1985 WL 56690 (N.D.Ala.)
United States District Court, N.D. Alabama.

IN RE: BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION

No. CV 84-P-0903-S. | Dec. 20, 1985.

Attorneys and Law Firms

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Opinion

POINTER, Chief Judge: -

***1** The Court will now dictate its findings of fact and conclusions of law. These findings of fact are based upon the evidence that has been presented over the past four and a half days, consisting of the testimony of various witnesses and the reception into evidence of voluminous documents.

I state at the outset that the conclusion that I reach is to be favorable to the defendants.

Basically the issue, the legal issue, which, as I view it, is determinative of this case is one that was stated in an order entered back in February of this year.

The conclusions there expressed either explicitly or implicitly were that under appropriate circumstances, a valid consent decree appropriately limited can be the basis for a defense against a charge of discrimination, even in the situation in which it is clear that the defendant to the litigation did act in a racially conscious manner.

In that February order, it was my view as expressed then, that if the City of Birmingham made promotions of blacks to positions as fire lieutenant, fire captain and civil engineer, because the City believed it was required to do so by the consent decree, and if in fact the City was required to do so by the consent decree, then they would not be guilty of racial discrimination, either under Title 7, Section 1981, 1983 or the 14th Amendment. That remains my conclusion given the state of the law as I understand it.

Counsel have amply noted that the law is not clear, however, in this regard. And that this decision is being made at a time when there is uncertainty as to the state of the law.

In the effort to determine what the state of the law is, as best I can determine it, I have considered no single decision. As I evaluate the decisions particularly out of the Supreme Court, it becomes apparent to me that if you look at any one given

decision, you can come up with a conclusion as to what the law is which is different from the decision you reach if you look at some other decision. And is required as a result somehow attempting to synthesize what I view to be a development in the law as yet not fully and finally defined.

Much argument has been made as this case came to trial about the burden of proof. I declined in advance of trial to rule definitively on certain hypothetical issues, because I wish to see the state of the evidence as it was presented. I am persuaded that at least in that respect my earlier decision was proper. Because it has become clear to me from the evidence in this case that it is not necessary for the Court to determine whether some action apparently permitted by the consent decree but not mandated by it would be protected against claims of discrimination.

In this case, under the evidence as presented here, I find that even if the burden of proof be placed on the defendants, they have carried that proof and that burden of establishing that the promotions of the black individuals in this case were in fact required by the terms of the consent decree.

I reach that decision on the basis that the language that has become the focus of these proceedings, namely language in paragraph two of the consent decree, would require or would allow an exception to the goals otherwise stated for the City in other provisions of the decree only if the decision-makers at the time of making the decision had information demonstrating that a black, although qualified, was demonstrably less qualified than a white on the basis of a job-related selection device.

During the presentation of evidence here, the only possible job-related selection device that has been presented is that of the test that the Personnel Board uses. Many other criterion have been selected, none have been in any way indicated or demonstrated as being job related. Job related in this sense must be addressed in the context of the regulations under Title 7, which were in force at the time the consent decree was adopted, and indeed continued in force.

In this particular case, the tests used by the Personnel Board have simply been assumed to be valid, that is, job related. However, the evidence demonstrates that the decision-makers on the part of the city did not have the information available to them on which they could have made any kind of judgment that the blacks scoring lower on those exams scored sufficiently lower to be demonstrably less qualified than the whites who were higher ranked.

I had anticipated until this morning that at the conclusion of the case and while still attending to the case I would attempt at the conclusion of the case to dictate findings of fact in my normal manner. That is, I had anticipated that I would simply from my own memory and recollection go through the various items of evidence and make the appropriate findings with respect to the variety of issues and persons involved.

I am varying from that today in doing something that I have done only once before that I can recall. The reason for doing so is that I have received this morning some findings of fact proposed by the defendants that I find to be ninety-eight percent objective, fair and the same findings I would make.

The appellate decisions have cautioned trial courts against simply adopting proposed findings submitted by parties. I am aware of that admonition. I have, however, gone through these proposed findings and will in just a few minutes indicate certain changes that I would make in them. To the extent I do not make changes, I adopt them as my own individual findings. This is both as to findings of fact and conclusions of law. There are in addition a few facts not contained in the findings of fact proposed by the defendants that I will recite as findings of fact by the Court.

First, I will attend to several matters that were not covered by the defendants' proposed findings of fact. Each of the plaintiffs who complains in this litigation against the failure to be appointed as a fire lieutenant or fire captain or civil engineer or who claims that he was delayed in such an appointment was adversely affected because he was white. Those persons in the absence of the consent decree and in the absence of any affirmative action plan adopted by the City as mandated by the decree would, as I interpret the evidence, have been appointed to the positions they desired and about which they here complain. Each of those individuals ranked higher on the certification list provided by the Personnel Board than the blacks who were appointed by the City pursuant to the consent decree.

Most but not all of those whites who were not selected for those positions had higher test scores on the test administered by the Personnel Board. Although the scores, as I have already indicated, were not known by the decision-makers at least with a sufficient degree of accuracy and completeness to make any judgment concerning the significance of those differences.

Several of the whites who were unsuccessful in their promotional efforts or who were delayed in those promotional efforts not only had higher test scores than the blacks who were selected but had scores which were sufficiently higher on the test

that using the techniques of statistical inference would have indicated that the true test score of the white was statistically significantly greater than the true test score of the black. I state that that is true for some of the whites involved but certainly not all.

I make particular mention, although it is contained in the proposed findings of fact submitted by the defendants, that the practice of the fire department both before and after the consent decree was to not consider qualifications in making promotions but instead is to follow willfully the certification list submitted by the Personnel Board, simply selecting the higher ranked person, whether qualified or not.

Only since the consent decree has that been changed one occasion, and that was at a time at deciding that a black who otherwise would have been mandated for promotion under the decree was not qualified. This Court upheld the decision by the City that under the particular facts of that case and that situation the black was not qualified.

With respect to the vacancy in the engineering office, the Court makes the following conditional matter that is perhaps not that explicit in the proposed findings submitted by the defendant. The white who would have been appointed to the position of civil engineer and who certainly was qualified for that position did score higher on the test than did the black who was selected. He, I am referring to Mr. Ware, is the individual who would have been selected by the chief engineer for that position had it not been for the consent decree. In noting, however, that the rankings and test scores coming from the Personnel Board were not in the engineering department deemed to be particularly valuable or useful, the chief engineer would have selected that individual Mr. Ware, even though he scored much lower than another white individual, that is the difference between his score and another white was even greater than the difference between Mr. Ware's score and the black.

Furthermore, the chief engineer in his deposition testimony indicated candidly that he considered the race of Mr. Thomas, person ultimately chosen, being black, as a negative feature. And that he would have so considered that as a negative feature, but for the fact that the consent decree required him to look otherwise at the candidate. He also noted in his deposition that although he would have preferred because of his view of the experience factor and certain other characteristics, the appointment of Mr. Ware, he could not say that Mr. Ware was to any significant degree better qualified than the person he chose, namely the black Mr. Thomas.

Now, with those additional matters being recited as findings of the Court, I will go through the proposed findings of fact submitted by the defendants and make certain revisions.

On page five, paragraph thirteen, [39 FEP Cases 1437], the last - starting with the words and similar underrepresentation, at that point the paragraph will simply read underrepresentation continues even with the actions taken under the consent decree to this day. And the following sentence will be deleted.

On page thirteen, paragraph forty-five, [39 FEP Cases 1439], that item will be revised to read as follows: Dr. Siskin did not in view of the Court's limitations as to the scope of trial conduct any studies to attempt to determine whether the Personnel Board's examinations are job related.

On the same page, paragraph forty-seven, [39 FEP Cases 1440] it should read as follows: Dr. Siskin concluded that at the 0-5 level of significance several non-selected whites' true test scores exceeded the true test scores of selected blacks by four or more SEM's.

On page fifteen, paragraph fifty-four, in the third line, [39 FEP Cases 1440, fourth and fifth lines], the word rank or, r-a-n-k space o-r, those two words are deleted.

