UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FELICIA ANDERSON,	)	
	)	
Plaintiff,	)	Civil Action No.
	)	11-CV-3398-SCJ
vs.	)	
	)	
CITY OF ATLANTA, at al.,	)	
	)	
Defendants.	)	

PLAINTIFF'S MOTION FOR CONTEMPT SANCTIONS AGAINST DEFENDANT CITY OF ATLANTA (WITH BRIEF IN SUPPORT)

This is a motion for civil contempt sanctions against the City of Atlanta. Plaintiff, Felicia Anderson, brought this case against the City and one of its police officers alleging, among other things, that she was falsely arrested for photographing police activity that occurred in public and that this arrest was conducted pursuant to an unlawful policy and practice of the Atlanta Police Department ("APD").

The parties ultimately reached a settlement on Ms. Anderson's claims that included a Consent Order, entered by this Court, requiring the City to: (A) add specific language to the Atlanta Police Department's Standard Operating Procedure ("SOP") prohibiting officers from deleting or destroying recordings of police activity; (B) upgrade the penalty for officers who interfere with the public's

right to record, or who delete or destroy these recordings, to a dismissal category offense; and (C) train officers every two years regarding these new changes to the SOP.

The court-ordered language prohibiting officers from deleting or destroying recordings was never added to the Atlanta Police Department SOP, and the required training regarding these revisions – ones that the City has yet to implement – has never been conducted.

I. The Terms of the Court Order

The Order entered in this case required the City of Atlanta to "permanently … implement" specific revisions to the APD SOP and "to conduct mandatory in-person training of all Atlanta police officers every two years regarding these SOP revisions." (D.E. 16 at 1.)

The portion of the Order that sets out the specific language the City was required to add to the Atlanta Police Department SOP states, in full:

> General Conduct (APD.SOP.2011)
>
> Section 4.4.1 ("Interference with Citizen's Right to Record") ***shall be amended*** to read as follows:
>
> 1. All employees shall be prohibited from interfering with a citizen's right to record police activity by photographic, video, or audio means. This prohibition is in effect only as long as the recording by the citizen does not physically interfere with the performance of an officer's duties.

> 2. Employees shall not intentionally delete or destroy the original or sole copy any photograph, audio, or video recording of police activity created by a member of the public.
>
> 3. Employees shall not intentionally delete or destroy the original or sole copy of any photograph, audio, or video recording relating to any use of force described under the "Reporting Requirements" section of APD SOP 3010 ("Use of Force")
>
> Disciplinary Process (APD.SOP.2020)
>
> Section 4.3.5(3) shall be revised to designate violation of the above-referenced rule regarding "Interference with Citizen's Right to Record" as a Category D (Dismissal) offense.

(D.E. 16 at 3 (emphasis added).)

II. The City has Failed to Comply with the Order

More than two years later, the City still hasn't complied with the simple, straightforward obligations imposed upon it by this Court. The language of Section 4.4.1 of APD.SOP.2011 is identical today to what it was when the Court ordered that it be revised. (True and correct copies of old (i.e., the one in effect before this Court entered its order) and current versions of the SOP are attached.)[1]

In addition, the City still has not conducted the training that this Court ordered it to conduct "regarding [the SOP] revisions" (D.E. 16 at 1); how could it, when the City hasn't even made the required SOP revisions that are supposed to

[1] The current version of Section 4.4.1 of APD.SOP.2011 was supplied to Plaintiff's counsel by the City in December of last year as a part of a series of communications between counsel and the City concerning the City's noncompliance with the Court's order. (*See* Email from Karen Gilpin Thomas to Dan Grossman, dated Dec. 10, 2014, attached hereto.) The nature and substance of these communications are detailed below.

serve as the basis for this training? Simply put, the City has failed to comply with this Court's order.

