

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2007

(Argued February 6, 2008

Decided August 11, 2008)

Docket No. 06-4764-cv

Bridgeport Guardians, Inc., Theophilus B. Meekins, Charles D. Smith,
Arthur Carter, Richard Herlihy, Thomas D. Flynn, David Daniels,
Raymond Sherwood, Carlos Medina, Joe Ann Simmons, James Sheffield,
Brenda Dixon, TNT Specialized Division,

Plaintiffs-Appellees,

William Bailey, Hispanic Society Bridgeport
Police Department, Inc.,

Intervenors-Plaintiffs-Appellees,

William H. Clendenen, Jr.,

Special Master,

v.

Arthur J. Delmonte, John Devine, John C. O'Leary, Frank Delaquila,
Larry Harris, Jr., Robert Bruno, James McCarthy, Glenn Prentice,
Captain William Giblin, Richard Cummings, Sgt. David J. Hoyt, All
Defendants, AFSCME Council 15, Local 1159, AFL-CIO, George Zwally,
Bridgeport Police Union AFSCME Council 15, AFL-CIO.

Defendants,

City of Bridgeport and Bridgeport Police Union,

Defendants-Appellants,

John Donovan, Thomas Scanlon, Robert Mangano, James Honis, James
Halpin, William Chapman, Aida Remele, Albert Fedorek,
Gregory Iamartino, Judd Lezotte, Thomas Sweeney,

Movants,

Michael Novia, USA, Board of Police Commissioners, Alfonso Losada,
Rachelle Berarducci, Ramon Larruciente, Eugene O'Neill, Kevin Boyle,

Interested-Party.

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Before:

CARDAMONE, PARKER, and HALL,
Circuit Judges.

The City of Bridgeport appeals from an order entered August 14, 2006 in the United States District Court for the District of Connecticut (Arterton, J.) affirming the referral to a special master of the discrimination complaint brought by a civilian employee of the Bridgeport Police Department, and denying the City's motion to reconsider.

Appeal dismissed for lack of appellate jurisdiction.

AIMEE J. WOOD, Bridgeport, Connecticut (William J. Wenzel, Pullman & Comley, LLC, Bridgeport, Connecticut, of counsel),
for Defendants-Appellants.

SEAN K. McELLIGOTT, Bridgeport, Connecticut (Antonio Ponvert III, Koskoff, Koskoff & Bieder, P.C., Bridgeport, Connecticut, of counsel), for Plaintiffs-Appellees.

1 CARDAMONE, Circuit Judge:

2 This is an appeal from an order of the United States
3 District Court for the District of Connecticut handed down by
4 Judge Janet Bond Arterton and entered on August 14, 2006. The
5 order affirmed the district court's prior referral to a special
6 master of the City of Bridgeport's objection to the same special
7 master's investigating a claim of racial discrimination made by
8 an employee of the Bridgeport Police Department.

9 Thus, the setting for the present appeal is the City of
10 Bridgeport, Connecticut, and in particular, its police
11 department. Bridgeport is Connecticut's largest city, with a
12 population of almost 140,000 people. Its advantageous location
13 on Long Island Sound attracted early settlers and by the mid-
14 nineteenth century the City had grown into a substantial
15 manufacturing center. During the 1900s, like many cities in the
16 Northeast, Bridgeport lost a portion of its manufacturing base,
17 and that left in its wake serious problems of unemployment and
18 crime. One of the hurdles Bridgeport has faced in adapting to
19 its changed circumstances is the fact that its police department
20 has engaged in racial discrimination against the Black and
21 Hispanic officers on its force.

22 Since 1972 Bridgeport has been bound by a series of federal
23 court orders designed to remedy this discrimination. A remedial
24 order was issued in 1983 by the United States District Court for
25 the District of Connecticut and remains in force today. That
26 order appointed the special master whose authority is the subject

1 of the present appeal. In this appeal, the City challenges,
2 first, the special master's authority to investigate the new
3 complaint of racial discrimination because it was brought by one
4 of the police department's civilian employees rather than a
5 police officer. And, second, the City questions the special
6 master's power to decide the scope of his own authority in the
7 first instance. We write to address the second question, and to
8 explain why our answer to that question deprives us of
9 jurisdiction to reach the merits of the City's appeal, to which
10 we now turn.