On page seventeen, paragraph number sixty, [39 FEP Cases 1441], the second sentence is revised to read as follows: This underrepresentation resulted at least in part from discrimination against blacks. On page eighteen, paragraph sixty-three, [39 FEP Cases 1441], that paragraph is deleted. On page twenty-two, paragraph seventy-eight, [39 FEP Cases 1442], the first sentence should read as follows: Moreover the evidence reflects that over the history of this program blacks have had - excuse me, whites have had a somewhat greater opportunity than blacks to achieve medic status. On that same page, the parenthetical sentences at the bottom of the page are deleted.

On page twenty-three, in paragraph seventy-nine, [39 FEP Cases 1442], the third sentence it should read a lead worker assist his or her lieutenant. The words "or her" being added.

In paragraph eighty-one on the same page, [39 FEP Cases 1442], that is rewritten to state the lead worker position is usually

assigned on the basis of station seniority. On the next page, page twenty-four, paragraph eighty-four, [39 FEP Cases 1443], that first sentence should read as follows: Additionally, as is the case with all criteria based substantially on seniority, blacks have not, as a whole had the same opportunities as white to meet this proposed criterion.

On page twenty-seven, paragraph ninety-six, [39 FEP Cases 1444], is simply a typographical correction in the spelling of the word "selection." On page twenty-eight, paragraph ninety-eight, [39 FEP Cases 1444], the last sentence, a typographical correction, the spelling of the word "consider." On page thirty, paragraph one hundred and ten, [39 FEP Cases 1444-1445], that paragraph is deleted.

On page thirty-three paragraph one hundred and twenty-three [39 FEP Cases 1445], the figures twenty-five percent are changed to fifty percent. On paragraph thirty - excuse me, on page thirty-five, paragraph one thirty-five [39 FEP Cases 1446], that should read in appropriate part, a selection procedure which relies in substantial part on subjective criteria is not a related selection procedure within the meaning of paragraph two within the City decree.

On page thirty-eight, in paragraph one forty-three [39 FEP Cases 1447], the footnote is deleted. On page forty, paragraph one forty-nine [39 FEP Cases 1447-1448], that paragraph is deleted. On page forty-one paragraph one fifty [39 FEP Cases 1448] the following shall stand as paragraph one fifty: The City decree entered by this Court immunizes the City from liability for actions required by it. Any questions concerning this proposition should be dispelled in this Circuit under the present state of the law by the decision of the Court in Palmer versus District Board. That will stand in place of what was written in paragraph one fifty.

In paragraph one fifty-two on page one forty-one and going over to page forty-two [39 FEP Cases 1448] is deleted. On page forty-two paragraph one fifty-three [39 FEP Cases 1448] the following is substituted: Information or opinions not known to the decisionmaker may not be utilized to establish that the individual selected - excuse me, that there were job related selection devices showing one candidate demonstrably better qualified than another.

In paragraph one fifty-four on the same page, the third line [39 FEP Cases 1448], the word "subject" is eliminated and substituted in its place the word "suspect, s-u-s-p-e-c-t. Two lines below that, the word "contemplated," that word is to be eliminated and instead the word "affected" is substituted for that word.

These findings and conclusions are entered at this time along with the findings and conclusions indicated at the outset of this recitation.

Entry of judgment should not be delayed or deferred. However, I am going to call upon counsel to submit to me on Monday an appropriate form of judgment that simply indicates that in accordance with the findings and conclusions dictated or incorporated by the Court in its oral charge that certain cases or claims are dismissed and directing under Rule 54-B that those findings and resolutions be made final.

I say that I ask this because there is some difficulty - I believe this case fully disposes of or resolves at the trial level the Bennett decision. But I don't believe that is so with respect to the case in which Mr. Ware had his claims, or at least I am not sure it does, and so there would have to be a 54-B finding in that case. Also since these cases were a part of a larger group of cases consolidated under the name Birmingham Reverse Employment Discrimination Case, it is for safety's sake appropriate to use 54-B to make sure that there is no question as to finality by virtue of those other cases not having been resolved at this time.

It is for that reason that I call upon counsel to make some analysis to present me with an appropriate one-page order is all it requires which clarifies which cases are due to be resolved as a result of this decision favorable to the defendants.

Cost but no attorneys' fees are taxed against the plaintiffs in this case. It is clear that there is sufficient merit in these cases to justify the pursuit of them. I say that both on a subjective and objective basis and that claims by a prevailing defendant under the Christian, Burg, Garment case [Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 16 FEP Cases 502 (1978)] would not justify an award of attorneys' fees against the plaintiffs even though the defendants have prevailed. There may be some question as to whether some change in the standards when you are talking about a reverse discrimination case, but at the present time I am persuaded that Christian, Burg, Garment is the applicable standard to be applied here, even though the - with the defendants having prevailed.

Let me stop at this point and see if counsel - I am obviously not asking for - but if counsel has any questions about the Court's ruling, the nature of it and what you are called upon to do and if you think I have totally left out a subject area that

perhaps should be included in the findings. Of course, it's not to cut off a request post-judgment for additional findings, I am not asking for a waiver in that. It may be since I am sure plaintiff's counsel have not had the opportunity to fully go through these items and compare them with ones that you might want a finding on, I didn't want to place in those findings that I think are particularly favorable to the plaintiffs to help put this case in the appropriate context which had not been included in the defendant's proposal.

Does counsel know of anything that - at the present time they would ask me to consider?

Mr. FITZPATRICK: Your Honor, you are correct that we have not had an opportunity to read this which was served at, I guess about twelve noon.

With respect to the other consolidated cases, I think it would be appropriate that if there is an appeal, that some mechanism be provided for keeping those matters on hold in the event there are additional claims filed during the process in which these matters are ultimately resolved on appeal, if appealed, we also set up a mechanism for that.

THE COURT: As to those other cases, I really was not suggesting anything at the moment other than to make sure the presence of those other cases did not affect the appealability of this decision.

MR. ALEXANDER: Your Honor, from the City, I think one concern we would have in trying to avoid a repetition of the expense attended to this matter. And perhaps we can work out some way to keep the other cases in a state of limbo until this is resolved.

THE COURT: Either that or could even be that the ultimate findings that I made here are sufficiently - some of the ones are going to be involved that something in the nature of a summary judgment could be done so that those cases get to be reviewed at the very same time. That's simply something for y'all to discuss. Certainly there seem to be several possible ways of addressing this. But certainly many of the issues -

MR. ALEXANDER: The one thing I don't want to do is start police depositions Monday.

MR. FITZPATRICK: Me too.

THE COURT: I am sure of it.

MS. MANN: One point of clarification, do you want to meet with counsel on Monday or do you just want a written -

THE COURT: I would assume that there is some one plaintiff's lawyer that is in Birmingham and some one defendant's lawyer that is in Birmingham that can come to me with a one-page document and say Judge, this I think is what you are looking for. We don't agree with it, we as plaintiffs, but this is what you were trying to do in order to permit the appealability decision. I am not looking for counsel to be around, other than somebody on behalf of the plaintiffs and somebody on behalf of defendants. Thank you very much.

DEFENDANTS RICHARD ARRINGTON, JR., THE CITY OF BIRMINGHAM AND DEFENDANT-INTERVENORS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Defendants Richard Arrington, Jr., the City of Birmingham, and Defendant-Intervenors ("defendants") submit the following Proposed Findings of Facts and Conclusions of Law to assist the Court in considering defendants' Motion for Involuntary Dismissal at the close of plaintiffs' case.

FINDINGS OF FACT

1. The individual plaintiffs are white males, employed by the City of Birmingham in its Engineering Department or the Birmingham Fire and Rescue Service ("BFRS"), who contend that they have been unlawfully denied promotions on the basis

of their race.

2. Also a plaintiff is the United States Department of Justice, an intervenor on the side of the plaintiffs. ("Plaintiffs" will hereafter refer to the individual plaintiffs and the United States collectively. When collective use is inappropriate, the Court will refer to "individual plaintiffs" and "United States" or "government".)

3. Defendants Richard Arrington, Jr., and the City of Birmingham (collectively the "City") admit that the Engineering Department and the BFRS have considered race in making promotions, but deny discriminatory intent, and proffer as their legitimate, non-discriminatory motive compliance with a Consent Decree entered in United States v. Jefferson County, 28 FEP Cases 1834 (N.D. Al. 1981) (the "City Decree"); discussed more fully below.