III. Harm Resulting from the City's Non-Compliance

The City's failures have resulted in actual harm, some of it very recent. In November 2014, several reporters covering the Ferguson demonstrations in downtown Atlanta had their cameras taken away from them by APD officers as these individuals attempted to film police activity. One of them was Tyson Paul, a photojournalist for 11Alive News, whose arrest by police officers during his coverage of the protests has been the subject of numerous news stories.[2] Another was John Ruch, a reporter for *Creative Loafing*. As described in a declaration submitted by Mr. Ruch as part of this motion, APD officers deliberately stopped Mr. Ruch from taking photos, grabbed his camera, and then arrested him, even as he and his editor told the officers repeatedly that Mr. Ruch was a reporter. (Decl. of John Ruch ¶¶ 3-6, attached hereto.) These are but a few examples that have

[2] *See, e.g.*, Jim Burress, *Does the Arrest of a Journalist During Atlanta's Ferguson Rally Point to Bigger Problems?*, WABE 90.1 FM, Dec. 8, 2014, http://wabe.org/post/does-arrest-journalist-during-atlantas-ferguson-rally-point-bigger-problems;
Rebecca Lindstrom, *11Alive Photographer Arrested While Covering Protests*, 11Alive.com, Nov. 26, 2014, http://www.11alive.com/story/news/local/2014/11/26/protest-ferguson-atlanta-media-arrest/19557525/. In the case of the WABE story, the City had supposedly provided the reporter for that story with the materials used by APD to train its officers on the public's right to record police activity, but, as the reporter correctly notes, the material – a PowerPoint presentation that Plaintiff has attached to this motion – "is ripe with blank slides, black squares, and embedded video that's not embedded."

come to light of the harm resulting from the City's complete failure to abide by this Court's order.[3]

III. The Need for Sanctions and the Legal Standards Regarding Civil Contempt

It is well-established that "[c]ourts have inherent power to enforce compliance with their lawful orders through civil contempt." *Citronelle-Mobile Gathering, Inc. v. Watkins*, 943, F.2d 1297, 1301 (11th Cir. 1991) (citing *Shillitani v. United States*, 384 U.S. 364, 370 (1966)). Once a plaintiff shows through clear and convincing evidence that the defendant has failed to comply with the Court's order, *id.*, then this Court should "enter[] an order requiring the defendant to show cause why he should not be held in contempt and conduct[] a hearing on the matter", *Mercer v. Mitchell*, 908 F.2d 763, 768 (11th Cir. 1990) (citation omitted). The only defense available in a contempt action requires proof that the defendant "either … did not violate the court order or that he was excused from complying." *Id.* (citation omitted). *See also Howard Johnson Co., Inc. v. Khiman*, 892 F.2d 1512, 1516 (11th Cir. 1990) ("[T]he focus of the court's inquiry in civil contempt proceedings is not on the subjective beliefs or intent of the alleged contemnors in

[3] Attached to this motion are sworn statements from other individuals who, following the Court's order in this case, have been arrested for or prevented from documenting police activity in public by APD officers, or have been harassed or accosted by APD officers for doing so. (*See* Decl. of Caroline Croland; Decl. of Marlon Kautz.)

complying with the order, but whether in fact their conduct complied with the order at issue") (citation omitted).

As demonstrated above, the City has blatantly violated the Court's order. The City, moreover, cannot argue that there are "changed circumstances [that] would make strict enforcement of the order unjust," *Mercer*, 908 F.2d at 768, because there are none. The City has had more than two years to implement the changes ordered by this Court, and did nothing.

If anything, the need for these policy revisions is as urgent as ever. With each passing day, the public has at its disposal more and more ways to film, photograph, and record public events, including encounters that take place between the public and the police.[4] Almost weekly, there are news reports of police misconduct in which the truth was revealed only because the misdeed was captured on video. Indeed, several such stories have emerged in the past few days alone.[5]

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[4] "Technology has put the ability to gather and disseminate newsworthy information literally in the hands of anyone who has a cell phone." *Crawford v. Geiger*, 996 F. Supp. 2d 603, 614 (N.D. Ohio 2014).

