Hartman v. Gelb

United States District Court for the District of Columbia
June 8, 1992, Decided ; June 8, 1992, Filed
C.A. No. 77-2019 CRR

Reporter: 1992 U.S. Dist. LEXIS 22186
CAROLEE BRADY HARTMAN, et al., Plaintiffs v. BRUCE S. GELB, Defendant

Subsequent History: [*1] Adopting Order of July 9, 1992, Reported at: 1992 U.S. Dist. LEXIS 22182.

Judges: Saltzburg

Opinion by: STEPHEN A. SALTZBURG

Opinion

REPORT AND RECOMMENDATIONS OF THE SPECIAL MASTER REGARDING FOREIGN SERVICE OFFICERS

I. *Introduction and Summary*

On May 7, 1992, the Court entered an order referring to the Special Master issues regarding entry-level foreign service officers. The Court ordered the Special Master to issue a report and recommendation on or before 4:00 p.m. on June 12, 1992, with respect to the following issues:

> (1) whether women who took the December 1984 foreign service officer examination are members of the class eligible to participate in the reevaluation process; and
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> (2) whether the rank ordering of test takers shall be determined according to the score on the cultural portion of the foreign service examination or whether the ranking shall be determined according to the overall score on all USIA cones on the examination; and
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> (3) how many slots shall be allocated to foreign service officer class members, and
> how many women should be reevaluated to fill these slots? [1]

[*2] The Court provided that the parties could submit additional memoranda to the Special Master under a briefing schedule set forth in the May 7th Order. The parties availed themselves of this opportunity and submitted memoranda on all issues as well as material previously submitted to the Court. [2] The Special Master heard argument on all issues on June 2, 1992.

For the reasons stated below, the Special Master recommends the following resolution of all disputed issues:

> (1) 52 slots should be set [*3] aside for *Hartman* class members; and
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> (2) the defendant should set aside a minimum of 15 slots each year for three years and seven slots in the fourth year for *Hartman* class members; and
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> (3) eight class members should initially be tested for each available slot so that approximately 416 class members should be reevaluated to fill all slots, but the number of class members invited should be reevaluated each year to see whether the 8:1 ratio, which appears at this time to be appropriate, is too high or too low, and whether an adjustment should be made; and
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> (4) any class member who seeks to participate in the process should be permitted to do so provided that her request is received prior to the preparation of the rank order list, and thereafter only upon a showing of good cause for a late filing; and

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[1] The Special Master notes that several subissues have arisen. One is whether class members wishing to participate in the foreign service officer process, but who filed their returns after the deadline set by the Court, should be disqualified. Another issue is the time period in which slots would be filled. Finally, it has become clear that the notice which is to be sent to class members telling them their test scores should provide certain additional information which explains the decisions the Court will make on the various issues presented.

[2] Two of the memoranda that the Court permitted were explicitly limited to ten pages. There was no limit placed upon filings with respect to the third issue, the number of slots to be allocated to class members. The defendant filed a 29 page memorandum, and the plaintiffs filed a motion to strike. The Special Master denied the motion at a hearing with the parties on June 2, 1992. A transcript of the hearing has been ordered by the Special Master, and the original will be delivered to the Court as soon as it is available.

(5) the rank ordering should be based on the information/culture cone of the examination, but the defendant should be permitted to take into account in the final process of selecting among applicants scores on the english expression and general background parts of the foreign service officer examination; and

(6) the notice to class members should *inter alia* inform them [*4] of the number of slots available to the class and the time period in which the slots will be filled, of their scores on the information/culture cone of the examination and on the english expression and general background portions of the examination, that the rank ordering is based only on the cone but the defendant may consider the other scores as part of the final review of candidates, that the defendant generally has not hired applicants who have not passed all three portions of the examination, what the passing scores were for the examinations, that it is possible that late claimants who show good cause might be added to the list so that there may be a final adjustment that could cause a class member to climb or fall several places on the list, that at this time it appears that approximately 416 class members will be reevaluated but that the number may increase or decrease in light of the success rate which actually occurs when the reevaluations begin; and

(7) in view of the importance of avoiding delay and extending invitations to the class to participate in the reevaluation process on or before July 15, 1992, as ordered by the Court on May 7, 1992, any appeal by either party [*5] from any recommendation made herein should be filed with the Court, together with all supporting memoranda no later than 4:00 p.m. on Friday, June 12, 1992.

