ct. App. Dec. 16, 2003)). In this case, the Settlement Agreement proposed must be evaluated under the basic principles of contract law.

“A contract has not formed without an offer, an acceptance of the offer, and consideration for its enforceability.” Pine River State Bank v. Mettille, 333 N.W.2d 622, 626-27 (Minn. 1983). Consideration for enforceability is the difficulty faced here.

“When there is a lack of consideration, no valid contract is ever formed. When there is failure of consideration, a contract valid when formed becomes unenforceable because the performance bargained for has not been rendered.” Franklin v. Carpenter, 309 Minn. 419, 422, 244 N.W.2d 492, 495 (1976).

Whether the Settlement Agreement here never forms a contract, or fails for lack of consideration, the court should not ratify it. Paragraph 21 of the Settlement Agreement says, “Nothing in this Agreement will be interpreted as obligating the City or any unions to violate and/or waive any rights or obligations under (i) the terms of the collective bargaining agreements, **including any successor collective bargaining agreements.**” [emphasis added.] This means that any promise in the settlement agreement may be abrogated by another promise made in a future collective bargaining agreement. This is not the only mention of collective bargaining agreements in the Settlement Agreement, and a reading of subsequent mentions reinforces the difficulty with consideration.

Paragraph 47 of the Settlement Agreement states “MPD will require that supervisors’ performance evaluations and promotions will be based upon the fulfillment of their supervisory duties **so long as not inconsistent with any applicable collective bargaining agreement.**” This can be logically rewritten as, “If it is inconsistent with any applicable collective bargaining agreement, MPD will not require that supervisors’ performance evaluations and promotions be based upon the fulfillment of their supervisory duties.” When written in this manner, it is clear that there is no promise made to support settlement in this paragraph.

Paragraph 51 reads, “Supervisors will formally and/or informally recognize, when appropriate **and as permitted by the applicable collective bargaining agreement** and civil service rules, officers who demonstrate a commitment to procedural justice, de-escalation, and

non-discriminatory and impartial policing.” The logic is a bit more complicated but it is equivalent to, “When not permitted by the applicable collective bargaining agreement or civil service rules, supervisors will not recognize, formally and/or informally, officers who demonstrate a commitment to procedural justice, de-escalation, and non-discriminatory and impartial policing.” Again, there is clearly no promise to support the MDR’s settlement of its suit.

Paragraph 133, “All disciplinary decisions will be documented in the administrative investigative file, EIS and disciplinary history record **consistent with any collective bargaining agreements** and reported in the case management system.” Again, restated, “Disciplinary decisions will not be documented in the administrative file, EIS and disciplinary history record nor reported in the case management system if inconsistent with any collective bargaining agreement.” Not only does this fail as consideration, but it may run afoul of the Minnesota Government Data Practices Act requirements on documentation of complaint data under Minn. Stat. § 13.43.

A valid contract "must be certain in terms and not so indefinite and illusory as to make it impossible to say just what is promised." Anderson v. Backlund, 159 Minn. 423, 425, 199 N.W. 90, 91 (1924). “Illusory promises cannot establish an enforceable contract.” Grouse v. Group Health Plan, 306 N.W.2d 114, 116 (Minn. 1981). “An unenforceable promise is really no promise at all, but an illusory one. Unless a promise is enforceable, the promisee receives nothing for his promise, and therefore it is without consideration.” Welsh v. Barnes-Duluth Shipbuilding Co., 221 Minn. 37, 44, 21 N.W.2d 43, 47 (1945). In this Settlement Agreement, not only paragraphs 47, 51, and 133 which mention the possibility of conflict with collective bargaining agreements are “indefinite and illusory,” but every paragraph is subject to abrogation by future collective

bargaining agreements under paragraph 21 of the Settlement Agreement. It is not a series of promises, but a series of things that promise nothing, clothed in the form of promises.

Courts traditionally do not like parties to make promises yet escape from bargains, and have enforced contracts through the doctrine of promissory estoppel. "Promissory estoppel may be applied where 'no contract exists because [**6] due to the bilateral power of termination neither party is committed to performance and the promises are, therefore, illusory.'" *Spanier v. TCF Bank Sav.*, 495 N.W.2d 18, 20 (Minn. Ct. App. 1993). Section 90 of the Restatement (Second) of Contracts sets out the elements of promissory estoppel: "A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee * * * and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." Restatement (Second) of Contracts, § 90(1) (1981). However, to be enforceable, "the promise must be clear and definite." *Cohen v. Cowles Media Co.*, 479 N.W.2d 387, 391 (Minn. 1992). The problem with the Settlement Agreement is that the promise is clearly and definitely illusory. Their illusory nature is clear in the rephrasings above. Future collective bargaining agreements abrogate the Settlement Agreement. The doctrine of promissory estoppel is a bad fit to correct this Agreement.