4. Defendant-intervenors represent the interests of the original black plaintiffs ("Martin plaintiffs") in Martin v. the City of Birmingham, as well as those of the beneficiaries of the relief won by the Martin plaintiffs and their certified classes. They join in the City's defense that the preferential promotion of blacks was legal pursuant to the City Decree.

5. On August 21, 1981, this Court entered an Order in United States v. Jefferson County approving as fair two consent decrees: one (heretofore designated as the "City Decree) between the City, the Martin plaintiffs, and the United States, executed May 19, 1981; and one between the Jefferson County Personnel Board (the "Board"), the Martin plaintiffs, and the United States (the "Board Decree"), also executed May 19, 1981.

6. Resolution 547-81 authorized the Mayor to enter into the City Decree (United States Exhibit 3 to Gordon Graham 1985 Deposition.)

7. The decrees generally required the City to attempt to meet certain long term and short term goals set forth in the City Decree, and the Board to "certify" to the City (as required by Alabama law under the Civil Service System ("Enabling Act")) sufficient numbers of black applicants to enable the City to meet its goals.

8. The individual plaintiffs contend that the City Decree is illegal and does not relieve the City from liability to whites who were "passed over" for promotion on account of their race. The government does not join the individual plaintiffs in their contention that the Decree is unlawful.

9. The individual plaintiffs and the government both contend that the City has exceeded the requirements of the City Degree and is hence not protected thereby. That argument consists of two necessary premises: that only employment decisions "mandated" in the sense of being required by the City Decree can provide the City with immunity for its race-conscious promotions; *and* that the City Decree does not *require* the promotion of less qualified blacks over demonstrably better qualified whites. The latter contention is grounded on ¶2 of the City Decree, which provides, in relevant part, that the City is not required to promote a less qualified black in preference to a demonstrably better qualified white, as determined by the results of a job related selection procedure. They thus contend that the promotion of a demonstrably less qualified black is not protected by the City Decree.

10. The individual plaintiffs contend that all blacks promoted in the Engineering Department and the BFRS since the entry of the City Decree are demonstrably less qualified than the white plaintiffs; the United States contends that only some of the white plaintiffs are demonstrably better qualified than some of the black promotees. Additionally, both the individual plaintiffs and the United States contend that some of the black promotees were unqualified for promotion at the time of their promotion.

11. In response, the City and Defendant-Intervenors contend that any action contemplated by, or made as a direct consequence of, the City Decree is lawful, and that the promotion of qualified, but demonstrably less qualified, blacks is contemplated and permitted by the City Decree. They further contend that in order to meet the goals provisions of the City Decree, the City is required to promote any black individual whom the City could not prove to be demonstrably less qualified according to the results of a job related, validated, selection procedure. Finally, the City and defendant-intervenors contend that, in any event, none of the blacks promoted are unqualified, or demonstrably less qualified, according to the results of a job related selection procedure.

12. In United States v. Jefferson County, supra, this Court found the City and Board Decrees to be warranted by the evidence of discrimination by the City, based on the factors set forth in United States v. Alexandria, 614 F.2d 1358, 22 FEP Cases 872 (5th Cir. 1980), and the other applicable decisions of the several courts of appeals. Plaintiffs have demonstrated no facts demonstrating that the previous conclusion of the Court was in any way in error.

13. To the contrary, the employment statistics reflect that blacks were seriously underrepresented in City employment, specifically in the Engineering Department and BFRS, at the time the City Decree was entered (during the 1950's, there was a period of time where blacks were not allowed to take the firefighter (Tr. (Pope)) or the civil engineer (Ex. 1982, 1983 examinations), and similar underrepresentation continues to this day. The evidence further reflects that, absent the Consent Decree, the record of the BFRS with respect to the employment of blacks throughout the department would be as abysmal as its record when the City entered into the Decree (see generally Ex. 23, I.A-H).

14. Nor are the interest of whites trammeled by the Decree. Since the entry of the Decree, some have been promoted immediately upon certification, others after only a delay, and those not promoted have had or will have an opportunity to compete as each new exam is given and an eligible register (which is valid for only a year) is created. (See generally, certifications of eligibles.)

15. It is uncontested that the City, in its Engineering Department (compare Duncan 1982 dep. 46-47 with Duncan 1985 dep. 42) and the BFRS (Gallant dlep. 663), has followed the same general promotional practices since the entry of the City Decree as were in place before the entry of the City Decree, the only material difference being that the City now considers the goals of the City Decree in making promotional decisions.

16. In the BFRS, it was Chief Gallant's pre-City Decree practice to review the personnel file of the certified individuals (Gallant dep. 488-89; Laughlin dep. 165), consult with Deputy Chief Laughlin, consider any other information he had received concerning the "certified eligibles" (Gallant dep. 214, 278, 529) (although he did not actively seek such information), and promote the eligibles in the order in which they appeared on the certification, absent a reason to believe they were not qualified to perform the duties of the position for which they were being considered (Gallant dep. 476-78; Laughlin dep. 141, 253, 328, 343, 452). The Chief made no effort to compare the qualifications of the certified individuals; the only decisions he made were whether he could prove that they were not qualified (Gallant dep. 140-41, 476; Laughlin dep. 361, 646).

17. The general procedure Gallant followed before the entry of the City Decree has not changed (Gallant dep. 663). The only material change in Chief Gallant's procedure since the entry of the Decree is that he now alternates between blacks and whites, selecting in each case the highest ranked white or black, as appropriate under the City Decree (Gallant dep. 368, 391-92, 489-90, 818).

18. Chief Gallant's procedure of selecting the highest ranked individual is based on his belief that, as a practical matter, if not a legal matter, he is required to promote in rank order absent an ability to prove that the highest ranked individual of either race is unqualified for the promotional position (Gallant dep. 140-41, 329-40). Gallant bases his belief on experience (id., 327) the strong civil service system (id., 480, 633-34, 813-14), the expectation of administrative appeals and/or lawsuits by a passed over candidate (id., 635-36), morale (id., 894), long-standing custom and tradition (id., 339, 634), and his inability to make comparison of qualifications (id., 498).

19. In Chief Gallant's view, the Board certifies the candidates as qualified for promotion, and he must assume the Board is correct unless he can prove otherwise (id., 140-41, 894).

20. Gallant does not base his practice of following rank order on any belief that the Board's certification procedure is effective in ranking candidates according to relative abilities. He has no knowledge of whether the Board examination tests the knowledge necessary for promotion (Gallant dep. 219), and he does not believe the highest ranked candidates are the best qualified (id., 659, 871). He does not believe the Board's procedure is the best possible system (id., 236).

21. Neither Chief Gallant nor Chief Laughlin are aware of any meaningful, job related method by which to compare the relative qualifications of candidates for promotion (id., 498; Laughlin dep. 137, 190, 298, 300). Laughlin is not aware of any way in which to quantify the value of diverse or competing varieties of experience (Laughlin dep. 156, 450, 672).

22. Gallant would, however, reject any candidate he could show is unqualified (id., 476) and has in fact rejected a black firefighter certified for promotion to Fire Lieutenant (id., ____).

23. The United States (and, apparently, the individual plaintiffs) have suggested that the following criteria could and should have been considered by Chief Gallant to compare the qualifications for promotion of the individual plaintiffs to the promoted blacks: 1) the raw, converted, and final scores achieved on the Board administered promotional exam, together with the rank of the individual on the "eligible register"; 2) the BFRS seniority (length of service on the department) of each

candidate for promotion; 3) the highest formal station assignment held by a candidate; 4) whether a candidate has been "certified" by the BFRS as a driver or assistant driver of an apparatus; 5) the number of months each candidate served as a leadworker or medic; 6) the number of shifts served by an individual as an acting officer; 7) any educational pay incentive received by the individual; and 8) other firefighting experience (aside from that gained in the BFRS) (See, Exhibits 139-159).

TEST SCORE AND RANK

24. Under state law, the Board has the authority and duty to "certify" candidates to the City for all positions, entry level or promotional, in the Classified Service (Enabling Act, §16).