The Special Master sets forth below the facts supporting these recommendations. The discussion which follows, together with the recommendations, constitute his report to the Court. He believes that the recommendations made above are fair to both sides. Each recommendation interrelates to some extent with the others. Thus, if the number of slots to be filled were a smaller number, the Special Master would have recommended a different and shorter time period for filling the slots. Similarly, if the number of slots to be filled were a larger number, the Special Master would have recommended a different and longer time period. In arriving at these recommendations, the Special Master gave the benefit of the doubt with respect to a remedy to class members, but his recommendations are supported by data which provides a substantial factual predicate for each recommendation. While giving the plaintiffs the benefit of the doubt on the scope of remedy, the Special Master has endeavored to recognize the legitimate interests of the defendant [*6] in implementing the remedies in ways that will promote the interests of all persons who work for USIA.

II. *The Number of Slots*

A. *The Court's Original Decree*

In its remedial order, *Hartman v. Wick,* 678 F. Supp. 312, 345-346 (1988), this Court ordered the defendant *inter alia* to obtain a list of names, addresses and foreign service scores of women who applied to the Foreign Service "between October 8, 1974 and November 16, 1984," and to create a "rank-order list of the women who unsuccessfully applied for FSO positions at the agency or who failed the USIA cone during this period." Thus, the Court originally provided relief for class members who were entry level applicants to the Foreign Service based upon an approach previously used pursuant to a consent decree in the case of *Palmer v. Schultz.* Other class members were to seek relief through "teamster hearings."

B. *The Court's Amendment of its Order*

After the entry of the Court's January 19, 1988 order granting relief, the parties filed on October 3, 1988 a joint motion seeking approval of a class notice and an amendment of the Court's earlier order. They represented to the Court [*7] that the Educational Testing Service did not have test scores prior to 1978. Pursuant to the joint motion, the Court ordered "that the Court's remedial Order of January 19, 1988, be and the same hereby is, amended so that applicants for entry level Foreign Service Officer positions with the United States Information Agency during the years 1974, 1975, 1976, and 1977, and all mid-level Foreign Service Officer Applicants for the years 1974-1984 will be afforded relief by *Teamster* hearings rather than the reexamination scheme ordered for other entry level Foreign Service Officer positions . . .."

Thus, the Court provided that class members who were FSO entry level applicants from 1974-1977 would receive any relief to which they might be entitled in the teamster hearing part of the case; they would not be reevaluated because the absence of test scores made a rank order listing impossible. Class members who were FSO entry level applicants from January 1, 1978 through the close of the class period, November 16, 1984, would participate in the reevaluation process. It is the Court's amended order that gives rise to the various issues which are the subject of this report.

C. *The Appropriate* [*8] *Remedy in this Case*

This Court noted in its remedial opinion, 678 F. Supp, at 335-336, that under Title VII, "a court must, as nearly as possible 'recreate the conditions and relationships that would have been had there been no' unlawful discrimination." *Quoting International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 372, 52 L. Ed. 2d 396, 97 S. Ct. 1843 (1977), which quoted *Franks v. Bowman Transportation,* 424 U.S. 747, 769, 47 L. Ed. 2d 444, 96 S. Ct. 1251 (1977). Although the Court opted for *Palmer*-type relief for the class members who applied for FSO entry level positions from 1978-1984, the basic equitable doctrine that the injured party should be made whole applies to this part of the case as well as to the teamster part.

In a perfect world, we would determine precisely which members of the class were discriminated against during the relevant period and provide them relief. But, this is an imperfect world, and it is impossible to do this. Instead, under the Court's order, it is necessary to do the next best [*9] thing.

