Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

November 4, 1987

Re: 86-772 City of St. Louis v. Praprotnik

Dear Sandra:

I read with interest your fine opinion in City of St. Louis v. Praprotnik, and am happy to see that we are in basic agreement concerning the proper disposition of this case. Like you, I am convinced that Frank Hamsher was not a policymaking official whose conduct is attributable to the city for purposes of §1983 law. I have, however, some difficulty with certain statements in Parts IIIB and IIIC of your draft dealing with officials other than Hamsher, particularly because they seem to address issues which, in my view, are unnecessary to the resolution of this case.

As I indicated at Conference, I agree that the Eighth Circuit's "final authority" test is fundamentally inconsistent with Pembaur. In Pembaur, we made clear that a city is not subject to §1983 liability merely because the official who inflicted the constitutional injury had the authority to act on behalf of the city; rather, the responsible official must have the authority to establish policy for the city. Here, Frank Hamsher, whose unlawfully motivated decision to transfer respondent precipitated the constitutional injury, simply lacked any policymaking authority and thus could not, by his actions alone, subject the city to liability. To the extent that Messrs. Killen and Nash were involved in the layoff, respondent failed to call our attention to any evidence that these two officials were improperly motivated, and the court below did not suggest the facts were otherwise.

I am largely in agreement with Part IIIA of your draft, which sets out the governing legal principles established in Pembaur and its predecessors. (I do note, however, that Pembaur established that a single decision by an authorized policymaker is sufficient to subject the city to liability, see 106 S.Ct., at 1299; thus, is it necessary to "infer" an unconstitutional policy in such circumstances, as you suggest on page 10 of the draft?) Applying these principles here, I have no difficulty concluding that whatever authority the city vested in Frank Hamsher, it did not include the authority to establish final employment policy. Is not that conclusion sufficient to resolve the issue before us, making it unnecessary to decide, as Part IIIB of the draft seems

to do, that the final policymakers in St. Louis are the Mayor, the city aldermen and the Civil Service Commission?

In any event, I wonder whether it is correct, as PartIIIB suggests, that the identification of policymakers is neither a question of federal law nor of fact, but is instead a question resolved exclusively by reference to applicable state statutory law. Slip op., at 11. State law is, of course, the appropriate starting point, but ultimately must not the factfinder determine where final policymaking authority actually resides, not simply "where the applicable law purports to put it," id., at 12? For this reason, I question the conclusion tha. "there can be no justification for giving a jury the discretion to determine which officials are high enough in the government that their actions can be said to represent a decision of the government itself." Ibid. As you note earlier in the opinion, local governing bodies may take myriad forms, and I think it fair to say that there are doubtless many in which real and apparent authority diverge. I therefore would not foreclose future factual inquiry into such matters, particularly where it is not necessary to the disposition of the case before us. Here, there was simply insufficient evidence from which a jury could have found that Hamsher wielded any policymaking authority, final or otherwise.

I also question whether the "custom or usage" line of cases compensates for the inherent inflexibility of a rule that leaves to state law the identification of policymakers. As you indicate, "custom or usage" cases deal with situations in which a municipality's practices differ from its formal, written policies. No unconstitutional custom, of course, was alleged here. Rather, the question was whether the city delegated de facto final policymaking authority to Hamsher. I have no trouble concluding on the present record that it did not, and thus that it cannot be held accountable for Hamsher's unconstitutional conduct. Is not the "custom or usage" doctrine, however, simply inapplicable to cases such as this, where the question is one of delegation of authority, rather than acquiescence in an informal policy of unconstitutional conduct?

In view of the relatively narrow question before us, I wonder whether it is necessary to discuss whether the Mayor or aldermen enacted any ordinance authorizing unconstitutional retaliation against those who invoked the city's grievance machinery. Such cases are rare and easily resolved under Monell and its progeny, and I would not wish to suggest that a §1983 plaintiff must come forward with this kind of evidence in order to prevail. Similarly, do we really wish to say that a plaintiff cannot prevail unless he or she "prove[s] the existence of an

unconstitutional municipal policy," slip op., at 14? In both Tuttle and Kibbe, we left open the question whether a city can violate §1983 through a policy that, while not unconstitutional in and of itself, may give rise to constitutional deprivations. Do we really wish to resolve that question in this case? Would it not be sufficient simply to decide that Hamsher, the official who constructively discharged respondent, was not a final policymaker? Part IIIC of the draft makes this determination, but in so doing appears to sweep more broadly than the case itself warrants. While I would agree that Killen, like Hamsher, was also not a policymaker, I am not sure we would be justified in reaching the same conclusion as to Nash; the latter official was the city's Director of Public Safety and, because the Civil Service Commission never reviewed respondent's layoff, we have no way of knowing whether his employment decisions would have received greater deference than those of Hamsher, Kindelberger and Spaid. Again, though, I see no reason to reach the question, since the court below did not attempt to sustain the jury's verdict on the theory that either Nash or Killen were unlawfully motivated. (Indeed, had the court been able to infer such a finding on the part of the jury, it would not have been necessary to indulge a constructive discharge theory.)

In sum, I am afraid I am unable to join the opinion as presently written. This seems all the more regrettable to me insofar as the language giving rise to my concerns is, in my view at least, unnecessary to the decision itself. If you become persuaded to that view, I don't believe I'd have any difficulty in joining you.

Sincerely,

Bill

Justice O'Connor

cc: The Conference