[5] James Queally, *Video Seems to Show Man Fleeing as Police in Washington State Shoot Him*, L.A. Times, Feb. 11, 2015, http://www.latimes.com/nation/nationnow/la-na-nn-washington-police-shoot-man-20150211-story.html; Matt Pearce, *After Video Surfaces, Grand Jury Charges 2 Philadelphia Policemen in Beating*, L.A. Times, Feb. 5, 2015, http://www.latimes.com/nation/la-na-philadelphia-police-charged-20150205-story.html; Ben Candea, *Alabama Police Officer Arrested, Accused of Injuring Indian Man in Dashcam Video*, ABC News, Feb. 13, 2015, http://abcnews.go.com/US/alabama-police-officer-arrested-accused-injuring-indian-man/story?id=28936001; *Assault Charges Dropped For Fruit Vendor After Video Reveals Cop Lied*, Gothamist, Feb. 14, 2015, http://gothamist.com/2015/02/14/assault_charges_dropped_for_fruit_v.php.

It is not just the public's right to record that requires attention, however, but what happens to these recordings when officers come into possession of them. Recordings are useless if they are deleted or destroyed so it is imperative that police officers be required to preserve any video and audio from these recordings, and severely disciplined for deleting them. That is exactly the objective of the Order in this case. Yet the court-ordered SOP revisions prohibiting police officers from deleting or destroying video evidence were never implemented by the City.

In addition, revisions to an SOP are meaningless if officers are not told about and taught how to comply with the new rules, which is why the Order also required that officers be trained about these changes. But they never were. And still have not been.[6]

Sanctions are appropriate in this situation to force the City into compliance. *Matter of Trinity Industries, Inc.*, 876 F.2d 1485, 1493 (11th Cir. 1989) ("Sanctions may be appropriate to coerce the contemnor to comply with the court's order") (citing *United States v. United Mine Workers*, 330 U.S. 258, 303 (1947)). Such sanctions may take the form of, among other things: "a coercive daily fine … attorneys' fees and expenses … and coercive incarceration." *Watkins*, 943 F.2d at

[6] As explained in more detail below, the remedial "training" conducted by the City after Plaintiffs' counsel brought this matter to the City's attention utterly fails to comply with the Order. Among other things, the City "trained" its officers on the ***old, unrevised*** SOP. Officers were not trained about the new rules prohibiting deletion or destruction of recordings, nor were they trained that the penalty for interfering, deleting, or destroying recordings had been upgraded to dismissal.

1304 (citations omitted). The Eleventh Circuit has emphasized that district courts have "wide discretion in fashioning an equitable remedy for civil contempt." *McGregor v. Chierico*, 206 F.3d 1378, 1385 (11th Cir. 2000) (citation omitted).

At a minimum, the City's contumacious behavior here calls for the reimbursement of the attorneys' fees and expenses incurred by Plaintiff in bringing this contempt action, and perhaps the imposition of a coercive daily fine. To be effective, the coercive fine imposed by the Court against the City should be large enough so that it would compel a noncompliant defendant of similar financial resources to comply with the Court's order. *See, e.g.*, *Matter of Trinity Industries, Inc.*, 876 F.2d at1494 (finding as "entirely reasonable" the imposition of a coercive fine of $10,000 per day against a noncompliant defendant that had "net sales of $434,326.00 and net assets of $139,989.00" in a year). The City of Atlanta is a major metropolitan city whose police force alone had an operating budget in 2013 of $159,942,916.[7] If the Eleventh Circuit found a coercive fine of $10,000 per day "entirely reasonable" for a noncompliant defendant that had a fraction of the financial resources possessed by the City, it stands to reason that for any coercive

[7] *See* Page 59 of City of Atlanta's Adopted Budget for FY 2015, *available at* http://www.atlantaga.gov/modules/showdocument.aspx?documentid=16263.

fine to be effective in this case, it must be substantially greater than the fine approved by the Eleventh Circuit in *Trinity Industries*.[8]