25. In fulfilling this obligation, the Board administers written examinations. The Board then grades the examinations, first determining a "raw score," or simply the number of questions an individual answers correctly. The Board then sets a passing point and calculates a "converted score" on a scale of seventy (70) to one hundred (100), for those who passed the exam. A "final score" is determined by adding to the converted score one point for each year of service in the classified service in the City up to twenty (20) years. Finally, the Board ranks the candidates on an "eligible register" based on the final scores.

26. Plaintiffs contend that the City should have considered test and rank information in comparing candidates for promotion. The City and Defendant-Intervenors respond that, assuming a duty to compare qualifications, the information was not reliably available to the City, nor was information necessary to enable the City to determine the significance of any differences in test scores. (The issue of the validity, vel non, of the examinations has been severed. In light of the Court's disposition of the case, that issue need not be reached.)

27. When a department has promotional vacancies, it prepares a "request for certification" of promotional candidates. (Graham 1985 dep. 159). Prior to forwarding the request to the Personnel Board, the City Office of Personnel reviews the Request for Certification to determine, *inter alia*, whether the department is in compliance with its affirmative action plan. If not, a notation is stamped on the request, indicating that the City requests that qualified blacks and/or females be certified. (Graham 1985 dep. 161-162). The City then receives a certification of the names of individuals eligible for promotion. Prior to the entry of the Decree, the City received a number of names equal to the number of vacancies plus two additional names ("Rule of 3"). (Graham 1985 dep. 169). Since the entry of the City Decree, when the City indicates on its request for certification that its promotional goals have not been met, the Board certifies ranking individuals pursuant to the rule of three, plus the names of a sufficient number of black individuals to enable the City to meet its City Decree goals. (Graham 1985 dep. 170-71).

28. The Board forwards the certification to the City Office of Personnel which, after reviewing the certification to determine that a sufficient number of names have been identified, forwards the certificate to the department. (Graham 1985 dep. 180-81).

29. The department head selects a candidate from the certification and submits a recommendation for the Mayor's approval. (Graham 1985 dep. 180-81).

30. The only entity which can verify test score and ranking data is the Personnel Board. (Graham 1985 dep. 223-24).

31. The Certification contains only a list of names, with no reference to any score or rank (the rank of white individuals can be inferred, at least initially, by the order in which they are certified; the rank of selectively certified blacks is not reflected, nor can it be ascertained from the face of the certification.) (Paragraph 5 Supplemental affidavit of Gordon Graham, U.S. Exhibit 5 to Gordon Graham 1985 Dep).

32. The City has never received test score information from the Board and has never relied on test scores in making promotions (except for a single interval, the circumstances surrounding which render it irrelevant to the instant controversy.) (Graham 1985 dep. 229-231; Arrington dep. 111, 113) In re: Birmingham Reverse Discrimination Employment Litigation, 37 Fair Emp. Prac. Cas. 1, 6 n. 15.

33. The Board Rules and Regulations provide that test scores are confidential by reason of public policy. (PX2, Board Rule 1.11).

34. The testimony concerning whether the Board would have provided test scores to the City had the City requested was inconclusive. The Court concludes that plaintiffs have not demonstrated that the test scores were available to the City from the Board. (Arrington dep. 111, 113).

35. Plaintiffs contend that the City could have acquired rank and test score information from "informal lists", reflecting rank and test score information, created by individual promotional candidates and frequently posted, as a matter of general interest, at the stations (Tr. 851). The lists do not include descriptive statistics, such as standard error of measurement (Tr. 119, 851, 1024-25).

36. The informal lists are created through a "grapevine" process of calling various test-takers to ascertain their rank (and sometimes score) as well as the rank of any other individuals of which they may claim knowledge (Tr. 1024).

37. The informal lists are rarely complete beyond the first ten (10) to fifteen (15) positions (if complete to that point), and reflect the scores of between zero and fifty (50%) percent of the individuals listed. (Tr. 851, 1025).

38. The City considers efforts by the City employees to compile score and ranking data unreliable. (Graham 1985 dep. 223).

39. Due to problems with clerical errors, the City does not consider the Personnel Board card sent to examinees to be a reliable source of score and rank information. (Graham 1985 dep. 224).

40. The lists are generally, though not entirely, accurate with respect to the rank of the top ten (10) to fifteen (15) individuals, where listed, but are not as accurate with regard to the test scores listed, if any. (See exhibits 162-165; stipulation).

41. The Court concludes that the informal lists do not provide sufficiently complete or reliable information to enable the City to make any meaningful judgment regarding relative qualifications of promotional candidates.

42. The plaintiffs also contend that the City could have acquired test score information from the Board Consent Decree reports filed with the Court. Comparison of the filing dates of the Board's report with dates of promotions reveals that Woodrow Laster was the only black whose score could have been ascertained prior to his promotion and the Court had previously determined that Mr. Laster was promotable at a hearing on April 23, 1982. Moreover, there is no evidence suggesting that these reports were contemplated as a source of test score data and were not, under the terms of the Personnel Board Consent Decree, required to be furnished to the City.

43. Dr. Bernard Siskin is an expert qualified to testify concerning statistics. (Tr. 753-54).

44. Dr. Siskin analyzed the probability that the difference between two individuals' test scores would be as observed if their true test scores were a given number of standard errors of measurement ("SEMs") apart. (Tr. 756-57; 762-68).

45. Dr. Siskin's analysis does not show whether the Personnel Board's examinations are job related or valid. (Tr. 773-74; 793-94).

46. Dr. Siskin compared the test scores of selected (i.e., promoted) blacks with the test scores of certain nonselected (i.e., nonpromoted) whites. He used test scores from the 1982, 1983 and 1984 fire lieutenant's exam and for the 1983 fire captain's exam. (Tr. 755; PX 23; PX 101).

47. Dr. Siskin concluded that, at the .05 level of significance, several nonselected white's true test scores were 4 or more SEMs apart. (Tr. 768-71; PX 101).

48. The SEMs used by Dr. Siskin for the examinations he considered had been calculated by the Personnel Board and provided to him by counsel for the United States. (Tr. 771-778; PX 23). The SEMs had been calculated based on the Kuder-Richardson 20 reliability coefficient ("KR20"). (Tr. 787). He used raw examination scores, (Tr. 754-55), and, given the data he had, converted scores could not be used. (Tr. 772). However, he testified that he did not believe that there would be much difference in the results if converted scores were used rather than raw scores. (Tr. 773).

49. If the City had had all of the converted scores for a particular examination, it could calculate the standard deviation. (Tr. 781). The reliability coefficient which he used for raw scores could reasonably be used to calculate the SEMs for converted scores. (Tr. 782).

50. To calculate the SEMs, the City would have had to have the reliability coefficient and the standard deviation of the test being considered. (Tr. 783).

51. To calculate the standard deviation, the City would have had to have all of the examinees' scores on a particular examination. (Tr. 785-86).

52. To calculate the KR20, the reliability coefficient Dr. Siskin used, the City would have had to have the number of correct responses given to each question on the exam. (Tr. 786). Without the pass/fail rates for any of the questions, the KR20 could not have been determined. (Tr. 786-88).

53. Dr. Siskin's analysis could not have been done by the City if the only information available to the City were the informal lists of examinee's ranks and scores reflected in PX 162, PX 163, PX 164 and PX 165. (Tr. 788-90). There is no evidence that any of the informal lists contained enough information to conduct Dr. Siskin's analysis.

54. The Court concludes that the City had no source from which it could reliably obtain sufficient information to consider in any manner on the rank or test score of a candidate on a promotional exam in comparing competing candidates. The City officials making (or recommending) candidates for promotions did not on any occasion have sufficient reliable information about the test scores and about the significance of the differences in these scores to have been justified in not promoting a minority candidate. See, In Re Birmingham Reverse Discrimination Employment Litigation, 37 Fair Empl. Prac. Cas. 1, 7 (N.D. Ala. 1985).

BFRS SENIORITY

55. Plaintiffs appear to rely on seniority as a proxy of sorts for experience gained in the BFRS. It is basically agreed that experience as a firefighter with the BFRS is valuable in terms of performing the duties of lieutenant or captain. However, the amount of experience necessary or desirable, a manner in which to quantify experience for purposes of comparing the experience of the individuals, and the relationship of years of service to experience gained appears to be largely matters of personal opinion.