The next best thing is to determine, as accurately as possible, how many slots were filled by men rather than women as a result of discrimination during the relevant period, and to set aside in the future an equal number of slots for class members. The result would be to assure that for every slot affected by discrimination, a future slot is filled by a class member. This remedy provides full relief to the class and imposes upon the defendant the burden of rectifying past discrimination. This is the approach the Special Master has chosen. It finds support in the Court's remedial order, basic equitable principles, and decided cases. As explained below, it also gives the plaintiffs the benefit of an important doubt in this case.

D. *Figuring the Number of Slots*

1. *The 1984 Test*

One of the questions referred to the Special Master is whether women who took the 1984 test are among the class members eligible for *Palmer*-type relief. The Special Master recommends that they be included within the group eligible for this relief for the following reasons.

It is the practice of USIA to require all applications for entry level FSO positions to be filed prior to October 15 of [*10] any given year. The written examination is then given in December. Following the written examination, a number of applicants are selected for oral examinations. Those who pass the oral examinations then undergo a security examination and a medical examination. Those who are not disqualified undergo final review, and upon completion of this review a decision is made as to which applicants should be offered positions.

The reason that a question arises as to the 1984 test is that class members who took it had to file applications before October 15, 1984, which was within the class period. The written examination, however, was not given until December, or after the close of the class period. All other steps in the process also occurred after the class period ended.

Equitable considerations strongly favor the plaintiffs with respect to the 1984 test. To understand why, it is important to focus first on 1978. The Court's amended remedial order provides *Palmer*-type relief for all class members who applied for entry level FSO positions beginning on January 1, 1978. Thus, class members who took the 1977 examination would have been orally examined in 1978. The security and medical checks [*11] would have taken place in 1978, as well as the final screening. Yet, the members of the class cannot obtain a remedy for discrimination in 1978, because the 1977 December test scores have been destroyed. Thus, it is impossible to rank class members and to provide *Palmer*-type relief for 1978. Accordingly, class members who took the December, 1977 test are deemed to be members who applied for an entry level FSO position in 1977, not 1978, even though the selection process only began in 1977 and did not end until the next year.

Since all class members who took the 1984 test applied to take it before the close of the class period, it is fair and just to treat these class members as members who applied to the Foreign Service during the class period. The Court's original remedial order granted *Palmer*-type relief to "women *who applied* to the Foreign Service between October 8, 1974, and November 16, 1984, and were rejected." 678 F. Supp. at 345-346. The Court did not require that women have applied and completed all tests. When the Court amended the order, it did not change this language. Thus, the Special Master's recommendation is consistent with the [*12] language of the remedial order. [3]

[*13] More importantly, it is equitable. Women who applied in 1977 will have the opportunity for teamster

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[3] It is possible to distinguish the 1977 testtakers from the 1984 testtakers on the ground that those who took the test in 1977 both applied for and took the test during the class period, whereas those who applied in 1984 did not take the test until the close of the period. The Special Master does not believe that this difference ought to be conclusive. More important is the fact that in every year in which a test is given, the selection process continues into the following year. The first prerequisite to any application is that a written application must be received before October 15th of any year. This is the date that separates out those who

hearings. These women do not get *Palmer*-type relief even though the hiring process that began for them in 1977 was not completed until 1978 and they would not have been eligible to be hired until 1978. Women who applied before October 15, 1984 were undoubtedly applicants during the class period and should obtain relief.