11 BACKGROUND

12 A. Initial Actions

13 The instant case had its genesis in 1978 when plaintiffs, an
14 organization of Black police officers known as the Bridgeport
15 Guardians, Inc., and three individual Black police officers, sued
16 the City of Bridgeport and its Police Commissioners in the United
17 States District Court for the District of Connecticut, alleging
18 racial discrimination and free speech violations within the
19 Bridgeport Police Department (Department). See Bridgeport
20 Guardians, Inc. v. Delmonte, 553 F. Supp. 601, 604 (D. Conn.
21 1982). The Department had already been the target of a number of
22 discrimination suits resulting in federal court orders going back
23 to 1972. See Bridgeport Guardians, Inc. v. Members of Bridgeport
24 Civil Serv. Comm'n, 354 F. Supp. 778, 782, 798-800 & n.16 (D.
25 Conn. 1973) (enjoining use of patrolman's examination found to
26 have adverse impact on Black and Puerto Rican candidates, and

1 imposing hiring and promotion quotas to remedy past
2 discrimination), aff'd in part and rev'd in part, 482 F.2d 1333
3 (2d Cir. 1973) (holding promotion quotas unwarranted but
4 affirming in all other respects), modified order aff'd, 497 F.2d
5 1113 (2d Cir. 1974); Bridgeport Guardians v. Bridgeport Police
6 Dep't, 431 F. Supp. 931, 941 (D. Conn. 1977) (rejecting challenge
7 to Department's detective examination, but noting that the
8 "distressing absence of minority group members from the
9 supervisory ranks of the [Department] should be a cause for
10 continuing concern by responsible officials").

11 While the previous suits had focused on the disparate impact
12 of the Department's hiring and promotion procedures, the
13 plaintiffs in the 1978 suit claimed the Department was
14 intentionally discriminating against Black and Hispanic police
15 officers, and then retaliating against those who complained about
16 the violation of their constitutional rights. See Delmonte, 553
17 F. Supp. at 607-18. The district court agreed, holding
18 defendants' actions violated Titles VI and VII of the Civil
19 Rights Act of 1964, 42 U.S.C. §§ 2000e et seq., and the First
20 Amendment of the U.S. Constitution. Delmonte, 553 F. Supp. at
21 607-18. It specifically found a pattern of intentional
22 discrimination in (1) the way the Department assigned police
23 officers to its internal divisions, geographic areas, and
24 individual partners, (2) the way the Department carried out
25 disciplinary procedures, and (3) the overall environment in which
26 police officers were forced to work. Id. It found Black police

1 officers were almost entirely excluded from assignments to the
2 Department's more prestigious divisions, and were effectively
3 segregated within the patrol division by being regularly paired
4 as partners with other minority officers. Id. at 607-10, 12-13.
5 Black and Hispanic officers in the patrol division were then
6 disproportionately assigned to high crime areas. Id. at 610-12.

7 In addition, the court found Black officers were very likely
8 to be disciplined or fired for conduct that was generally ignored
9 when committed by White police officers. Id. at 613-14.

10 Moreover, Black officers were frequently harassed and subjected
11 to racial slurs and disparaging remarks within the Department
12 that were not only tolerated, but also were engaged in by
13 supervisory personnel, which included the head of the Department.
14 Id. at 614-16. Among many examples of shocking harassment was a
15 displayed poster -- one that the court assumed was approved by
16 supervisory personnel -- in which a Black man, identified by a
17 racial epithet, was portrayed as a target to be shot at. Id. at
18 615.

