

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON**

United States of America,

Plaintiff,

v.

**Case No. 3:08-cv-348
Judge Thomas M. Rose**

City of Dayton,

Defendant.

**ENTRY AND ORDER OVERRULING OBJECTIONS OF FRATERNAL
ORDER OF POLICE, CAPTAIN JOHN C. POST LODGE 44,
INTERNATIONAL ASSOCIATION OF FIREFIGHTERS LOCAL 136, AND
INDIVIDUAL INTERVENORS, AND APPROVING CONSENT DECREE.**

On April 14, 2009, the Court provisionally approved a consent decree agreed to by the United States of America and the City of Dayton. That consent decree established a procedure for judicial review that allowed interested parties to object to the provisions of the consent decree and called for a fairness hearing to be held on October 14, 2009. Prior to that hearing, the Court granted a motion to correct the consent decree, doc. 21, 21-2, 22, and permitted the Fraternal Order of Police, Captain John C. Post Lodge 44 and International Association of Firefighters Local 136 to intervene as defendants for the purpose of objecting to the consent decree and the purpose of appealing any ruling on the fairness of a settlement. Doc. 23.

Consequently, FOP Lodge 44 and IAFF Local 136 filed a joint objection to the settlement. Similarly, four individuals filed objections. However, because the settlement is fair, reasonable,

adequate, and consistent with the public interest as expressed in federal statutes, the objections will be overruled and the settlement approved.

I. Background

The instant case was brought by the United States of America against the City of Dayton, Ohio, alleging that Dayton's hiring practices for police and firefighters disparately impacted African-Americans in violation of § 707 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-6.

Between June 2005 and August 2008, the United States conducted an investigation into the City's employment practices with respect to hiring entry-level police officers and firefighters. During that investigation, the United States requested information and documents regarding the City's selection process for entry-level police officers and firefighters, including data for all applicants who took the 2006 written police officer examination and similar information for individuals who applied for the position of firefighter throughout this period.

In August 2008, the United States filed a complaint alleging that the City's use of an internally created written police officer examination in 2006, along with its use of heightened minimum qualifications for firefighters, including requiring applicants to have EMT-Basic and Firefighter I and II certifications at the time they apply, beginning in 2004, had a disparate impact on African Americans. The complaint further alleged that neither practice had been demonstrated by the City to be job related and consistent with business necessity as required by Title VII. 42 U.S.C. § 2000e-2(k)(1)(A)(i).

The United States and the City agreed upon a decree, which they stipulate will resolve the allegations set forth in the United States' Complaint. The Decree provides relief in five general ways:

1. *Injunctive Relief*

- The City will not use the 2006 written examination as part of the City's entry-level police officer screening and selection process nor will it use the heightened minimum qualifications (EMT-Basic and Firefighter I and II certifications) adopted in 2004 as part of the City's entry-level firefighter screening and selection process.
- The City will develop new selection procedures for hiring entry-level police officers and firefighters that comply with Title VII.
- The Decree establishes processes the City must follow in advertising for police officer and firefighter positions and requires the City to develop a recruitment plan for the hiring of entry-level firefighters.

2. *Settlement Fund*

- The Decree requires the City to pay \$450,000 into a settlement fund, which will be used to make monetary awards of backpay to African-American claimants who are determined to be eligible for relief under the Decree.

3. *Individual Relief to Police Officers Whose Hiring Was Delayed*

- Four African American police officers who took the 2006 police officer examination and received a score of at least 70, but whose hiring was delayed due to the rank order use of the test results, will each receive monetary relief from the settlement fund; two of those claimants will also receive retroactive seniority for all purposes except for time-in-grade required for promotion, and the opportunity to receive retroactive pension credit.

4. *Individual Relief for Claimants Not Hired as Police Officers*

- African Americans who took the 2006 police officer examination, received a score of less than 70 and were not hired as police officers, may receive a priority offer of employment from the City, a monetary award of back pay from the settlement fund, retroactive seniority for all purposes except for time-in-grade required for promotion, and retroactive pension credit.