2. *The Number of Women Not Hired*

During the remedial hearing, the Court heard testimony from the plaintiffs' expert, Dr. Bernard Siskin. Dr. Siskin had updated data used by another of the plaintiffs' experts, Dr. Rosenblum, during the liability phase of the case. One of the exhibits prepared by Dr. Siskin is attached hereto as Exhibit 1. Dr. Siskin identified year by year for the years 1979-1985 the number of persons hired, both male and female, as FSOs in the 1085 job classification. He determined the expected number of female hires using Bureau of Labor Statistics' data for editors and reporters. He determined shortfalls in hiring for each year. His figures indicate that approximately 39 fewer women were hired than would have been expected. It is fair to conclude, [*14] given the Court's finding of discrimination, that these slots were not filled as a result of discrimination. [4]

[*15] Dr. Siskin ended his exhibit in 1985. The fact is, however, that a woman who took the 1984 test would not have been put on a list of eligible people for at least six to nine months afterward. This time is needed for the oral examinations and the other procedures discussed above. Moreover, a woman who made the list would have been eligible to be hired for 18 months thereafter. As it turns out, women who took the 1984 test would have been eligible to have been hired for all three hiring periods in 1986. The defendant has submitted an exhibit, which is attached hereto as Exhibit 2. That exhibit shows that 61 persons were hired in 1986, and only 19 were women. Using the same percentage (51.70) for eligible females in the labor market that Dr. Siskin used in Exhibit 1 for 1985, it appears that the expected number of women hired for
1986 would have been 31.537, which is rounded off to 32. The shortfall for 1986 is 13. If the number 13 is added to the number 39 which Dr. Siskin arrived at in Exhibit 1, it appears that the correct conclusion is that 52 slots were filled by men rather than women as the result of discrimination. This is the number the Special Master recommends to the Court.

[*16] In making this recommendation, the Special Master explicitly acknowledges that it may slightly overcompensate for two reasons. First, women who took the 1985 test would have been eligible for some of the 1986 slots. This is not absolutely clear, however, since women who took the 1985 test would not have been put on a list until 1986, and it is impossible to know when that would have occurred. Second, Exhibit 2 reveals that the agency's figures on the number of entry level FSOs is lower than that used by Dr. Siskin. The Special Master has prepared Exhibit 3, which contains the Special Master's handwritten transposition of the data on Exhibit 2 to the data contained in Exhibit 1. Exhibit 3 demonstrates that if the numbers the defendant proffers in Exhibit 2 are correct, the number of slots would be 41 rather than 52.

The Special Master has arrived at the higher figure for three reasons. First, Dr. Siskin testified at the remedial hearing. The defendant had an opportunity to cross-examine him. Any errors or qualifications with respect to the numbers could have been the subject of examination. Second, the plaintiffs have not had an opportunity to cross-examine anyone with respect to Exhibit [*17] 2, and it is too late in this case to interrupt the process to permit another hearing, particularly in view of the fact that the exhibit was not prepared until years after the remedial hearing. Third, the Court would have been entitled to rely in 1988 on Dr. Siskin's numbers. Had

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may take a test from those who may not. It, therefore, is the critical date. It is true that some applicants may choose not to take the test, but it is equally true that some applicants who take the test may refuse to undergo a security or medical examination and thus drop out of the process. The fact that a woman might drop out of the process is undeniable, but it is also not very helpful in deciding when a woman is an applicant. For the reasons stated herein, the Special Master concludes that a woman is an applicant on October 15th of any year. She may drop out, but she is at that time an applicant.

[4] Dr. Siskin had two other exhibits which cross-mapped but used different job categories. They showed almost no shortfall. The Special Master chose to rely upon the third exhibit for three reasons. The job categories used therein corresponded to the job categories used by the defendant's expert, Dr. Wolfbein. See Trial Transcript, June 1, 1979, at 103. Thus, it was fair to the defendant to use this exhibit. Second, the defendant did not demonstrate at the remedial trial that this exhibit should not be used. Third, the plaintiffs are entitled to the benefit of the doubt.