Fines and attorneys' fees are not enough, however. The City had more than two years to abide by the Court's order; instead, it did nothing. Before initiating this contempt proceeding Plaintiff's counsel reached out to the City to explore the City's noncompliant behavior. In doing so, counsel proposed to the City a simple, straightforward, and specific plan in which Plaintiff's attorneys would "work together [with the City] to effect full compliance" with the Court's order. (Letter from Dan Grossman to Cathy Hampton, dated Dec. 12, 2014, attached hereto.) But the City never responded to this proposal. Instead of working with Plaintiffs' counsel to implement compliance with the Order, the City embarked on a belated, superficial, and wholly non-compliant attempt to avoid sanctions. Thus, as Plaintiff's counsel waited for the City to respond to their proposal, the City, instead, used that time to "train" its officers in apparent accordance with the Court's order. But it did so, notably, without first having even revised its policies and procedures on which any such training was required to be based

Nor does the substance of this "training" pass muster under the law. It is not training when all the City does is distribute or read aloud the language of SOPs to officers at roll call, but most of all it is not training within the meaning of the

[8] Such a fine would be "paid into the court registry, not to the complainant." *See In re Chase & Sanborn Corp.*, 872 F.2d 397, 410 (11th Cir. 1989).

Court's order ("in-person training of all APD officers every two years ***regarding these SOP revisions***", D.E. 16 at 1 (emphasis added)), when the SOPs that were read or distributed are not the SOPs revised per the Court's order, because the SOPs were never revised in the first place. And it is not "training … regarding these SOP revisions" when the City apparently made no effort at all to mention one of the most important revisions, which upgraded the penalty for violating the revised SOPs to a dismissal-level offense. The purpose of upgrading the penalty was prophylactic; it was believed that if officers knew they would be dismissed for unlawfully interfering with a citizen's right to record, they would be less likely to do so. But that prophylactic can only be effective if officers know that the new, revised penalty is dismissal, and the City made no effort to train officers about this crucial, Court-ordered change.[9]

[9] Information pertaining to the City's rushed attempt to train its officers under the auspices of this Court's order came to light in a batch of documents the City delivered to Plaintiff's counsel in lieu of responding to counsel's substantive proposal to bring the City into compliance. (*See* Letters from Karen Gilpin Thomas, Deputy City Attorney to Dan Grossman, dated Dec. 19, 2014 and Jan. 15, 2015, collectively attached hereto.) These documents were supposed to include, among other things, information about the course materials and lesson plans used by APD for its court-mandated training. (Letter from Karen Gilpin Thomas to Dan Grossman, dated Jan. 15, 2015, *supra*.) Instead, they consist almost exclusively of sign-in sheets for roll calls conducted during the month of December 2014, when Plaintiff's counsel first voiced its concerns to the City about its noncompliance. There are a few exceptions to this, the notable ones being an email dated December 8, 2014, that was sent to all APD senior officers directing them to "read" certain SOPS at roll call as part of a "mandatory roll call training", and excerpts of what appears to be the SOPs that were read at some of these roll calls, none of which contain the court-ordered revisions to Section 4.4.1 of APD.SOP.2011. Plaintiff has incorporated as part of this motion all of these "training" documents. Because of the large number of these documents, they are being uploaded in five separate attachments, and have all been Bates-stamped with the legend "ANDERSON-[page number]" in the lower right-hand corner of each page. The December 8th

Such behavior by the City falls well short of compliance with the Court's order, especially at such a late stage in the proceedings. *Mercer*, 908 F.2d at 769 n. 10. As the Eleventh Circuit has observed, "a party [cannot] flout or willfully … disobey a court order and then [attempt to] comply[] with the order before the contempt proceeding begins." *Id.* In such a situation:

> [T]he court may conclude that, even though the defendant is in technical compliance at the time of the proceeding, the defendant's prior conduct indicates that he will not continue to comply with the court's [order so that] it may be appropriate to hold the defendant in civil contempt and sanction him until he satisfies the court that he will indeed obey the [court's order].