- The Decree requires the City to hire up to five eligible claimants as police officers from a priority hire list to be created pursuant to the process set forth in the Decree.
5. *Individual Relief to Claimants Not Hired as Firefighters or Deterred from Applying for Hire as Firefighters*
- African Americans who applied to take a firefighter examination administered in 2004 or later, but who were rejected because they did not meet the heightened minimum qualifications, or who were deterred from applying to take the firefighter examination because of the heightened minimum qualifications may receive a priority offer of employment from the City, a monetary award of back pay from the settlement fund, retroactive seniority for all purposes except for time-in-grade required for promotion, and/or retroactive pension credit.
 - The Decree requires the City to hire up to nine eligible claimants as firefighters from a priority hire list to be created pursuant to the process set forth in the Decree.

The United States and the City of Dayton filed the Decree on February 26, 2009 and moved the Court to provisionally enter the Decree, subject to final approval following a fairness hearing. *See Decree, ¶¶ 22, 27.* On April 14, 2009, the Court granted the parties' motion and provisionally entered the Decree.

Earlier, on January 6, 2009, the unions representing employees of the City's police and fire departments, the Fraternal Order of Police, Captain John C. Post Lodge No. 44 ("FOP") and the International Association of Firefighters, Local 136 ("IAFF") (collectively "the Unions"), moved to intervene as defendants in this action. On April 14, 2009, the Court permitted the Unions to intervene, limiting the scope of that intervention to the submission of objections to any settlement and the right to appeal any ruling on the fairness of a settlement.

To ensure fairness, the Decree required that individuals whose interests may be affected by the Decree (including all individuals potentially eligible for relief, all current City police officers and firefighters, and the unions representing police officers and firefighters) be given notice of the Decree and an opportunity to file objections with the Court, and that the Court hold a fairness

hearing to consider and resolve those objections Decree, ¶¶ 22-26. This notice having been given, the fairness hearing was held on October 14, 2009.

There were four objections to the Decree from individuals and one from the Unions. The individual objections were from individuals who were either incumbents or applicants to the City's police and fire departments. The individual objections generally failed to appreciate the legal significance of the Government's *prima facie* case and of Title VII's job-related study requirement. The Unions objected to the provisions of the Decree that grant retroactive seniority to individuals who have been identified, or will be identified, as having been adversely affected by the practices challenged by the United States in its complaint. Of the objectors, only the Unions appeared at the fairness hearing.

II. STANDARD FOR APPROVAL OF THE CONSENT DECREE

A consent decree is essentially a settlement agreement subject to judicial approval as a final judicial order and subject to continued judicial policing. *Williams v. Vukovich*, 720 F.2d 909, 920 (6th Cir. 1983); *United States v. City of Miami*, 664 F.2d 435, 439-40 (5th Cir. 1981) (en banc). Because judicial approval of a settlement agreement places the power and prestige of the Court behind the compromise struck by the parties, such judicial approval may not be obtained for an agreement that is illegal, a product of collusion, or contrary to the public interests. *Williams*, 720 F.2d at 920; *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 236 n.10 (1975). Once approved, the respective provisions of the consent decree operate as an injunction. This injunctive quality compels the Court to: (1) retain jurisdiction over the decree during the term of its existence, (2) protect the integrity of the decree with its contempt powers, and (3) modify the decree should changed circumstances subvert its intended purpose. *Williams*, 720 F.2d at 920.

The procedure for approving consent decrees involves three steps. “The proposed decree should be preliminarily approved, interested persons given notice, and a reasonableness determination made after a hearing is held.” *Williams* at 921. The reasonableness hearing is a forum for all interested parties to comment on the proposed decree. *Williams* at 921.

The ultimate issue the Court must decide at the conclusion of the hearing is whether the decree is fair, adequate and reasonable. The Court has no occasion to determine the merits of the controversy or the factual underpinning of the legal authorities advanced by the parties. (citation omitted) If the Court determines that the decree is problematic, it should inform the parties of its precise concerns and give them an opportunity to reach a reasonable accommodation. See *Stotts*, 679 F.2d at 554, *Miami*, 614 F.2d at 1332. The Court should articulate its ‘principled reasons’ for rejecting a decree if the accommodation is not satisfactory. See *Stotts*, 679 F.2d at 554; *Miami*, 614 F.2d at 1333. In making the reasonableness determination, the Court is under the mandatory duties to consider the fairness of the decree to those affected, the adequacy of the settlement to the class, and the public interest.

Williams, 720 F.2d at 921.