The defendant observes that one of the other exhibits of Dr. Siskin used the job categories which corresponded to those used by Dr. Rosenblum at trial. This, the Special Master concludes, is not dispositive. Dr. Rosenblum testified as to liability. At the liability stage, it may make strategic sense to demonstrate a shortfall using the most conservative figures. At the remedial stage of a case, the question is which figures are fair, given that there has been a finding of discrimination. The Special Master concludes that Dr. Siskin's exhibit is the best evidence available at this stage of the case and should be relied upon.

the Court done so, the number it would have arrived at would have been 52. [5]

The Special Master rejects the plaintiffs' contention that the correct number of slots is 216. The argument for this number is that Dr. Rosenblum's testimony, which the Court credited at the liability trial, was that there was a shortfall of 216 women in the 1085 job category. The problem is that this number did not focus on the discrimination that occurred only between October 8, 1974 and November [*18] 16, 1984, and it certainly did not focus on the 1978-1984 period. Dr. Rosenblum offered a snapshot for a single year, 1978, that reflected all discrimination that occurred during the entire history of the agency up to and including 1978.

Plaintiffs suggest that the defendant did not demonstrate at the trial that the 216 was not confined to 1974-1984. The defendant did not have to do so. Dr. Rosenblum's snapshot spoke for itself. He identified what he did in his cross-mapping, and he did not purport to tie his testimony just to the class period. And, there was no reason for him to do so, since prior discrimination surely would have been relevant to prove a pattern and practice of discrimination. At the liability stage, the question was whether there was such a pattern and practice. The Court found that there was, but there was no occasion to identify the precise number of slots in the FSO entry level category that was affected during the relevant period by the discrimination.

Plaintiffs also suggest that the correct number of slots is the total number of slots affected by discrimination from October 8, 1974 until November 16, 1984, rather than the number of slots affected from January [*19] 1, 1984 to November 16, 1984. To adopt plaintiffs' theory would be to provide a windfall to the plaintiffs that is unsupported in any case which the Special Master can find.

As explained above, every member of the class who applied for an entry level FSO position from October 8, 1974 through December 31, 1977 is entitled to seek a remedy in teamster hearings. Thus, *every class member who can demonstrate injury will get a remedy for the 1974-1977 period.* In fact, the defendant's failure to retain test scores for this period means that it may be very difficult for the defendant to defend against claims by women who applied for FSO positions in these years. It remains to be seen whether the defendant can demonstrate a reason for not hiring a woman without having her score or scores of others who competed. The likelihood is that the teamster hearings will provide relief to *more* women than would have actually been hired, because of the difficulty the defendant will have in defending these claims. This is the result of the defendant's own inability to produce test scores. But, to add *Palmer*-type relief on top of teamster relief for the years 1974-1977 is to provide a double [*20] remedy. There is no justification for such a remedy. As Justice Brennan wrote for a plurality of the Supreme Court in *Local 28 v. EEOC,* 478 U.S. 421 476, 92 L. Ed. 2d 344, 106 S. Ct. 3019 (1986), "a court . . . should also take care to tailor its orders to fit the nature of the violation it seeks to correct." (Footnote omitted)

The plaintiffs suggested that 75 slots be allocated to the *Hartman* class. This is the same number as was allocated for remedial relief in *Palmer.* But, the plaintiffs' suggestion was made in tandem with the claim that they were entitled to 216 slots. Having rejected the 216 number, the Special Master also rejects the number 75. There is no relationship between the number 75 and the actual number of slots affected by discrimination in this case. 75 is an arbitrary number. [6] The fact that is was used in *Palmer* has no relevance. The number of FSO slots available to the State Department is much different than the number available to USIA. The State Department has more room than USIA to add FSOs. But, even if the agencies were exactly the same, the question is what number of slots can be justified [*21] on the basis of the actual hiring numbers which are available. The best answer at this time is 52.

III. *The Time Period for Hiring*

For the past three years, USIA has averaged approximately 30 entry level FSO hires each year. The number for 1989 was 35, for 1990 was 34, for 1991 was 29. The expected number for 1992 is 30. The Special Master raised with the parties at the hearing on June 2, 1992 the possibility of setting aside an entire year for *Hartman* hires--*e.g.*, not giving a 1992 test and hiring only *Hartman* class members. Both sides agreed that this approach was unwise, because it threatened to stigmatize the class members by separating [*22] them from the ordinary hiring process.