19 B. 1983 Remedial Order of the District Court

20 To remedy these violations, the district court issued an
21 order in 1983, regulating various aspects of the Department's
22 procedures for appointments, assignments, and disciplinary
23 measures, and enjoining the defendants, as well as the
24 defendants' officers, agents, and employees, from engaging in
25 discrimination, harassment, or retaliation against Department

1 officers. See id. at 618-21. Among other things, the remedial
2 order appointed a "qualified, neutral Special Master" to

3 a) Review any and all disciplinary actions
4 instituted against any black officer who
5 claims such action is racially discriminatory
6 in purpose or effect; and to recommend an
7 appropriate adjustment in any such action
8 found to be racially discriminatory as to
9 initiation, severity of sanction or
10 otherwise.

11 b) Receive, investigate, and remedy all
12 complaints of discriminatory treatment,
13 racial harassment or slurs within the B.P.D.
14 and, in appropriate cases, to bring
15 disciplinary charges against those
16 responsible and/or those supervisors who
17 foster or permit such racial harassment to
18 occur in violation of departmental rules.

19 c) Review any disqualification of any black
20 officer seeking promotion which
21 disqualification is based on grounds of any
22 suspension, disciplinary action, or alleged
23 misconduct upon which such sanction was
24 premised occurring from 1978 to the date of
25 this Order.

26
27 Id. at 619-20. The order provides that the special master's
28 findings and recommendations may be appealed to the district
29 court. Id. at 620.

30 C. Special Master and City

31 Since his appointment, the special master has issued
32 numerous findings and recommendations in accordance with the
33 order. The district court in turn has recognized the special
34 master's broad powers to take all actions and measures necessary
35 or proper to implement the remedial order. Bridgeport Guardians
36 v. Delmonte, No. 05:78cv175 (D. Conn. May 14, 1999). It has also
37 held the Department in contempt at least three times. See
38 Bridgeport Guardians v. Delmonte, 371 F. Supp. 2d 115, 120 (D.

1 Conn. 2005). In its April 2005 contempt ruling, the district
2 court remarked on the Department's "long history of foot-dragging
3 and non-enforcement of its racial, ethnic and sexual slur and
4 harassment policies," which it thought defied logic. Id. at 117,
5 119-20.

6 The Bridgeport Police Department has now implemented a slur
7 and harassment policy, which states that "[i]n appropriate cases,
8 Police Department employees may file a complaint with [the]
9 Special Master." The policy has been approved by the district
10 court and there are other signs that the parties may be moving
11 closer to resolving their dispute. For now, however, the 1983
12 remedial order remains in effect, and the special master
13 continues to carry out his duties under it. See Bridgeport
14 Guardians v. Delmonte, 238 F.R.D. 123 (D. Conn. 2006) (denying
15 joint motion for modification of remedy order), reconsideration
16 denied, No. 05:78cv175, 2007 WL 108472, 2007 U.S. Dist. LEXIS
17 2029 (D. Conn. Jan. 10, 2007), appeal filed, No. 07-0960 (2d Cir.
18 Mar. 9, 2007).

19 D. Instant Complaint

20 It is against this background that one of the Department's
21 civilian employees -- an African-American female typist --
22 brought a new complaint of racial discrimination to the special
23 master's attention. Her complaint triggered the series of
24 decisions that led to the present appeal. When the special
25 master forwarded this new complaint to the parties and requested
26 a response, the City filed an objection with the district court.

1 It insisted the special master's mandate is limited to complaints
2 brought by police officers, and that he lacks authority to make
3 findings and recommendations on the complaints of civilian
4 employees.

5 On December 19, 2005 the district court entered an order
6 stating that the City's "objection to the investigation of the
7 complaint . . . is referred to the Special Master in light of the
8 Court's recent approval of the stipulated slur and harassment
9 policy." The City then moved for reconsideration, which the
10 district court denied in an order entered August 14, 2006. That
11 court ruled the case should remain with the special master for
12 him to determine in the first instance whether the complaint
13 falls within his purview under the remedial order and the slur
14 and harassment policy.

15 The City now challenges Judge Arterton's denial of its
16 motion for reconsideration. It argues that the complaint of a
17 civilian employee of the Police Department falls outside the
18 special master's authority and the special master lacks authority
19 under the 1983 remedial order to determine the scope of his own
20 authority in the first instance. Because the remedial order does
21 not supply such authority, the City maintains, the district
22 court's referral of the City's objection must be considered a
23 modification to that order and a new special master appointment
24 under Federal Rule of Civil Procedure 53. As such, the City
25 tells us, the referral should be overturned because the district
26 court did not comply with Rule 53. The Bridgeport Guardians aver

1 we lack jurisdiction because there is no appealable order before
2 us.