“In enacting Title VII, Congress expressed a strong preference for encouraging voluntary settlement of employment discrimination claims.” *Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981); see also *Williams v. Vukovich*, 720 F.2d 909, 923 (6th Cir. 1983). Accordingly, it has long been recognized that cooperation and voluntary compliance are the preferred means of achieving Title VII’s goals of ensuring equal employment opportunities and eliminating unlawful employment practices. See *Local 93, Int’l Ass’n of Firefighters v. City of Cleveland*, 478 U.S. 501, 515-16 (1986) (citing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974)). Moreover, a negotiated settlement in a lawsuit in which the plaintiff is an agency of the federal government “carries with it [a] presumption of validity that is overcome only if the decree contains provisions

which are unreasonable, illegal, unconstitutional, or against public policy.” *United States v. City of Alexandria*, 614 F.2d 1358, 1362 (5th Cir. 1980).

The standard for approval of a consent decree resolving a pattern or practice case brought under Title VII is whether the proposed decree is lawful, fair, reasonable, adequate and consistent with the public interest. *See Bailey v. Great Lakes Canning, Inc.*, 908 F.2d 38, 42 (6th Cir. 1990); *Williams*, 720 F.2d at 921. In applying that standard, a court should “weigh[] the plaintiff’s likelihood of success on the merits against the amount and form of the relief offered in the settlement,” *Williams*, 720 F.2d at 921 (quoting *Carson*, 450 U.S. at 88 n.14), while remaining mindful that a consent decree “normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation.” *Carson*, 450 U.S. at 87; *see also Williams*, 720 F.2d at 922 (recognizing that consent decree “is a compromise which has been reached after the risks, expense, and delay of further litigation have been assessed”). Thus, a court should not “decide the merits of the case or resolve unsettled legal questions.” *Carson*, 450 U.S. at 88 n.14. Instead, the Sixth Circuit has directed that, in assessing the strength of the plaintiff’s case, the court should give deference to “the judgment of experienced counsel who [have] completely evaluated” the strength of the case, and that a court’s deference should “correspond to the amount of discovery completed and the character of the evidence uncovered.” *Williams*, 720 F.2d at 922-23.

Finally, in considering whether a consent decree is consistent with the public interest, a court should consider whether a “decree which seeks to enforce a statute [is] consistent with the public objectives sought to be obtained by Congress.” *Williams*, 720 F.2d at 923. In accordance with the Supreme Court precedent discussed above, the Sixth Circuit has recognized that “voluntary

compliance [with Title VII] will frequently contribute to the achievement of public objectives” because voluntary compliance is encouraged by Congress.*Id.* The Sixth Circuit also has stated that “minimiz[ing] the delay and expense” of protracted litigation by entering into a consent decree is consistent with the public interest. *Id.*

III. DISCUSSION

A. Authority of Court to Enforce Decree

The Court will consider its authority to enforce the Consent Decree before considering the Unions’ objections to that authority.

1. Substantial Likelihood to Prevail on the Merits

The United States’ investigation of the City’s hiring processes for entry-level police officers and firefighters revealed facts sufficient to establish a *prima facie* case of disparate impact discrimination in violation of Title VII. There was a disparate impact in the pass rate of whites on the written examination of 68.1% (295/433), compared to the pass rate of African Americans of 28.7% (25/87). Similarly, the overall percentage of African-American applicants to the firefighter position declined dramatically – from 30% of applicants in 2002 to 5.8% of applicants in 2005 – after the City’s implementation of the heightened minimum qualifications challenged in the Complaint. *See* Joint Mem. at 6 (¶19).

Moreover, although the City denies that its selection processes violated Title VII, it stipulated for purposes of entry of the Decree that it cannot satisfy its burden of rebutting the United States’ *prima facie* case by proving that the challenged selection processes are “job related for the position in question and consistent with business necessity.” 42 U.S.C. § 2000e-2(k)(1)(A)(I). Such a showing typically requires an employer to demonstrate “by professionally acceptable methods”

that its selection devices are “predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated,” *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975) (internal quotations omitted), and that those devices are “demonstrably a reasonable measure of successful job performance.” *Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971). In this case the City has stipulated that it has no job analysis or validation study demonstrating that the challenged practices accurately measure knowledge or skills that are essential for the positions or that they are otherwise related in any meaningful way to successful job performance. *See* Joint Mem. at 5, 27 (¶¶ 16, 27). Thus, the likelihood that the United States will succeed on the merits of its claims is substantial.