Perhaps a future court could find that it is inequitable to allow this abrogation of promises. Unfortunately, that future court would find paragraph 11 of the Settlement Agreement, which bars the Commissioner from seeking relief based on "res judicata, collateral estoppel, or equitable estoppel." (Notably this ban does not apply to the City.) However, a ban on equitable estoppel is not the final block to fixing this agreement should this Court ratify it.

As stated by the Police Officers Federation of Minneapolis in their Memorandum in Support of Intervention, the Settlement Agreement would create conflict with rights under

Minnesota Public Employment Labor Relations Act (“PELRA”), Minn. Stat., ch. 179A (2022). Once a future agreement is reached, PELRA will create additional legal obstacles to the enforcement of the Settlement Agreement. (Memo in Support, p.4.) The same Memorandum describes negotiations for the successor to the previous collective bargaining agreement which expired December 31, 2022 (Memo in Support, p. 7.)

Rather than forcing a future court to wade through the thickets of PELRA, promissory estoppel and equitable estoppel to enforce this agreement, this court has a simple option. Ratify this agreement after the parties remove reference to successor collective bargaining agreements in paragraph 21, and specific references in paragraphs 47, 51, and 133. Give meaning to the negotiated promise and resolve this matter.

In addition to the consideration issue which strikes at the heart of the idea of a settlement agreement, there are other sins. One of these is the definition of Discipline or disciplinary action in paragraph 454. According to that paragraph, “Discipline does not include routine supervision or coaching.” This is a matter of importance, because according to Minn. Stat 13.43, subd. 2(a)(5), “[T]he final disposition of any disciplinary action together with the specific reasons for the action and data documenting the basis of the action” are public data. In fact, the question of whether “coaching” is a “disciplinary action” subject to public inquiry is currently the subject of litigation between the City of Minneapolis and the Minnesota Coalition on Government Information, 27-CV-21-7237. In that action, the Honorable Karen Janisch found “disciplinary action” to be an ambiguous term and ordered the parties to brief the meaning of the “paramount statutory term.”

That action is still in the discovery phase but the question of whether “coaching” is “disciplinary action” is the central controversy in that law suit. The acceptance of this definition

as part of the settlement agreement bypasses this judicial scrutiny, hiding it in the final section of the Settlement Agreement, and this definition has far-reaching implications in the effectiveness of the public accountability and reporting functions of the Settlement Agreement. Acceptance of this definition by the Court, the state, and the city will lend weight to the idea that there is some substantive difference between telling someone they did wrong and must change in a written warning (public discipline) and telling someone that they did wrong and must change in a written coaching statement (nonpublic personnel matter). This definition effects the results of paragraph 109 of the Settlement Agreement linking use of force data to officer's discipline history; paragraph 183 tying training needs assessment to discipline; and paragraph 274 regarding data analyzed by the Early Intervention System. The far-reaching nature of this definition in terms both the information requirements of the contract and the public or nonpublic nature under the Data Practices cries out for a definition that is neutral rather than slanted to reduce public accountability.

While the prior two points critique the legal nature of the Settlement Agreement, CUAPB as a police accountability organization has policy viewpoints on many of the terms. We will limit our argument to just one, however, the number of hours officers are allowed to work under paragraph 290, "MPD will at least continue to limit the number of hours worked by officers to 16 hours per day and 74 hours per week." Officers must notify commander if they exceed 64 hours per week. These hours are not limited in duration or during emergencies, but the everyday limits on officer hours, and they are far too high for the good of both the officers and the city. While the parties deserve some credit for addressing the issue, even if it is embracing the status quo, ratifying the status quo flies in the face of scientific evidence regarding policing and hours.

In the interest of illustrating the point, the Phoenix Police Department participated in a 9-month study in which they evaluated changing police officer schedules from four 10-hr shifts to three 13-hr 20-min shifts. This is no increase over the total 40-hour week and the longer shifts were nowhere near the MPD's 16-hour limit. The results over 9 months were that "Officers working 13:20-hr shifts experienced significant decreases in hours of sleep, overall quality of sleep, concentration, cognitive processing, and quality of life...Significant increases were observed in fatigue, daytime dysfunction due to sleepiness, reaction time, anticipatory errors and Professional Standards Bureau complaints."

Ratifying the status quo for hours worked effectively ratifies officer misery and dysfunction. If the parties cannot agree on a more humane and effective measure, elimination of the paragraph from the agreement has no substantive effect on the agreement. The court should not ratify the agreement with paragraph 290 in place, simply in the public interest.

CONCLUSION

Communities United Against Police Brutality, based on its 22 years of police accountability work, respectfully requests that the Court refuse to accept the Settlement Agreement between the parties in this matter, and not accept future iterations of the Settlement Agreement that contain a provision abrogating terms that conflict with future collective bargaining agreements, nor iterations that include a definition of discipline that is slanted against government transparency (particularly while before another court in the district), nor iterations that ensconce the status quo of nearly unlimited officer hours under the courts imprimatur.