It is necessary to absorb the *Hartman* class into the routine hiring process, but to do so quickly enough that class members do not give up on the remedy that has been

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[5] The Special Master has relied upon Exhibit 2 to determine the number of slots for 1986. Dr. Siskin did not address that year, and Exhibit 2, offered by the defendant, contains numbers to which the defendant cannot object. The plaintiffs have not offered numbers for 1986.

[6] For the same reason, the Special Master rejects the defendant's argument that, if 75 was the right number in *Palmer,* a smaller number (12-18) is right in the instant case because there are fewer USIA FSO positions than there are State Department FSO positions. Because the number 75 is arbitrary, the mathematics suggested by the defendant also is arbitrary.

provided them. The Special Master believes that USIA should set aside 15 slots for the next three years, and seven in the fourth year. Although USIA indicated that it would prefer to set aside one-third of its hires for the *Hartman* class, to honor this preference would mean that only 10 class members would be hired in any year in which only 30 entry level FSOs were hired. It is possible that it would take 6 years to fill the 52 slots, and six years is too long.

The Special Master also considered an approach that would require USIA to set aside one slot of every two, so that if the agency hired 36 people in a given year, 18 rather than 15 class members would be selected. But, after careful consideration, the Special Master recommends that the agency be required to set aside 15 slots for three years and *permitted* but not required to offer more slots to class members in any given year. In reaching this conclusion, the Special Master notes that his recommendation of 52 slots [*23] gives the plaintiffs the benefit of two doubts. It is appropriate to provide the agency with some discretion in deciding how best to incorporate the *Hartman* class members into the hiring process. Moreover, the notice to class members that 15 slots will be available for three years and seven in the fourth unless the agency chooses to speed up the hiring will provide clear information to class members as to what should be expected.

IV. *Number of Class Members to be Evaluated*

Generally, the experience of the State Department and USIA is that five candidates have to be given oral examinations for each spot to be filled. In the *Palmer* case, approximately eight oral examinations were required for each slot to be filled. The defendant estimates that an 8:1 ratio makes sense, and the plaintiffs estimate that a ratio of somewhere between 8:1 and 10:1 is reasonable. The *Palmer* case is the best precedent to rely upon, even though there are differences between the class in that case the *Hartman* class. It is possible that the age of the instant case will mean that a higher ratio is needed. It is equally possible that the rank-order approach will produce results equivalent to [*24] those in *Palmer*. Thus, the Special Master recommends that eight candidates be evaluated for each slot to be filled. Because the 8:1 ratio is only an estimate, he also recommends that the ratio be reexamined once there is some actual data available following the first round of reevaluations. [7]

The plaintiffs have indicated that approximately 9400 class members returned response cards asking that they be included in the *Palmer* part of the case. The defendant estimates that, of this number, as many as 1500 class members may be disqualified because, in 1978 and 1979 when they took tests, they indicated, as an applicant at the time could do, that they were seeking positions with the State Department rather than USIA. These class members received notices inviting them to return response cards as a result of a mistake, which is discussed in Part V., *infra*. Even if 1500 is subtracted from 9400, [*25] it is apparent that there is a large pool of applicants available from which to compile a rank order list. [8]

V. *The Cones to be Used*

The notice to class members, to which the defendant did not object, stated as follows: "In compliance with this Court's Order, the USIA has compiled a rank order list, by score for the years 1978-1979, of unsuccessful female applicants for entry level positions in the Foreign Service with the Agency. For the years 1980-1984, when the USIA participated in the Foreign Service Entrance Examination with the Department of State and other federal agencies, these rank order lists were compiled from the scores on the USIA's Information/Culture [*26] 'cone' or subtest on the examination."

The plaintiffs had suggested to the Court a rank order based upon a ratio of pertinent portions of the examination, but the Court rejected this suggestion as unduly complicated. The defendant took no position on the plaintiffs' suggestion. But, the defendant has now suggested that in addition to the "cone," the rank order list also should be based on the english expression and general background parts of the foreign service officer examination. Plaintiffs oppose this suggestion as untimely and unfair given the notice that was previously sent to class members.