3 DISCUSSION

4 A. City's Contention of Modification Under § 1292

5 If the City were correct that the district court's referral
6 of its objection constituted a modification of the 1983 remedial
7 order, then arguably we might have jurisdiction to review that
8 decision as an interlocutory order under 28 U.S.C. § 1292(a)(1).
9 See Crumpton v. Bridgeport Educ. Ass'n, 993 F.2d 1023, 1027 (2d
10 Cir. 1993) (holding that "we . . . have jurisdiction to determine
11 whether the district court's order constituted an impermissible
12 modification of the consent decree"). But the modification
13 contention is premised on a fundamental misreading of the
14 remedial order and misunderstanding of the doctrine of
15 jurisdiction to determine jurisdiction.

16 The remedial order unquestionably gives the special master
17 authority to determine the scope of his own authority in the
18 first instance. It does this implicitly by directing him to
19 "[r]eview" disciplinary actions and disqualifications and to
20 "[r]eceive, investigate and remedy" complaints. To carry out
21 this mandate, the special master must necessarily determine which
22 disciplinary actions, disqualifications, and complaints fall
23 within his purview. If he could not do that, he would be in the
24 position of acting only on cases individually referred to him by
25 the district court or some other body created to determine his
26 authority. While such a process might well have been instituted,

1 it plainly was not established or contemplated by the remedial
2 order in this case.

3 Nor is the City correct that the special master's
4 determination of his own authority, in the first instance, would
5 usurp powers reserved solely to Article III judges. While the
6 doctrine of jurisdiction to determine jurisdiction is often
7 discussed in the context of Article III courts, see, e.g., Kuhali
8 v. Reno, 266 F.3d 93, 100-01 (2d Cir. 2001), no reason suggests
9 it cannot apply in some form to other bodies as well, even those
10 acting in an investigatory capacity. See, e.g., SEC v. Brigadoon
11 Scotch Distrib. Co., 480 F.2d 1047, 1052-53 (2d Cir. 1973) ("The
12 [SEC] must be free without undue interference or delay to conduct
13 an investigation which will adequately develop a factual basis
14 for a determination as to whether particular activities come
15 within the Commission's regulatory authority."); cf. Prosecutor
16 v. Tadic, Case No. IT-94-1-I, Decision on the Defence Motion for
17 Interlocutory Appeal on Jurisdiction, ¶ 18 (Oct. 2, 1995)
18 (concluding that international tribunals inherently possess
19 jurisdiction to determine their own jurisdiction in the absence
20 of an express agreement to the contrary); Nottebohm Case (Liech.
21 v. Guat.), 1953 I.C.J. 111, 119 (Nov. 18) (same).

22 This is not to say that the special master's jurisdiction
23 here is the same as an Article III court's power to declare law,
24 or that the special master's jurisdictional determination would
25 have the same res judicata effect as a federal court's. See,
26 e.g., United States v. United Mine Workers, 330 U.S. 258, 293-95

1 (1947) (holding that a party may be punished for disobeying a
2 court order even if the court was ultimately determined to lack
3 jurisdiction to issue the order); Chicot County Drainage Dist. v.
4 Baxter State Bank, 308 U.S. 371, 376-78 (1940) (holding that
5 courts' determinations of their own jurisdiction, "while open to
6 direct review, may not be assailed collaterally"). But we need
7 not assign those attributes of an Article III court's
8 jurisdiction to the special master in order to hold that, like
9 any person or body with limited authority, he acts only after
10 first deciding he has the authority to do so. The 1983 remedial
11 order unquestionably gives the special master this authority.