56. Several witnesses, including a Battalion Chief, take the view that the quality and quantity of experience gained in a given amount of time varies widely depending on the activity of a station and the general nature of the emergencies in its territory (e.g., industrial or commercial firefighting versus residential firefighting) (Tr. 79, 103-04). Other witnesses, including a Battalion Chief, testified that the station assignment is of little significance. (Tr. 178). Yet other witnesses fall between the two extremes, agreeing that station assignment can make a difference, but assigning varying degrees of significance to that difference.

57. No witness was able to state a manner in which the difference in experience could be meaningfully measured or quantified in any fashion (tr. 103), much less one that would reasonably measure the job relatedness of that criterion. To the contrary, those questioned on the matter professed an inability to quantify or compare experience. The Court thus finds it unnecessary to adopt any opinion as to the degree to which experience may vary, due to the Court's finding that experience cannot be measured or compared for purposes of predicting job performance as lieutenant or captain.

58. It appears clear that experience does vary to some undetermined and undeterminable extent from station to station, and hence the Court concludes that time in service is not a reliable or uniform measure of experience.[*]

59. Most importantly, there is no evidence demonstrating a relationship between BFRS seniority and job performance as an officer.

60. Additionally, the first black was not hired on the department until 1968 (PX 27, Tr. Bolin, 221), and only one additional black was hired prior to the initiation of the Martin suit in 1974. (Ex. 23). This underepresentation has already been found by this Court to have resulted from discrimination against blacks. In light of the obvious adverse impact on blacks which results from considering seniority, together with the absence of any suggestion that seniority predicts job performance, the Court finds that seniority is not a factor which can be considered under the City Decree in selecting between black and white candidates.

HIGHEST FORMAL STATION ASSIGNMENT

61. Within the general classification of firefighter, various positions exist. For example, on the engine, the positions from lowest to highest are plugman, back-up man, nozzleman/assistant driver, and driver (the driver is also frequently a "leadworker" position, recognized by the Board in the form of 5remium pay - the leadworker position will be addressed separately, below)

62. The general rule, which appears to be followed the vast majority of the time, is that station positions are assigned based on station or department seniority. (Tr. 89-90). While there was testimony that the captain, who assigns positions, has the discretion to appoint a less senior firefighter to a position "above" a more senior firefighter (e.g., Tr. 290-91), that appears to occur very rarely, and then usually due only to the preference of the senior firefighter not to take the higher position.

63. The only case testified to in which a junior firefighter was assigned (in this case on a temporary basis) a station assignment above a more senior employee involved a junior white and senior black. (Tr. 456).

64. While there was testimony that the leadworker position provides valuable experience for the rank of lieutenant, there was no testimony suggesting that serving in one of the remaining positions, as opposed to another, had any bearing on the qualifications of an individual to serve as lieutenant or captain. (Tr. 108-109). The only testimony in that regard was from Battalion Chief Bolin, who stated that he "certainly wouldn't want to make a statement that a plugman wouldn't be eligible to be a lieutenant." (Tr. 106). While each position carries with it a specific responsibility upon arriving at a fire, the evidence reflects that once these responsibilities are fulfilled, every firefighter assists in any manner necessary or helpful at the fire scene.

65. Most significantly, there is no evidence that the specific position(s) held as firefighter are predictive of performance as lieutenant or captain.

66. Because there is no evidence that position assignment as a firefighter is predictive of performance as a lieutenant or captain, and because position assignment is tainted by reliance on seniority, the Court concludes that highest formal station assignment held is not a permissible criterion on which to base promotional decisions, particularly in light of the underlying intent of the City Decree.

CERTIFICATION AS DRIVER

67. The policy of the BFRS is to require that drivers and assistant drivers be "certified" as qualified to drive an apparatus by passing an "examination" of skills administered by Captain Smith (Tr. 188) at the drills and training field (Tr. 189). The BFRS prefers that anyone in a position which makes it likely that he or she will need to fill in as driver also be certified, though that is not always possible, and hence, not always the case. (Tr. 878).

68. In order to take the driver's test, an individual must successfully acquire a letter from his captain to Captain Smith, requesting that Smith administer the test and stating the Captain's belief that the individual is prepared for the test. (Tr. 878-79; Ex. 75). It is the obligation of the individual's officer to prepare him for the driver's exam (Tr. 214, 222) who hence bears partial responsibility for a firefighter's test result (Tr. 215). One of the blacks testified that the reason why he was not certified as a driver was that at his station only those one level below the driver could take the driver test.

69. The driver's exam is administered by Smith and includes knowledge of the equipment and the apparatus, use of that equipment, hydraulics, and a road test. (Tr. 188-191) The individual is tested on the apparatus he usually rides. If he does not ride an engine, he is tested on the engine at his station as well (Tr. 191-92). A firefighter need pass the driver's test only once, regardless of whether he transfers to an apparatus on which he has never been tested (Tr. 213).

70. The test is oral, rather than written (Tr. 192), and there apparently exists no document reflecting the questions to be asked (Tr. 209). Though the test in each case seems to be fairly uniform and exhaustive, there are no guarantees of consistency (see Tr. 193). The grading also appears to be flexible (see, Tr. 210, 212).

71. The first black to pass the test was Leslie Garner, who did so in 1972 (Tr. 215-16). Only 16 blacks have since passed the driver's test (Tr. 216-218).

72. Records of those passing the test are forwarded to the Chief's office; records of those failing are not. (Tr. 200-201).

73. While Smith testified that the driver's test is job related to the job of driving a fire apparatus (Tr. 219), he testified only that the knowledge covered by the driver's test was "useful" to a fire lieutenant in the performance of his duties (Tr. 222).

74. The Court concludes that the right to take the test, the test itself, and the scoring thereof, involve too much latitude left to be exercised at the discretion of superior officers. This makes the criterion of certification as driver the kind which has been found to be particularly suspect as likely to be affected by the biases of the superior. Moreover, there is no evidence on which to base a finding that passage of the driver's test is predictive of performance as a lieutenant or captain. It is not a permissible criterion on which to base promotional decisions.

MONTHS SERVED AS MEDIC

75. A "medic" is a state licensed paramedic capable of performing advanced life support procedures. The training of a medic is extensive (Tr. 135-39), and in light of the fact that 60% (Tr. 140) of all of the BFRS runs are for emergency medical service, it certainly appears to be valuable experience for an employee of the BFRS of any rank.

76. While there was testimony that being a medic was beneficial to a Lieutenant, there was also evidence that it should not be considered (Tr. 356), and there is no evidence suggesting that whatever benefit it confers can be quantified. (Tr. 824-25).

77. More significantly, there is no evidence showing that qualifying as a medic is predictive of job performance as a lieutenant or captain.

78. Moreover, the evidence reflects that blacks have been excluded from the opportunity to achieve medic status, except at their own time and expense, a burden not imposed on many of the white medics. (Tr. 100-01) The medic program was established in 1973. (Tr. 158). No black firefighters of the BFRS were in either of the first two medic classes attended by employees of the BFRS (Tr. 161-162); the department paid the tuition for that training and allowed the selected employees to receive the training, in part, on company time (Tr. 163-64). Witnesses have been able to name only a few black paramedics out of 120 in the department as a whole. (See, Tr. 183). Whether this was based on the intentional exclusion of blacks from the medic program or, as is more likely, resulted from the earlier exclusion of blacks from the department as a whole is irrelevant. The fact remains that blacks as a group are substantially underrepresented in the medic ranks, a status which is likely to continue since the BFRS in 1982 stopped paying tuition and allowing time off for paramedic training. (Tr. 165). Reliance on medic status cannot be validated and is an impermissible criterion for comparing promotional qualifications.

(The Court notes that plaintiffs organized their criteria with months served as medic/months served as leadworker as one category and shifts served as acting officer as another. Because the evidence shows that the job of a medic is not comparable to the job of a leadworker, TR. 171, and further, that the value of leadworker experience, if any, is due to a leadworker's service as acting, the Court has rearranged plaintiffs' categories to conform to the evidence.)