The Special Master believes that, had the defendant come forward prior to the sending of the notices, with a suggestion that women who passed the english expression and general background parts of the examination should be ranked higher on a list than those who failed one or both parts of the examination, the suggestion would have warranted serious consideration. This is especially so in view of the fact that generally the agency will not hire an applicant who has not passed these sections.

But, the defendant's suggestion comes too late. A woman who had a low score on the "cone" may have [*27] chosen

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7 The Special Master believes it is important to inform class members that the 416 number is not chiseled in granite.

8 The defendant had sought to exclude late claims (several hundred) and those who took the 1984 test (approximately 2200). As noted elsewhere in this report, the Special Master recommends that these class members be included in the rank order list. Even if they were excluded, the number of claimants eligible for the *Palmer* process will exceed 5,000.

not to indicate interest in the process. If, however, she had passed the other sections and had been told that women who did not pass the other sections would be ranked lower than she, she might have chosen to participate. The defendant suggests that the number of women in this position is not large. But, there is no way of knowing how many such class members exist, and it is too late for another round of notices.

The defendant's interest in hiring the best women in the class is genuine and understandable. This can be accomplished if the defendant is permitted take the scores on the english expression and general background portions of the examinations into account as part of the final evaluation of any applicant. The plaintiffs have not objected to such a procedure. That procedure is consistent with the notice to class members. It also allows the agency to do what it would do in a typical final evaluation.

Thus, the agency's interests can be protected and the expectations of the plaintiff class preserved by using the score on the cone to prepare the rank order list. This may mean that the defendant will give oral examinations to some women who have failed a part of the test. [*28] The burden of these examinations is unfortunate, but it is the result of the defendant's suggestion about rank-ordering coming too late after the notices were sent to class members.

At some future time, it might be necessary to decide whether and how to break a tie between a large number of class members. For example, if there were one slot open and 100 class members with the same cone score, it might make sense to test only some of the 100. There will be time enough to address that issue in later years, if indeed it proves to be a practical problem rather than a theoretical one.

VI. *Late Claims*

Some class members filed their responses to the FSO class notice after the deadline fixed by the Court and stated in that notice. Class members are spread over the entire country and world. They had no reason to expect a particular notice at a particular time. It is understandable that some class members would be away from home and unaware of the notice until after the deadline passed. [9]

[*29] The notice process for FSO members of the class was flawed through no fault of the plaintiffs or their counsel. It appears that the list of FSO testtakers submitted to the defendant by the Educational Testing Service included, for the years 1978 and 1979, names of women who indicated that they were applying for the State Department, not USIA. Thus, a number of class members filed responses and will have to be informed that they are not, in fact, eligible. The relevance of this is that it demonstrates that both sides were operating under enormous time pressure with respect to the FSO notices. This is a factor to be considered in deciding whether or not to disqualify a class member whose return was late.

At the June 2, 1992 hearing, the Special Master opined that the defendant had no reason to fear inclusion of late filing class members in the rank order list, and that their inclusion benefitted both the plaintiffs and the defendant, because both have an interest in selection of the best qualified women. Should late filers be among the best qualified, no one is well served by their exclusion. In the teamster part of the case, the defendant has an interest in opposing late claims, because [*30] each claim poses the risk of an additional payment being required of the defendant. In the *Palmer* part of the case, however, there will be a certain number of slots allocated (52 are recommended herein), and this number will be unaffected by a decision to permit late filers to be included.

The defendant agreed with this analysis and indicated that his opposition to late claims was based on a concern for fairness to the plaintiff class. Counsel for the plaintiff class have represented that their class members would regard it as fairer to have all women included who file claims. Thus, no party has an interest in opposing the inclusion of late claims.

