

**IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF COLORADO**

Case No.:

FRATERNAL ORDER OF POLICE LODGE 27
MICHAEL JACKSON
MICHAEL BRITTON
SONYA LEYBA
ROBERT PABLO
BRET GAREGNANI

Plaintiffs,

v.

THE CITY AND COUNTY OF DENVER, a Colorado municipal corporation;
CAREER SERVICE AUTHORITY BOARD of the City and County of Denver

Defendants.

COMPLAINT AND JURY DEMAND

Plaintiff, Fraternal Order of Police Lodge 27 (“Plaintiff” or “FOP Lodge 27”), by and through its legal counsel, Elkus & Sisson, P.C., hereby submits his Complaint and Jury Demand.

I. PARTIES AND VENUE

1. The FOP is a non-profit organization that is head quartered at 8400 Alcott Street, Westminster, Colorado.

2. Michael Jackson is an individual that resides within the State of Colorado.

3. Michael Britton is an individual that resides within the State of Colorado.

4. Sonya Lebya is an individual that resides within the State of Colorado.

5. Robert Pablo is an individual that resides within the State of Colorado.

6. Bret Garegnani is an individual that resides within the State of Colorado.

7. The Defendant, The City and County of Denver (hereinafter referred to as “Denver”) is a municipal corporation with administrative offices in the City and County of Denver, State of Colorado.

8. The Defendant, Career Service Authority Board of the City and County of Denver, is an agency of the City and County of Denver established and existing under provisions of § 9.1.1 of the Charter of the City and County of Denver, and pursuant to the Charter, has final decision making authority as to issues within its jurisdiction involving employment matters, including discipline, of Career Service employees, including those within the Denver Sheriff Department.

II. JURISDICTION AND VENUE

9. This action arises under the Constitution and laws of the United States and 42 U.S.C. §1983. Jurisdiction is conferred on this Court pursuant to 28 U.S.C. §§ 1331 and 1343. Jurisdiction supporting Plaintiff’s claim for attorney’s fees is conferred by 42 U.S.C. § 1988.

10. Venue in the United States District Court for the District of Colorado is proper in that the action complained of took place in the State of Colorado, City and County of Denver, and all the parties, upon information and belief, are residents of the state.

III. GENERAL ALLEGATIONS

a. Career Service Rule 20 giving rise to First Amendment Violation

11. The Fraternal Order of Police is the world’s largest organization of sworn law enforcement officers with more than 2,500 local lodges and more than 325,000 members nationally.

12. FOP Lodge 27 is the Fraternal Order of Police local lodge for the Denver Sheriff Department.

13. FOP Lodge 27 has over 700 members in its organization.

14. FOP Lodge 27 is the bargaining agent that negotiates the Collective Bargaining Agreement between the City and County of Denver and the Denver Sheriff Department.

15. FOP Lodge 27 has been the bargaining agent since January, 1996.

16. Individual members for FOP Lodge 27 pay union dues to FOP Lodge 27. Part of the union dues goes towards legal defense coverage. Legal defense, through the Fraternal Order of Police, provides and pays legal fees for a FOP Lodge 27 union member that is involved in a duty related administrative incident.

17. Denver Sheriff Deputies are Career Service Employees with the City and County of Denver.

18. Should a Denver Sheriff Deputy receive disciplinary action, which may include suspension, demotion or termination, the Sheriff Deputy may appeal the disciplinary action to the Career Service Hearing Office.

19. Under Career Service Rule 19, should a Sheriff Deputy appeal his/her disciplinary action, the Sheriff Deputy has an evidentiary hearing before a Career Service Hearing Officer. In an appeal before the Career Service Hearing Office, the Sheriff Deputy has the opportunity to call witnesses, cross-examine witnesses, put forth evidence and make argument concerning the merit(s) of the disciplinary action imposed.

20. Prior to October 19, 2017, and pursuant to Career Service Rule 19, the Career Service Hearing Office reviewed all Career Service Employees' disciplinary appeals *de novo*.

When reviewing a disciplinary appeal *de novo*, the department or agency that issued the discipline had the burden of proof by a preponderance of the evidence to establish that the employee engaged in the misconduct and that the discipline imposed was within a reasonable range of alternatives.

21. On October 20, 2017, the Career Service Board revised Career Service Rule 19. The revised Career Service Rule 19 changed the burden of proof for Denver Sheriff Deputies that appealed their disciplinary actions to the Career Service Hearing Office. The revised Career Service Rule 19 now places the burden of proof upon Denver Sheriff Department officers, where all other Career Service Employees are operating under the prior Rule 19 which still has the burden of proof on the department or agency that imposed discipline.