Date: June 22, 2023

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REQUEST FOR AMICUS STATUS

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City of Minneapolis,

Judge: Karen Janisch

Defendant.

Communities United Against Police Brutality (“CUAPB”) hereby requests leave to file an amicus brief with the Court in this matter. CUAPB is a Minnesota non-profit corporation dedicated to police reform in the state of Minnesota. CUAPB will be urging that the Court does not approve the settlement agreement in its current form.

CUAPB was formed in the year 2000 and has been working in the areas of policy reform, education, victim support, case reinvestigation, government data practice and analysis, as well as legal advocacy. Over twenty years of experience in this cross-disciplinary approach to police reform puts CUAPB in a singular position to analyze the proposed Settlement Agreement in this matter.

CUAPB helped form the coalition MPLS For A Better Police Contract in 2020, and has been involved in close readings of the prior labor contracts between the Police Federation and the City of Minneapolis, as well as litigation aimed to open negotiation sessions between those parties to the public, as permitted in Minnesota statute. As such, CUAPB is well-qualified to address the interaction between labor contracts and the Settlement Agreement.

CUAPB has collected Complaint data for the Minneapolis Police Department through Minnesota Government Data Practice requests and disseminated it through its website at www.cuapb.org for many years, long before the City began a more limited distribution of similar data. As a result, CUAPB has a depth of background knowledge that can assist the Court in its decision regarding approval of the Settlement Agreement.

CUAPB has worked with volunteer attorneys for years not only to witness labor negotiations with the Police Federation and to enforce data practice law, but to represent victims of police violence. As of 2022, CUAPB hired staff counsel to help in the push for police reform. As such, CUAPB is the only local nonprofit with in house counsel, solely focused on the interactions that lead to improved police performance.

Finally, CUAPB is based in Minneapolis, and its geographic placement has led it to spend much of its energy involved in Minneapolis policing. For example, board members met with prior Chief of Police Medaria Arradondo on a monthly basis. CUAPB is intimately familiar with the MPD and has been for over twenty years.

Based upon the value that CUAPB and our coalition partners can provide the Court regarding the settlement agreement, it respectfully requests that it be allowed to address the court as *amicus*.

Black Lives Matter Minnesota (“BLM-MN”) was established in 2015 after the death of Marcus Golden at the hands of police. BLM-MN been on the frontlines of the Black Lives Matter movement since then, working extensively to address policing issues. BLM-MN provides advocacy for African Americans and other people of color. Our major focus right now is reparations for descendants of chattel slaves and ending police qualified immunity. BLM-MN respectfully requests that it be allowed to join CUAPB in addressing the court as *amicus*.

CAIR-Minnesota, founded in 2007, is a nonprofit organization dedicated to protecting and enhancing civil rights, combating Islamophobia, and promoting justice for all individuals, particularly those from marginalized communities. Our organization was initially established in response to FBI abuses within the Muslim community and since then we have continuously addressed cases involving abuses by both local and federal law enforcement agencies. Our commitment to addressing police abuses and promoting justice aligns closely with the mission and vision of CUAPB. By joining the amicus brief, CAIR-Minnesota aims to contribute our expertise and perspective to the Court's deliberation, drawing from our experiences in advocating for the rights of marginalized communities and our in-depth knowledge of the local law enforcement landscape. Thank you for considering CAIR-Minnesota's request to join the brief as an *amicus*.

Minnesota Justice Coalition (“MJC”) is a nonprofit organization founded in 2020 to carry the voices of marginalized communities into the legislature and Congress. MJC writes and analyzes potential policies and legislation. MJC also provides training on advocacy through advancing legislation and policy. Based on MJC’s connection with the communities most impacted by police violence and efforts to champion their voice in the spaces where it is difficult to be heard, MJC can provide the Court with an important perspective regarding the settlement agreement. MJC respectfully requests that it be allowed to join CUAPB in addressing the court as *amicus*.

The Racial Justice Network (“RJN”) is a grassroots civil rights organization that was founded by attorney and activist, Nekima Levy Armstrong in 2018. RJN has been on the frontlines advocating for police reform, accountability and policy changes for MPD to address rampant police abuse and brutality. MJC respectfully requests that it be allowed to join CUAPB in addressing the court as *amicus*.

The Twin Cities Coalition for Justice for Jamar (“TCC4J”) was formed after the murder of Jamar Clark by the Minneapolis Police Department on the night of November 15, 2015. After the Fourth Precinct occupation, there was a recognized need by local activists and community members to continue the work and gather people around the fight against police crimes. TCC4J

represents multi-national working-class people in the community working to end police violence. TCC4J respectfully requests that it be allowed to join CUAPB in addressing the court as *amicus*.

Date: June 22, 2023

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