MONTHS SERVED AS LEADWORKER AND SHIFTS AS ACTING OFFICER

79. Leadworker status is the highest position which can be obtained by a firefighter in the BFRS. The position of leadworker carries with it responsibilities beyond those of other firefighters. (Tr. 67-68) A leadworker assists his Lieutenant in the performance of supervisory duties and can be called upon to serve as acting officer in the absence of the regularly assigned officer. (Tr. 67-68) An acting officer has the duties, responsibilities and privileges of an officer.

80. The evidence reflects the leadworker position can give a firefighter valuable experience for serving as an officer. (Tr. 67-68)

81. The leadworker position is generally assigned on the basis of station or BFRS seniority (usually station seniority). (Tr. 91, 94, 102, 148).

82. Assignment to leadworker is based on the discretion of the captain. In cases when the most senior firefighter is not promoted to leadworker, the captain chooses the leadworker based on his subjective opinion of who is most qualified. Criteria which are influenced by the subjective evaluations of supervisors are, obviously, in this context suspect.

83. However, the evidence does not support a conclusion that the mere fact of service as leadworker or acting officer predicts successful job performance as an officer. (See, Tr. 1021) While it is self-evident that leadworker and acting officer experience is valuable, and the record so reflects, there has been no testimony concluding that serving as leadworker or acting officer will necessarily make an individual a good officer. To the contrary, Battalion Chief Wood notes that the value of acting officer experience is determined by how well the individual performs as an acting officer. (Tr. 177). The mere fact of service does not reveal enough.

84. Additionally, as is the case with all criteria based substantially on seniority, blacks have been barred from meeting this proposed criteria. (Tr. 91) The testimony indicates that only one black has ever served as leadworker.

85. Due to the clear adverse impact on blacks and the absence of evidence that service as leadworker or acting officer will successfully predict job performance, leadworker and acting officer status are not permissible criteria on which to base promotional decisions.

EDUCATIONAL PAY INCENTIVE

86. Pursuant to the Board rules, incentive pay is awarded for certain educational accomplishments. An individual who obtains an AAS degree in Fire Science (offered at Jefferson State Junior College) will receive a 5% pay increase. (Tr. 964, 984) An additional 5% may be obtained if an individual earns a four year degree in certain, specified fields (e.g., Business Administration). (Tr. 47).

87. The Fire Science Curriculum at Jefferson State consists of approximately twenty-six (26) courses, thirteen (13) fire related courses and thirteen (13) liberal arts courses. (Tr. 46).

88. As with the other criteria heretofore discussed, opinions as to the value of fire science course work cover a broad range. A Fire Science degree was considered highly significant by some witnesses, yet relatively unimportant to others. Those who thought it should be considered in promotional decisions were unable to assign a weight to its value relative to other criteria. Others thought it should not be considered at all in making promotional decisions.

89. More significantly, there was no evidence that lieutenants or captains with a Fire Science degree perform better than lieutenants or captains without such a degree, or that a Fire Science degree predicts to any demonstrable extent the performance of an individual as an officer. Having a Fire Science degree, hence, has not been shown to be a job related selection criterion.

90. As to credit for non-fire-related degrees, there has been little or no explanatory testimony that such a degree is related to the responsibilities of a fire officer. The Court finds that any possible connection is tenuous at best and whether a candidate has a liberal arts degree is not an appropriate measure of comparison.

OTHER FIREFIGHTING EXPERIENCE

91. The testimony reflects that firefighting experience gained outside the BFRS may be helpful, but again may not. (Tr. 358, 386). It would certainly appear to depend on the extent and complexity of the prior experience, factors not taken into account by the United States. (See, Exhibits 139-159). It appears that the BFRS's extensive training subsumes all but extensive, sophisticated prior experience. (Tr. 748).

92. More importantly, there is no evidence demonstrating a relationship between outside firefighting experience and performance as a lieutenant or captain. It is not a job related selection criterion.

93. The Court finds that prior fire experience is not a permissible criterion on which to base promotional decisions in the Fire Department.

SELECTION PROCEDURE

94. The United States and plaintiffs have suggested that the foregoing criteria should have been considered collectively to compare promotional candidates. The City and Defendant-Intervenors have responded, not unfairly, that the factors are a "hodgepodge" of unvalidated criteria.

95. Irrespective of the value of any individual criterion standing alone, the Court recognizes that there has been no testimony explaining, or even suggesting, how each of the criteria should or could have been weighed and evaluated against other criteria. Those who testified on the subject were unable to suggest an analysis; and the record reflects that each individual questioned had a different notion of whether, and to what degree, a particular factor was of significance or should be considered in making promotions.

96. While plaintiffs presented a great deal of evidence suggesting that meeting certain criteria could be useful to an officer, this Court has heard not an iota of evidence that officers who meet any or all of those criteria actually perform better as officers than those who do not. Plaintiffs, in short, have not presented evidence that their proposed criteria can be combined to create a job related selectin procedure, i.e., a method of evaluating candidates which will accurately predict their future performance as officers.

97. Therefore, the plaintiffs have not demonstrated that any of the individual plaintiffs, were at the time of their promotion demonstrably better qualified than any of the blacks certified from the same eligible register based on the results of a job related selection procedure.

ENGINEERING DEPARTMENT

98. John Duncan recommends candidates for promotion in the Engineering Department. Because Duncan is personally familiar with most of the people in the Engineering Department, his promotional practice, both pre-and post-Decree, is to base his recommendation for promotion on his assessment of the job duties of the position in question, and his knowledge of the past experience, job performance and training of the candidates for promotion. (Duncan 1982 dep. 46-47; Duncan 1985 dep. 42). Hobson Riley, Assistant City Engineer, assists Duncan in selecting candidates for promotion by interviewing the candidates and making recommendations to Duncan. (Duncan 1982 dep. 37). Of course, Duncan considered the requirements of the City Decree (See, Duncan 1982 dep. 95).

99. In Duncan's view, the Personnel Board determines whether an individual is qualified; Duncan also evaluates the individual and makes an independent determination. (Duncan 1982 dep. 83-84).

100. Neither Duncan nor Riley were aware of the test score or rank of Lucious Thomas prior to his promotion. (Riley dep. 99; Duncan 1982 dep. 104-05).

101. Riley and Duncan discussed the promotional list and recommended Lucious Thomas for the position of civil engineer based on the requirements of the City Decree. (Riley dep. 38; Duncan 1982 dep. 91-92).

102. Lucious Thomas was qualified for the civil engineer position (Duncan 1982 dep. 96; John Duncan 1985 dep. 98; Riley dep. 37-38).

103. The reasons Duncan considered Ware better qualified than Lucious Thomas were: his higher rank on the certification of

eligibles, his seniority, the fact that his job performance was slightly better (Duncan 1985 dep. 114) (though he also testifies that they were "about equal" (id. 113)), and the fact that Mr. Thomas was black. (id. 191-92).

104. Duncan considered the fact that Ware was white to be a positive factor which would have supported the selection of Ware. (Duncan 1985 Dep. 191-192)

105. Though Jack Dunlap, a former supervisor of Thomas, had certain criticisms of Thomas' past performance (Tr. 1162-63), Dunlap did not discuss these criticisms with Duncan prior to Thomas's promotion to civil engineer. (Id. 1176-77) Dunlap had also recommended Thomas for promotion to Chief of Party based on his job performance (Tr. 1176).

106. Duncan believes that Lucious Thomas was not demonstrably less qualified than Kenneth Ware (Duncan 1982 Dep. 97; Duncan 1985 Dep. 97-98, 113-114), and the Court so finds.

107. The promotion of Thomas was made pursuant to (Tr. 1112, 1114, 1167), and was required by the City Decree (1982 Duncan dep. 95, 97; 1985 Duncan Dep. 97-98, 113-114).

INVOLVEMENT OF CITY ADMINISTRATION AND PROMOTIONS

108. Aside from the selection of department heads, the Mayor of the City of Birmingham and the Mayor's office have very little involvement in making promotional recommendations in the Engineering and Fire Department. (Deposition of Mayor Arrington at p. 104). Typically, the City's Office of Personnel reviews all personnel matters with the exception of Department head promotions without the involvement of the Mayor's Office. (Arrington Dep. 104; Graham 1985 Dep. 192).