22. The October 20, 2017 revision to Career Service Rule 19 eliminated *de novo* review for all (and only) Denver Sheriff Department officers. Career Service Rule 19 was replaced with Career Service Rule 20. Under Career Service Rule 20, disciplinary appeals brought to the Career Service Hearing Office by a Denver Sheriff Department officer is not subject to *de novo* review hearings. Instead, a Denver Sheriff Department officer that files an appeal to the Career Service Hearing Office bears the ultimate burden of proof in disciplinary appeals to show that the decision for the discipline was clearly erroneous.

23. With the revision of Rule 19 and the addition of Career Service Rule 20, all other Career Service Employees do not fall under Career Service Rule 20 and thereby those Career Service Employees do not bear the ultimate burden of proof in disciplinary appeals to show that the decision for the discipline was clearly erroneous. To the contrary, all other Career Service Employees still receive the benefit that the department or agency has the burden of proving that

the employee engaged in the misconduct and that the discipline imposed was within a reasonable range of alternatives.

24. On October 19, 2017, the Career Service Board had a public meeting to address the revisions to Career Service Rule 19. During the public meeting Mr. Robert Nespor, Assistant City Attorney for the City of Denver, explained why Rule 19 needed to be revised. Where there was a lengthy explanation by Mr. Nespor for the requested Rule change, the essence for the Rule change was that the City and County of Denver wanted consistency for all employees in the Department of Public Safety, which include the Sheriff Department, Fire Department and Police Department.

25. Upon information and belief, Mr. Nespor's explanation for the Rule change, which this Complaint shall address in detail herein, was pre-textual as the real reason for seeking to change Rule 20 is that the Fraternal Order of Police – which is a fraternal organization – was the entity that was funding the appeals in fighting the disciplinary actions which were being imposed by the City and County of Denver.

26. On or about October 25, 2017, FOP Lodge 27 made a Colorado Opens Record Request (“CORA”) to the Career Service Hearing Office. The CORA request specifically sought information regarding the names of all Career Service Employees that submitted Career Service Hearing Office appeals from calendar year 2015 through October 25, 2017.

27. On or about October 26, 2017, the Career Service Hearing Office provided FOP Lodge 27 with the requested information.

28. A review of the CORA information revealed that, of the approximately 73 appeals filed to the Career Service Hearing office that involved Denver Sheriff Department officers,

approximately 71 of those cases were individuals that were all members of the Fraternal Order of Police.

29. Notably, the public service entities under the Department of Public Safety (Sheriff, Fire and Police) are all union organizations that collectively bargain with the City and County of Denver. Upon information and belief, these three (3) entities are the only entities that collectively bargain with the City and County of Denver that have had the burden of proof changed under their respective appeal procedures either through the Civil Service Commission or Career Service Authority. All other employees that are not affiliated with a union organization that collectively bargains with the City and County of Denver are not subjected to proving that the discipline imposed is clearly erroneous.

30. Under the City and County of Denver's Charter it states: "[t]he Career Service personnel system shall provide for equal employment opportunity without regard to race, color, creed, national origin, gender, sexual orientation, age, disability, or *political affiliation*...." [Emphasis added]

b. FOP Lodge 27 membership dues

31. At all relevant times, Plaintiffs Jackson, Britton, Leyba, Pablo and Garegnani are all members of FOP Lodge 27.

32. Currently, the Mayor for the City and County of Denver appoints the position of Sheriff for Denver Sheriff Department.

33. FOP Lodge 27 has raised concern that because the Sheriff is an appointed position that the Sheriff will be committed to the political needs and wants of the Mayor as opposed to the organizational needs of Deputy Sheriffs in the Denver Sheriff Department.

34. FOP Lodge 27 has openly stated that management of the Denver Sheriff Department would improve if the position of Sheriff was subject to an open election as opposed to Mayoral appointment.

35. FOP Lodge 27 has openly stated that a Sheriff that is elected by the voters would be accountable to the public for the management of the Sheriff Department as opposed to being held accountable to only the Mayor.

36. In the Spring of 2018, FOP Lodge 27 sought to increase union membership dues to assist in a grassroots effort to place a referendum on the ballot to elect a Sheriff for the City and County of Denver.

37. Based on the foregoing, the Executive Board for FOP Lodge 27 had voted and agreed to increase the dues for FOP Lodge 27 members from \$79.37 per month to \$129.37 per month.

38. The increase of membership dues was only for a period of three (3) months.

39. The Executive Board advised the membership that if a member objects to supporting the “elect our sheriff” initiative that such members must state their objection in writing to the Executive Board. If the Executive Board receives the objection the Board would either discontinue that member’s contribution and/or refund said contribution to that member.

40. Out of the 700 plus members of FOP Lodge 27, approximately 64 objected to increasing their union dues for the “elect our sheriff” initiative.

