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March 30, 2011

Honorable Viktor V. Pohorelsky
United States Magistrate Judge
United States District Court, Eastern District of New York
225 Cadman Plaza East
Brooklyn, N.Y. 11201

Re: Luis Delgado v. City of New York, et al., Docket No.: 09 cv 2544 (BMC)(VVP)

Dear Magistrate Judge Pohorelsky:

The plaintiff is in receipt of Defendants' CITY; RAFAEL PINEIRO; CHARLES V. CAMPISI and ROBERT J. GIANNELLI'S motion seeking a protective order precluding the taking of their depositions as well as limiting the scope of the Rule 30(b)(6) witness. Plaintiff has been consistent throughout this litigation, the scope of the Rule 30(b)(6) inquiry continues from June 10, 2004 until this day. For the reasons set forth below, this motion must be denied.

Pursuant to Rule 26(b) of the Federal Rules of Civil Procedure, a party "may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." Fed.R.Civ.P. 26(b)(1). Any party to a civil action ordinarily will be able to take the deposition of any person, including a party, at least in the absence of a protective order entered pursuant to Fed. R.Civ.P. 26(c).[1] However, Rule 26(c) states that the Court "may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense." Fed.R.Civ.P. 26(c). "[T]he burden is upon the party seeking non-disclosure or a protective order to show good cause." *See* Dove v. Atlantic Capital Corp., 963 F.2d 15, 19 (2d Cir.1992) (citations omitted). "Under Rule 26(c), the trial court has 'broad discretion ... to decide when a protective order is appropriate and what degree of protection is required.' " *See* Duling v. Gristede's Operating Corp., 266 F.R.D. 66, 72 (S.D.N.Y.2010) (quoting Seattle Times Co. v. Rhinehart, 467 U.S. 20, 36, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984)).

Generally, high ranking government officials are not subject to depositions. *See* Marisol A. v. Guiliani, No. 95-CV-10533, 1998 WL 132810, at *3 (S.D.N.Y. Mar. 23, 1998) (citing National Nutritional Foods Ass'n v. F.D.A., 491 F.2d 1141, 1144-46 (2d Cir.), cert. denied, 419 U.S. 874 (1974). High ranking government officials are granted this limited immunity from

[1] Fed.R.Civ.P. 30(a).

being deposed "when they have no personal knowledge to ensure that they have the time to dedicate to the performance of their governmental functions." *See* Marisol A., 1998 WL 132810, at *3 (citing Warzon v. Drew, 155 F.R.D. 183, 185 (E.D.Wis.1994)). The policy surrounding this privilege is to allow the function and flow of government to proceed unabated. *See* Capitol Vending Co. v. Baker, 36 F.R.D. 45, 46 (D.D.C.1964); Church of Scientology v. I.R.S., 138 F.R.D. 9, 12 (D.Mass.1990).

However, "depositions of high level government officials are permitted upon a showing that: (1) the deposition is necessary in order to obtain relevant information that cannot be obtained from any other source and (2) the deposition would not significantly interfere with the ability of the official to perform his governmental duties." *See* Toussie v. County of Suffolk, No. 05-CV-1814, 2006 WL 1982687, at *1 (E.D.N.Y. July 13, 2006) (citing Marisol A., 1998 WL 132810, at *2); *see* also Martin v. Valley Nat'l Bank, 140 F.R.D. 291, 314 (S.D.N.Y.1991). Where the government official was personally involved in the event(s) giving rise to the litigation, courts have directed such depositions to go forward. *See* Lederman v. Giuliani, No. 98-CV-2024, 2002 WL 31357810, at 1 (S.D.N.Y. Oct. 17, 2002); Gibson v. Carmody, No. 89-CV-5358, 1991 WL 161087, at 1 (S.D.N.Y. Aug. 14, 1991).

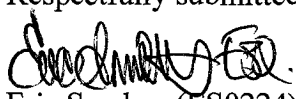
Here, Defendants' CITY; RAFAEL PINEIRO; CHARLES V. CAMPISI and ROBERT J. GIANNELLI seek to preclude Plaintiff for investigating his allegations of racial discrimination. Defendants' argue that they should be able to offer Inspector Donna G. Jones as an alternative to Defendants' RAFAEL PINEIRO; CHARLES V. CAMPISI and ROBERT J. GIANNELLI'S deposition testimony. While Inspector Jones is certainly knowledgeable about the practices of the Employee Management Division and could discuss the documents in this case relative to her departments monitoring and review, she certainly cannot testify to the documents accuracy or veracity. Nor can Inspector Jones testify about the reasoning behind the creation of those documents unless she had a direct conversation with the drafter of each document that she or her subordinates reviewed. Additionally, Inspector Jones cannot testify as to the storage of data relative to the Department's computer systems, or investigation, review and quality control within the Internal Affairs Bureau regarding members of the service accused of committing sex offenses or the investigation, review and quality control within the Office of Equal Employment Opportunity regarding members of the service accused of committing sex offenses. Plaintiff argues that Defendants' arguments are in direct conflict with Toussie and Lederman and Gibson, as well as the Federal Rules of Civil Procedure, certainly designed to further preclude him from challenging their decision making.

Plaintiff argues that the depositions of these Defendants' are necessary in order to obtain information that cannot be obtained from any other source and these depositions would not significantly interfere with their ability to perform their governmental duties. Plaintiff has offered to hold the depositions at the New York City Law Department to make it convenient for the Defendants. Defendants; RAFAEL PINEIRO; CHARLES V. CAMPISI and ROBERT J. GIANNELLI are the only persons who can discuss the reasoning behind each one of their personal decisions related to the Plaintiff since his arrest and modification on June 10, 2004, their decisions began on June 10, 2004 and the impact of those decisions continue to this day. Defendant RAFAEL PINEIRO can testify as to his decision to authorize the monitoring of Plaintiff based upon his arrest on June 10, 2004, and his subsequent decisions over the past seven

(7) years to utilize the resources of the Personnel Bureau to assist with the internal monitoring of the Plaintiff, as well as his subsequent decision as a member of the Special Monitoring Board to recommend that Plaintiff be placed on Level III Special Monitoring. Defendant CHARLES V. CAMPISI can testify as to his decision to authorize the arrest of Plaintiff on June 10, 2004, and his subsequent decisions over the past seven (7) years to utilize the resources of the Internal Affairs Bureau to assist with the internal prosecution and monitoring of the Plaintiff, as well as his subsequent decision as a member of the Special Monitoring Board to recommend that Plaintiff be placed on Level III Special Monitoring. Defendant ROBERT J. GIANNELLI can testify as to his decision as a member of the Special Monitoring Board to recommend that Plaintiff be placed on Level III Special Monitoring. Plaintiff argues that based upon these Defendants' recommendations, the Police Commissioner has used his statutory authority under New York City Administrative Code § 14-115, to pass him over for Promotion to Sergeant on two (2) different civil service examinations and to never return him to full duty without any firearm restrictions. It is important to note, that Defendants' do not offer any sworn affidavit to the contrary that they were not directly involved in the decision making process from the inception of the Plaintiff's arrest up to this point.

Therefore, the Court must deny Defendants' motions in their entirety.

Respectfully submitted,



Eric Sanders (ES0224)

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