109. The Mayor's view is that the certification of an individual for promotion by the Personnel Board creates a presumption that the individual is qualified. (Deposition of Richard Arrington at p. 94; pp. 33-38, 428-429, Gordon Graham 1985 Deposition). The information provided to the City by the Board relative to individuals' qualifications is scanty. The Mayor has never seen test scores of individuals certified as eligible for a position with the City of Birmingham - even of those candidates for department head positions (Deposition of Richard Arrington at p. 111), despite the Mayor's having requested the Personnel Board to allow him to see all the information that was available on candidates for the position of Police Chief. (Deposition of Richard Arrington at 113).

110. The Court finds that the City's ability to determine relative qualifications is hindered further by the Personnel Board policy against allowing the City to take further action that the Personnel Board deems to be "additional testing." The Personnel Board's refusal to allow the Mayor to establish a three-member committee of engineers to interview candidates for the position of City Engineer is an example of the limitations imposed by the Board on the City in making employment selections and promotions. (Deposition of Dr. Ed Lamonte at p. 94, 96-97; deposition of Richard Arrington at p. 172).

111. The Court finds further that the Mayor's involvement in reviewing promotions within the Fire Department and the Engineering Department of the City of Birmingham is so slight that it merits no further attention by this Court. (Deposition of Dr. Edward Lamonte at p. 27, p. 59; deposition of Richard Arrington at p. 104, p. 356).

112. Gordon Graham, the Chief Personnel Officer of the City of Birmingham, is responsible for directing the activities of the Office of Personnel which includes supervision of personnel records, affirmative action responsibilities, benefits administration, administering the occupational safety and health plan and labor relations. (p. 33 Gordon Graham 1982 Deposition). Pursuant to the Consent Decree, the Mayor further designated Mr. Graham as the City's Affirmative Action Officer. (p. 141 Gordon Graham 1985 Deposition).

113. When the City rejects a certified candidate on the basis that the individual is not qualified, the Personnel Board recertifies the rejected candidate. (p. 391-394 Gordon Graham 1985 deposition).

114. The only factors department heads are required to consider in making promotional recommendations are the individuals certified by the Personnel Board, the requirements of the Consent Decree and the City's preferential policy toward City residents. (p. 196 Graham 1985 Deposition)

115. All applicants certified by the Personnel Board are presumed qualified unless a candidate lacks some essential skill that

the Personnel Board did not test. (p. 428-429 Gordon Graham 1985 deposition).

116. As Affirmative Action Officer of the City, Mr. Graham is responsible for reviewing, prior to final selection, a department head's written justification for failure to select certified black or female applicants in jobs in which blacks or females are underrepresented under the terms of the Consent Decree. (Paragraph 3 Supplemental Affidavit of Gordon Graham, U.S. Exhibit 5 to Graham 1985 dep.).

117. The City has no formal promotional criteria. Department heads have been instructed to recommend candidates who in their judgment are qualified. (Graham 1985 dep. 423-24).

118. On occasions the Office of Personnel has accepted explanations of the failure to recommend a certified black or female pursuant to a determination by the department head that the female or black was less qualified. (Graham 1985 dep. 173-75).

119. If a department fails to recommend a certified black or female and the Consent Decree goals have not been met, when the Office of Personnel receives the recommendation from the department head he reviews the recommendation to determine if there was sufficient written justification for the failure to select a black or female. (Graham 1985 dep. 61-62, 100-101).

CITY DECREE INTERPRETATION

120. One purpose of the City Decree was to insure that any disadvantages to blacks and women that may have resulted from past discrimination against them are eliminated. City Decree at 2.

121. One purpose of the City Decree was to avoid the burdens and expense of litigation. City Decree at 2.

122. Paragraph 5 of the City Decree obligates the City to adopt as a long term goal the employment of blacks and women to each job classification in each department of the City in percentages which approximate their respective percentages in the civilian labor force of Jefferson County as defined by the 1970 Federal Census.

123. Paragraph 6 of the City Decree obligates the City to establish and attempt to achieve an annual goal of making probational appointments of blacks to vacancies in the position of Fire Lieutenant at a rate of 25% or at the rate of black representation among applicants, whichever is higher.

124. Paragraph 8 of the City Decree obligates the City to promote at least one black to the next two captain vacancies in the Fire Department.

125. The goals referred to above and set out in paragraphs 5, 6 and 8 of the City Decree are expressly made subject to the availability of qualified black applicants; the aforementioned goals are not expressly made subject to the availability of black candidates who are not demonstrably less qualified than competing white candidates based upon the results of a job related selection procedure.

126. The purpose of the aforementioned goals is to correct the effects of any underrepresentation of blacks and women in the City's work force.

127. Paragraph 10a of the City Decree obligates the City to request the Personnel Board to certify selectively to the City for appointment qualified blacks and females, whenever such action is necessary to enable the City to meet the aforementioned goals.

128. Paragraph 3 of the City Decree provides that "remedial actions and practices required by the terms of or permitted to effectuate and carry out the purposes of the Decree shall not be deemed discriminatory within the meaning of ... the provisions of 42 U.S.C. §2000e-2(h), (j)"

129. Paragraph 2 of the City Decree provides that nothing in the City Decree shall be interpreted as requiring the City to hire or promote a less qualified person in preference to a person who is "demonstrably better qualified based upon the results of a job related selection procedure".

130. The purpose of paragraph 2 was to relieve the City from liability under the Decree if, although otherwise required by the Decree, it should reject a minority candidate because the results of a job related selection procedure show that person to be demonstrably less qualified.

131. The hiring and promotion by the City of less qualified blacks in preference to competing white candidates who are demonstrably better qualified based upon the results of a job related selection procedure is permitted to effectuate and carry out the purposes of the Decree.

132. The City Decree authorizes the City, in order to meet the aforementioned goals, to hire and promote black candidates who are certified as qualified by the Personnel Board, even if such candidates are demonstrably less qualified than competing white candidates based upon the results of a job related selection procedure.

133. The Phrase "job related selection procedure", as used in paragraph 2 of the City Decree, means a selection procedure which is validated or capable of being validated.

134. The word "demonstrably", as used in paragraph 2 of the City Decree, means both clearly and measurably.

135. A selection procedure which relies in whole or in part on subjective criteria is not a job related selection procedure within the meaning of paragraph 2 of the City Decree.

136. The use of a selection procedure which has a component that would perpetuate the effects of past discrimination would be contrary to the express purposes of the City Decree; such selection procedure is not a "job related selection procedure" within the meaning of paragraph 2.

137. The City Decree does not obligate the City to compare the relative qualifications of black and white candidates for promotion prior to hiring or promotion blacks.

138. The City Decree does not obligate the City to adopt a job related selection procedure.

139. The City Decree does not obligate the City to compare scores achieved on promotional examinations by black and white candidates prior to promoting blacks.

CONCLUSIONS OF LAW

140. The City Decree is lawful. It was approved by this Court in United States v. Jefferson County, 28 Fair Empl. Prac. Cas. (BNA) 1834 (N.D. Ala. 1981) and plaintiffs cannot collaterally attack the Decree's validity. See Thaggard v. City of Jackson, 687 F.2d 66, 32 FEP Cases 228 (5th Cir. 1982); Dennison v. Los Angeles Department of Water & Power, 658 F.2d 694, 26 FEP Cases 1739 (9th Cir. 1981); Austin v. County of DeKalb, 572 F.Supp. 479, 39 FEP Cases 1561 (N.D. Ga. 1983). [Joint Pretrial Memorandum of Defendants, the City of Birmingham, Richard Arrington, Jr. and Defendant-Intervenors, "Pretrial Mem.," at 65-68.] The United States has conceded it is not attacking the Decree's lawfulness and as a signatory it cannot. City Decree ¶3. The only avenue of attack open to the private plaintiffs is to show that challenged action was not taken pursuant to the Decree. United States v. Jefferson County, 720 F.2d 1511, 1518, 33 FEP Cases 829 (11th Cir. 1983). Furthermore, under all the relevant case law of the Eleventh Circuit and the Supreme Court, it is a proper remedial device, designed to overcome the effects of prior, illegal discrimination by the City of Birmingham. United States v. Jefferson County, 28 Fair Emp. Prac. Cas. (BNA) 1834 (N.D. Ala. 1981). See United States Steelworkers v. Weber, 443 U.S. 193, 20 FEP Cases 1 (1979); Palmer v. District Board of Trustees, 748 F.2d 595, 36 FEP Cases 778 (11th Cir. 1984); United States v. City of Alexandria, 614 F.2d 1358, 22 FEP Cases 872 (5th Cir. 1980); Paradise v. Prescott, 767 F.2d 1514, 38 FEP Cases 1094 (11th Cir. 1985). [Pretrial Mem. at 69-84.]