41. Based on the overwhelming majority of FOP Lodge 27 membership agreeing to increase their dues for the “elect our sheriff” initiative, FOP Lodge 27 contacted the City and

County of Denver to advise the City of the increase of union dues except for the objecting members.

42. FOP Lodge 27 contacted the City and County of Denver regarding the union dues increase because the City is required take union dues out of an employee's paycheck on a monthly basis in accordance with the Collective Bargaining Agreement.

43. Despite FOP Lodge 27 directing the City and County of Denver to take union dues out of Deputy Sheriff Department employees' paychecks, the City and County of Denver refused.

44. There is no legal justification for the City and County of Denver to refuse FOP Lodge 27's request to take union dues out of non-objecting FOP Lodge 27 members' paychecks.

45. Plaintiffs Jackson, Britton, Leyba, Pablo and Garegnani are FOP Lodge 27 members that agreed to have their union dues increased to \$129.37 per month for the "elect our sheriff's initiative."

46. Plaintiffs Jackson, Britton, Leyba, Pablo and Garegnani did not object to FOP Lodge 27 contacting the City and County of Denver to withdraw from the Plaintiffs' paychecks the increased membership due amount of \$129.37 per month.

47. Plaintiffs Jackson, Britton, Leyba, Pablo and Garegnani wanted their union dues increased because of their full support of the "elect our sheriff" initiative.

48. By denying Plaintiffs Jackson, Britton, Leyba, Pablo and Garegnani to have their union dues increased for the "elect our sheriff initiative" the City and County of Denver unlawfully infringed upon and violated Plaintiffs' right to free speech and right to political affiliation.

FIRST CLAIM FOR RELIEF
42 U.S.C. § 1983 FIRST AMENDMENT VIOLATION
(FOP LODGE 27 vs ALL DEFENDANTS)

49. FOP Lodge 27 hereby incorporates by reference all averments in this Complaint.

50. FOP Lodge 27 is a fraternal organization that is the Collective Bargaining Agent for the Denver Sheriff Department.

51. At all times relevant, the Defendants were aware that FOP Lodge 27 is the Collective Bargaining Agent for the Denver Sheriff Department.

52. At all times relevant, the Defendants were aware that over a three (3) year period (from calendar years 2015 through, and including, 2017) there were approximately 73 Denver Sheriff Department appeals before the Career Service Hearing Office.

53. Of those 73 appeals, approximately 71 of those appeals were Denver Sheriff officers that were members of FOP Lodge 27.

54. Upon information and belief, the Defendants were aware that the Fraternal Order of Police provides legal defense funding for FOP Lodge 27 members that bring forth appeals before the Career Service Hearing Office.

55. At all relevant times, the Department of Public Safety consists of three (3) agencies: Denver Fire, Denver Police and Denver Sheriff.

56. The Defendants have treated the three (3) Department of Safety unions differently than all other City and County of Denver employees. Unlike all other City and County of Denver employees, the three (3) Department of Safety unions that collectively bargain with the City and County of Denver have the burden to prove that the discipline imposed by the City of Denver was clearly erroneous. Notably, non-union City of Denver employees (who do not collectively bargain

with the City and County of Denver) do not have to establish that the discipline imposed by the City of Denver was erroneous. To the contrary, when a non-union City of Denver employee is disciplined the department or agency issuing discipline has the burden of proving that the employee engaged in the misconduct and that the discipline imposed was within a reasonable range of alternatives.

57. The substantial or motivating factor in driving Defendants' decision to modify the Career Service Rules and implement Rule 20 for Denver Sheriff Deputies only was based on the union activities of the Fraternal Order of Police.

58. Defendants' actions caused FOP Lodge 27 to suffer injuries that would chill a person of ordinary firmness from continuing to engage in such constitutionally protected activity.

59. Defendants' acts were done under color of state law.

60. Defendants ratified and approved the creation of Career Service Rule 20.

61. Defendants were the final policymakers in ratifying and creating Career Service Rule 20.

62. Defendants engaged in the conduct described by this Complaint intentionally, knowingly, willfully, wantonly, maliciously, and in reckless disregard of FOP Lodge 27's federally protected constitutional rights.

63. Defendants' conduct proximately caused significant injuries, damages, and losses to FOP Lodge 27.

64. The actions of the Defendants violate the First Amendment to the United States Constitution and 42 U.S.C. § 1983.

SECOND CLAIM FOR RELIEF
42 U.S.C. § 1983 FIRST AMENDMENT VIOLATION
(PLAINTIFFS JACKSON, LEYBY, PABLO AND GAREGNANI vs CITY AND COUNTY
OF DENVER)

65. Plaintiffs hereby incorporates by reference all averments in this Complaint.

66. At all relevant times, Plaintiffs Jackson, Britton, Leyba, Pablo and Garegnani are all members of FOP Lodge 27.

67. In the Spring of 2018, FOP Lodge 27 sought to increase union due membership to assist in a grassroots effort to place a referendum on the ballot to elect a Sheriff for the City and County of Denver.