12 Without being able to argue that the remedial order has been
13 modified, the City's case for jurisdiction under 28 U.S.C.
14 § 1292(a)(1) collapses. Section 1292(a)(1) "functions only as a
15 narrowly tailored exception to the policy against piecemeal
16 appellate review," and in the absence of a motion "specifically
17 addressed to injunctive relief," it requires a showing that the
18 order (1) might have a serious, perhaps irreparable consequence;
19 and (2) can be effectually challenged only by immediate appeal.
20 Sahu v. Union Carbide Corp., 475 F.3d 465, 467 (2d Cir. 2007).

21 The City has not shown the district court's referral of the
22 complaint (much less the objection) to the special master will
23 have consequences that can be adequately challenged only by an
24 immediate appeal. There has been no determination with respect
25 to the special master's authority over civilian complaints.
26 Instead, the district court has simply asked the special master

1 to determine in the first instance whether this particular
2 complaint falls within his purview under the remedial order and
3 the stipulated slur and harassment policy. This Court cannot
4 review whether the special master may rule on the civilian
5 complaint at issue in this appeal until the special master has
6 made a determination, and the district court, in turn, has had an
7 opportunity to rule on that determination in an appealable order
8 that is then brought before us.

9 B. Reference By the District Court is not
10 A Final Decision Under § 1291
11

12 The only other conceivable argument for appellate
13 jurisdiction in the case at hand would be if either of the
14 district court's orders could be deemed a final decision within
15 the meaning of 28 U.S.C. § 1291. A final decision is one that
16 "ends the litigation on the merits and leaves nothing for the
17 court to do but execute the judgment." Coopers & Lybrand v.
18 Livesay, 437 U.S. 463, 467 (1978); Ibeto Petrochem. Indus. Ltd.
19 v. M/T Beffen, 475 F.3d 56, 61 (2d Cir. 2007). An order
20 referring a matter to a special master, however, is generally not
21 a final order appealable under 28 U.S.C. § 1291. See Grilli v.
22 Metro. Life Ins. Co., 78 F.3d 1533, 1538 (11th Cir. 1996)
23 (holding that "[a]n order referring a matter to a special master
24 is not a final order appealable under 28 U.S.C. § 1291 because it
25 does not terminate the appellant's claim"); Loral Corp. v.
26 McDonnell Douglas Corp., 558 F.2d 1130, 1131-32 (2d Cir. 1977)
27 (finding an order of reference to a magistrate as special master

1 for hearing and preparation of proposed findings not a final
2 judgment or order and therefore not appealable).

3 It is true that a different analysis may be required where a
4 final judgment has already been entered and an order is issued
5 during "a protracted remedial phase." United States v. Yonkers
6 Bd. of Educ., 946 F.2d 180, 183 (2d Cir. 1991). In such
7 circumstances, we have held that § 1291 must be given a
8 practical, not a technical construction. Id.; cf. Silverman v.
9 Tracar (In re Am. Preferred Prescription, Inc.), 255 F.3d 87, 93
10 (2d Cir. 2001) (applying this reasoning to hold appealable the
11 appointment of a trustee in bankruptcy proceedings after the
12 confirmation of a reorganization plan).

13 Nonetheless, even under a practical approach there is
14 nothing final about the orders at issue in this case, which
15 simply recognize the special master's inherent authority,
16 discussed above, to determine his own authority under the 1983
17 remedial order. Once a special master has been appointed in
18 circumstances like the ones we face, to treat the referral of
19 each complaint as final would have the undesirable effect of
20 turning the "protracted remedial phase" into an endless war of
21 attrition through appeal. We cannot hold that § 1291 encompasses
22 such an absurd outcome.

23 The district court has neither modified the scope of the
24 1983 remedial order nor conclusively determined any rights of the
25 parties involved. Consequently, we have before us neither an
26 interlocutory order under 28 U.S.C. § 1292(a)(1) nor a final

1 decision under 28 U.S.C. § 1291. Nor is there any other basis
2 for appellate jurisdiction present in this case. Having found we
3 lack jurisdiction to review the district court's actions, we must
4 dismiss the appeal.

5 CONCLUSION

6 Accordingly, for the foregoing reasons, the appeal is
7 dismissed for lack of appellate jurisdiction.