Id.[10]

For all these reasons, this Court should, over and above fees, costs and a daily fine, order the City, for a three-year period, to:

(1) Provide a semi-annual (i.e., every six months) report documenting the City's compliance with the Court's order, including but not limited to, information about: (a) any and all revisions and modifications to APD policies and procedures under consideration by the City whose adoption would potentially bring the City out of compliance with the Court's order;

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email and the SOP excerpts discussed above can be found on pages 146, 151, 288, 331, 344 and 351 of this attachment.

[10] Plaintiff's counsel communicated by letter with the City as recently as January 27, 2015, asking the City to provide whatever additional information it might have in its possession pertaining to the City's compliance with this Court's order. (Letter from Dan Grossman to Karen Gilpin Thomas, dated Jan. 27, 2015, attached hereto.) As of this date, counsel has received no response from the City to this communication, either informing counsel that more information is forthcoming or supplying counsel with the information itself.

(b) any and all complaints that have been made against APD officers pertaining to alleged violations of the polices and procedures at issue in this case, as revised pursuant to the Court's order; (c) any and all disciplinary actions taken by the City against any APD officers in accordance with the polices and procedures at issue in this case, as revised pursuant to the Court's order;

(2) Notify Plaintiff's counsel no less than two weeks in advance of any "mandatory in-person training" the City will conduct to comply with the Court's order;

(3) Provide Plaintiff's counsel and their agents access to attend and record, by video or some other means, these training sessions;

(4) Give Plaintiff's counsel full access to the training materials created, maintained and used by the City for the purpose conducting its mandatory in-person training as ordered by this Court;

(5) Compensate Plaintiff's counsel for the time and effort they will expend in ensuring compliance with the Court's order, including, but not limited to, counsel's involvement in the tasks described above;

* * * *

The right of the general public to film, photograph and otherwise record the conduct of police officers is an important one, protected by the United States

Constitution. *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (The general public has "a First Amendment right … to photograph or videotape police conduct") (collecting appellate and district court decisions upholding this principle); *see also Glik v. Cunniffe*, 655 F.3d 78, 82-83 (1st Cir. 2001). But more than that, it is a right whose exercise has been proven to deter the abuse of police power and lead to better policing. *Glik*, 655 F.3d at 82-83 ("Ensuring the public's right to gather information about their officials not only aids in the uncovering of abuses, but also may have a salutary effect on the functioning of government more generally").[11] Real-life examples that depict the power of photography and video to serve as checks on executive authority are legion; from the Associated Press photo of the police dog lunging at a young civil rights activist in Birmingham, Alabama circa 1963, to the video, captured by a civilian, of the LAPD's full-on assault of Rodney King, to the now-infamous cell phone video in which Eric Garner is shown gasping for air while being subjected to an unlawful chokehold by an NYPD officer, ultimately killing him. This is the reason why Plaintiff and her attorneys fought hard to obtain a court order mandating that the City change its SOPs and train its officers on these new SOPs: to make absolutely clear to the City's police force that they must submit to the scrutiny of the public eye even if it

[11] *See generally* Geoffrey J. Derrick, *Qualified Immunity and the First Amendment Right to Record Police*, 22 B.U. Pub. Int. L.J. 243 (Summer 2013), *cited in Crawford*, 996 F. Supp. 2d at 614 nn. 6-7; Kevin D. Williamson, *Against Secret Police: The Presumption Should be in Favor of Transparency*, National Review, Dec. 31, 2014, at 16-18, article attached hereto.

is through the lens of a camera. Instead, the City has chosen to renege on its promises to the Plaintiff and to flout the authority of this Court: by and large the old policies are still in place and no training has been conducted. The time has long passed for the City to demonstrate its compliance. Contempt sanctions are in order to force the City to do what it was ordered to do more than two years ago.

Respectfully submitted this 17th day of February, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on February 17, 2015, I electronically filed the attached with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorney of record:

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