Because there are several hundred of these claims, the defendant will have the burden of including them on the rank order list. But that list is likely to have several thousand names on it, [10] and inclusion of several hundred more, while more than a minuscule burden, is not so great that it should not be done. Moreover, any class members whose late claim was rejected might file a motion for permission to file late, and the burden on the parties and the Court of dealing with several hundred motions outweighs any costs of including the [*31] late claimants now.

Once the defendant has compiled a rank order list, there will be a burden in changing the list. For that reason, claims received after the list is compiled should only be approved upon a showing of good cause under the recommendation made by the Special Master.

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9 The deadline for returning a response card was relatively short. The notices were mailed in October 1991, and responses were required by December 1, 1991.

10 *See* footnote 8, *supra.*

VII. *Notice to the Class*

The Court's May 7, 1992 Order requires that invitations to participate in the reevaluation go out no later than July 15, 1992. The Court has also held that the defendant should inform all class members who responded to the notice and have asked to be included in the *Palmer* process of their scores. If class members are to make informed decisions concerning whether or not to continue to participate in the process, they need to know about the number of slots, the time period for filling them, the extent to which parts of the examination other than the informational/cultural cone might be used in some way or other, and a few additional things. To assure that the defendant is [*32] not unnecessarily burdened with more than one notice, the Special Master recommends that the Court require that the notice which the defendant is to send to class members informing them of their score on the cone also inform them of the number of slots available to the class and the time period in which the slots will be filled, of their scores on the english expression and general background portions of the examination, that the rank ordering is based only on the cone but the defendant may consider the other scores as part of the final review of candidates, that the defendant generally has not hired applicants who have not passed all three portions of the examination, what the passing scores were for the examinations, that it is possible that late claimants who show good cause might be added to the list so that there may be a final adjustment that could cause a class member to climb or fall several places on the list, [11] and that at this time it appears that approximately 416 class members will be reevaluated but that the number may increase or decrease in light of the success rate which actually occurs when the reevaluations begin.

[*33] Such information will enable the class members to make intelligent choices about whether or not to continue in the *Palmer* process. It also may cause some class members who failed one or two of the parts of the written examination to opt out and save the defendant the burden of giving them an oral examination when it is unlikely that they will be selected. The information described above also will let class members know that the rank order might change slightly, so that they will not be surprised if this happens.

VIII. *Appeals*

Although the Special Master has done all in his power to decide the issues referred to him fairly, with due consideration of the equities of both parties, he recognizes the issues are important and one or both parties may wish to challenge one or more recommendations. In view of the importance of avoiding delay and extending invitations to the class to participate in the reevaluation process on or before July 15, 1992, as ordered by the Court on May 7, 1992, the Special Master will file his report and recommendations on Monday, June 8, 1992, well before the June 12 deadline, and will have copies of the report and recommendations delivered on June 8, [*34] 1992 to the parties. The Special Master recommends that the Court order that any appeal by either party from any recommendation made herein should be filed with the Court, together with all supporting memoranda, no later than 4:00 p.m. on Friday, June 12, 1992. The parties have briefed the issues, they have argued them, and the Special Master informed them on June 2, 1992 of his likely recommendations. Therefore, prompt and simultaneous filings should be adequate to permit either side to raise any challenge and should give the Court time to decide any issue that remains without risk to the July 15, 1992 deadline for invitations to class members.

IX. *Proposed Orders*

For the convenience of the Court, and in the interests of time, the Special Master has provided two proposed orders for the Court. One requires any filings by the parties to occur on or before 4:00 p.m. on June 12, 1992. The other covers all other issues addressed in this Report.

DATED: June 8, 1992

Stephen A. Saltzburg

Special Master

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[11] There are approximately 180 class members whose test scores cannot be found. This might be because they did not take a test in the 1978-1984 period, or because they have changed their names, particularly as a result of marriage or divorce. The parties have agreed that it is important for the defendant to give the names to the plaintiffs as soon as possible and for the plaintiffs to seek to provide a social security number for each name. It is possible that some of the class members' test scores will not be located prior to July 15, 1992. This is an additional reason to make it clear to class members that the rank order list might have to be adjusted.