141. The burden of proof is on plaintiffs. Once defendants show that promotions were made pursuant to a consent decree, the burden shifts to the plaintiffs to prove by a preponderance of the evidence either that the promotions were not undertaken to meet the goals of the decree or that the decree is invalid. Palmer v. District Board; Setser v. Novack Investment Co., 657 F.2d 962, 26 FEP Cases 513 (8th Cir. 1981); Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 25 FEP Cases 113 (1981). Evidence that race was considered in an affirmative action context is not the equivalent of the finding of direct discrimination that shifts the burden of persuasion to the defendants. Dougherty v. Barry, 607 F.Supp. 1271, 37 FEP Cases

1201 (D.D.C. 1985).

142. In light of the City Decree, plaintiffs cannot prevail if they do not establish that the City acted with unlawful discriminatory intent. That an action was taken pursuant to a valid affirmative action plan or consent decree is proof that it was not taken with the requisite discriminatory intent. United States v. Jefferson County, 720 F.2d at 1518; Palmer v. District Board, 748 F.2d at 601. [Pretrial Mem. at 22-25.]

143. "Job related selection procedure," as the term is used in paragraph two of the Decree, refers to a validated employees selection procedure.† See Blake v. City of Los Angeles, 595 F.2d 1367, 19 FEP Cases 1441 (9th Cir. 1979); Craig v. County of Los Angeles, 626 F.2d 659, 24 FEP Cases 1105 (9th Cir. 1980); United States v. Georgia Power Co., 474 F.2d 906, 5 FEP Cases 587 (5th Cir. 1973). [Pretrial Mem. at 30-37.]

144. "Any attempt to assess the relative qualifications of two individuals on the basis of their test scores is a risky process, and at a minimum requires knowledge of the magnitude of the difference in their scores if not also the significance of that difference given the characteristics of the measuring device. The need for such information under paragraph 2 of the consent decree is highlighted by the language of that paragraph relieving the city from its minority employment goals only if such minority applicants are 'demonstrably' less qualified.[**]

> ***23** ** Of the common meanings of the word "demonstrably," the ones most suitable in this context are "obviously" or "clearly."

In re: Birmingham Employment Litigation, 37 Fair Emp. Prac. Cas. 1, 6-7 (N.D. Ala. 1985).

145. The criteria upon which plaintiffs are relying to prove comparative qualifications have not been shown to be valid; furthermore, they are the kind of criteria that have been viewed suspiciously by courts because of their subjectivity and tendency to perpetuate the effects of past discrimination. See Albemarle Paper Co. v. Moody, 422 U.S. 405, 10 FEP Cases 1181 (1975); Miles v. M.N.C. Corp., 750 F.2d 867, 36 FEP Cases 1289 (11th Cir. 1985); Walker v. Jefferson County Home, 726 F.2d 1554, 34 FEP Cases 465 (11th Cir. 1984); Ensley Branch, NAACP v. Seibles, 616 F.2d 812, 22 FEP Cases 1207 (5th Cir. 1980). [Pretrial Mem. at 37-46.] Any selection procedure which utilizes subjective criteria or length of service - or other criteria which have been tainted by subjectivity or consideration of length of service -- cannot be reconciled with the City Decree, which was expressly intended to ensure an end to discrimination against blacks, and to remedy any disadvantage to blacks resulting from past discrimination.

146. The hodge-podge of "criteria" proposed by plaintiffs do not constitute a selection procedure. No formula has been offered, let alone proven valid, to assess the relative importance of the "criteria" offered by the plaintiffs. The overall approach is wholly subjective and is as invalid as its individual components. [Pretrial Mem. at 46-47.]

147. Paragraph two of the Decree does not require the City to develop or use a job related selection procedure. It gives the City a limited option and limited defense should the City fail to meet the Decree's goals. This conclusion is compelled by the Decree's language and purpose, and is supported by the pre-Decree practices of the City and the Personnel Board. [Pretrial Mem. at 47-57.]

148. Plaintiffs have not established that any of the white plaintiffs are demonstrably better qualified than any of the black promotees based on the results of a valid, job related selection procedure. The failure of plaintiffs to identify a selection procedure, let alone one that is valid and job related, compels that conclusion.

149. The City Decree and the affirmative action plan for the promotion of blacks it created, clearly contemplate the promotion of blacks who are demonstrably less qualified than competing whites. This conclusion is compelled by the wording and purposes of the Decree. United States v. Jefferson County, 28 Fair Emp. Prac. Cas. (BNA) 1834 (N.D. Ala. 1981). The 1981 statements of the parties to the Decree and the proceedings at the Fairness Hearing make clear that was also the contemporaneous understanding of the parties. United States v. Jefferson County, CA-75-P-0666-S, Fairness Hearing on August 2, 1981, Transcript at 63. [Pretrial Mem. at 8-21.]

150. The City Decree entered by this Court, immunizes the City from liability for actions taken pursuant to it. See City Decree, ¶3, United States v. Jefferson County, 720 F.2d 1511, 33 FEP Cases 829 (11th Cir. 1983), recognizes that proposition. If there has been any doubt about that after Jefferson County, the Eleventh Circuit's subsequent decision in Palmer v. District Board, made clear that an action taken pursuant to a consent decree, not just one absolutely required by it,

is not an act of discrimination under Title VII. [Defendants' Memorandum Addressed to the Burden of Proof and the "Mandated" Language in Jefferson County, "Burden of Proof Mem.," at 21-30.]

151. Race-conscious actions taken by an employer pursuant to a valid affirmative action plan are legal. United States v. Jefferson County, 720 F.2d 1511, 1518, 33 FEP Cases 829 (11th Cir. 1983); Palmer v. District Board of Trustees, 748 F.2d 595, 601, 36 FEP Cases 778 (11th Cir. 1984). [Pretrial Mem. at 22-25.]

152. The United States has consistently taken positions in this litigation inconsistent with positions it pressed so vigorously in the litigation leading up to this Consent Decree. It has repeatedly breached its obligations to uphold the Decree and this Court's instructions, In Re: Birmingham Employment Litigation, 37 Fair Emp. Prac. Cas. 1, 8 (1985), that it act in accord with its obligations under the Decree. Its actions in these proceedings have been tantamount to an attack on the Decree's validity.

SUBSIDIARY CONCLUSIONS OF LAW

153. Information or opinions not known to the decisionmaker are inadmissible as irrelevant.

154. Evidence of prior discrimination by the City of Birmingham is admissible to establish the factual basis for the legality of the City Decree, to show that seniority based criteria are subject as a result of prior underrepresentation, and that subjective criteria for evaluating promotions may be contemplated by the vestiges of such discrimination or the attitudes of those hired during such period.

155. Selection criteria which incorporate seniority or which are based on the subjective discretion or opinions of supervisors may not be considered in comparing black and white candidates under paragraph two of the City Decree.

Parallel Citations

39 Fair Empl.Prac.Cas. (BNA) 1431

Footnotes

* "[I]t could hardly be contended that because of longer city service an individual would be demonstrably better qualified for promotion." In re: Birmingham Reverse Discrimination Employment Litigation, 37 Fair Empl.Prac.Cas. at 5 n.14.

† Indeed, more than three years ago and only one year after entry of the City Decree, Mr. Fitzpatrick, counsel for the private plaintiffs, interpreted paragraph two to require a "validated" procedure:

> "Whether the City uses [statistics pertaining to test scores] in making their decisions or not, we don't claim is relevant to the question of whether or not in fact one person possesses superior job related qualifications *in accordance with a validating (sic) procedure and that is our interpretation and understanding of paragraph 2*." (Emphasis added.)
> B.A.C.E. v. Arrington, CV 82-P-1852-S, T.R.O. Hearing on September 21, 1982, Transcript at 49.