68. Based on the foregoing, the Executive Board for FOP Lodge 27 had voted and agreed to increase the dues for FOP Lodge 27 members from \$79.37 per month to \$129.37 per month.

69. The increase of membership dues was only for a period of three (3) months.

70. The Executive Board advised the membership that if a member objects to supporting the “elect our sheriff” initiative that such members must state their objection in writing to the Executive Board. If the Executive Board receives the objection the Board would either discontinue that member’s contribution and/or refund said contribution to that member.

71. Out of the 700 plus members of FOP Lodge 27, approximately 64 objected to increasing their union dues for the “elect our sheriff” initiative.

72. Based on the overwhelming majority of FOP Lodge 27 membership agreeing to increase their dues for the “elect our sheriff” initiative, FOP Lodge 27 contacted the City and County of Denver to advise the City of the increase of union dues.

73. FOP Lodge 27 contacted the City and County of Denver regarding the union due increase because the City is required to take union dues out of an employee's paycheck on a monthly basis in accordance with the Collective Bargaining Agreement.

74. Despite FOP Lodge 27 directing the City and County of Denver to take union dues out of Deputy Sheriff Department employees' paychecks, the City and County of Denver refused.

75. There is no legal justification for the City and County of Denver to refuse FOP Lodge 27's request to take union dues out of non-objecting FOP Lodge 27 members' paychecks.

76. Plaintiffs Jackson, Britton, Leyba, Pablo and Garegnani are FOP Lodge 27 members that agreed to have their union dues increased to \$129.37 per month for the "elect our sheriff" initiative.

77. Plaintiffs Jackson, Britton, Leyba, Pablo and Garegnani did not object to FOP Lodge 27 contacting the City and County of Denver to withdraw from the Plaintiffs' paychecks the increased membership due amount of \$129.37 per month.

78. Plaintiffs Jackson, Leyba, Pablo and Garegnani wanted their union dues increased because of their full support of the "elect our sheriff" initiative.

79. The substantial or motivating factor in driving the City and County of Denver to refuse to take the increase union dues out of the Plaintiffs' pay check was due to their affiliation with FOP Lodge 27.

80. The substantial or motivating factor in driving the City and County of Denver to refuse to take the increase union dues out of the Plaintiffs' pay check was due to FOP Lodge 27's efforts to get a referendum on the ballot to elect a Sheriff for the City and County of Denver as opposed to have the Denver Mayor appoint the Sheriff of the Denver Sheriff Department.

81. The actions of the City and County of Denver was to chill a person of ordinary firmness from continuing to engage in such constitutionally protected activity.

82. The City and County of Denver acts were done under color of state law.

83. The City and County of Denver has established an official policy or unofficial custom to inhibit and/or obstruct the efforts of a union that seeks to alter or change the policies of the City and County of Denver. As noted herein, the official policy or unofficial custom was to limit a City employees' rights to financially contribute to its' union in order to support the political efforts of FOP Lodge 27 to have the Sheriff be an elected position as opposed to allowing the Denver Mayor to appoint the Sheriff.

84. These official policies or unofficial customs were enacted and/or maintained by the City and County of Denver with deliberate indifference to the inevitable Constitutional injury that would be, and in the case of these individual Plaintiffs, was in fact, caused thereby.

85. The City and County of Denver engaged in the conduct described by this Complaint intentionally, knowingly, willfully, wantonly, maliciously, and in reckless disregard of these individual Plaintiffs' federally protected constitutional rights.

86. The City and County of Denver's conduct proximately caused significant injuries, damages, and losses to the individual Plaintiffs.

87. The actions of the City and County of Denver violates the First Amendment to the United States Constitution and 42 U.S.C. § 1983.

WHEREFORE, the Plaintiffs respectfully requests that this Court enter judgment in their favor and against the Defendants and grant:

(a) Appropriate declaratory and/or equitable relief;

- (b) Compensatory and consequential damages in an amount to be determined at trial;
- (c) All economic losses allowed by law;
- (d) Attorney's fees and the costs associated with this action;
- (e) Pre- and post-judgment interest at the lawful rate;
- (f) Any further relief that this court deems just and proper, and any other relief as allowed by law.

JURY DEMAND

PLAINTIFFS DEMANDS TRIAL BY JURY OF ALL CLAIMS AND ISSUES SO TRIABLE.

Respectfully submitted this 12th day of October, 2018.

ELKUS & SISSON, P.C.

/s/ Reid J. Elkus

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