2. Fairness, Reasonableness, Adequacy and Consistency with the Public Interest

District courts have “not merely the power but the duty to render a decree that will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.” *Albemarle Paper Co.*, 422 U.S. at 418 (citation omitted). The decree in the instant case ensures that the City will not use the challenged employment practices in the future and, to the extent possible and discounted for early settlement, makes whole African Americans who have been harmed by the employment practices the United States has alleged to be unlawful. Thus, the relief provided in the Consent Decree is fair, reasonable and adequate in light of the purposes of Title VII.

a. Prospective Injunctive Relief

The Decree prohibits the City from using the selection procedures challenged in the United States’ Complaint and requires the City to develop new selection procedures for hiring entry-level police officers and firefighters. Additionally, to remedy the deterrent effect of the City’s use of the challenged practices, the Decree requires the City to take certain steps in advertising for police

officer and firefighter applicants and to develop a recruitment plan for the entry-level firefighter position. *See* Decree, ¶¶ 9-21; Joint Mem. at 8-9. When an employer has engaged in a pattern or practice violation of Title VII, an award of prospective injunctive relief is justified without any further showing. *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 361 (1977). In this case, particularly in light of the City's stipulations, the injunctive relief provided by the Decree is adequate, fair, reasonable, and consistent with the public interest. *Bailey*, 908 F.2d at 42.

b. Individual Remedial Relief

In enacting Title VII, "Congress took care to arm the courts with full equitable powers" so that the courts may fashion relief for identifiable individuals harmed by unlawful employment practices. *Albemarle*, 422 U.S. at 418. In exercising these equitable powers, a court may "order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without backpay . . . or any other equitable relief as the court deems appropriate." *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763 (1976) (quoting Section 706(g) of Title VII, 42 U.S.C. § 2000e-5(g)). In Title VII pattern or practice cases such as this, "[t]he injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed." *Albemarle*, 422 U.S. at 418-19 (citation omitted).

The Court finds the individual relief of backpay, retroactive seniority, retroactive pension credit, and consideration for priority hire to be appropriate. Individual remedial relief is limited to those individuals who were affected by the practices alleged by the United States to be unlawful. The Court also finds that the remedial relief will have a minimal impact on incumbent police officers and firefighters.

i. Priority Hires

The Decree provides for priority hiring of up to five qualified African-American applicants as entry-level police officers and up to nine African-American applicants as entry-level firefighters. Decree, ¶ 64. The number of priority hires is based on the “hiring shortfall” resulting from the City’s use of the challenged practices. The hiring shortfall is a statistical estimate of how many of the African-American applicants who were eliminated from the selection process solely because of the City’s use of the challenged practices.

The hiring shortfall was calculated by comparing the percentage of African Americans in the overall applicant pool that sat for the written exam to the percentage of test passers who were African American. For firefighters, the shortfall was calculated based on an estimate of the percentage of African Americans that would have been expected to apply absent the City’s use of heightened minimum qualifications compared to the actual number of African Americans hired. Based on applicant and hiring data maintained by the City, the parties estimated that the City would have hired five more African-American police officers and nine more African-American firefighters if the City had not used the challenged practices. *See* Joint Mem. at 4-5 (¶¶ 11-13), 7 (¶¶ 23-24). Under the Decree, only the individuals who are determined to be actual victims of the challenged practices will be eligible for priority hiring relief.

In addition, the City will have an opportunity to screen the claimants eligible for consideration for priority hire to assure that they meet the lawful qualifications for the positions required of all other police officers and firefighters. Only individuals who demonstrate that they are currently qualified for a police officer or firefighter position will be eligible to receive priority hiring relief, and those individuals will be required to pass the same background, medical and other screenings required of other candidates before being hired as a priority hire. Decree, ¶ 61. The

Decree does not require that the City hire as a priority hire any claimant who is not currently qualified for the position of police officer or firefighter, and the priority hiring relief does not require any employees to be removed from their jobs and does not bar the employment of other persons.

ii. Monetary Awards

The dollar amount of the settlement fund (\$450,000) was also calculated based on the hiring shortfall, discussed above, and discounted for early settlement. Specifically, the settlement fund amount was based on estimates of the income and benefits lost by the delayed hire claimants (*i.e.*, the income and benefits they would have received if hired by the City in May 2007, rather than in January 2008), and the value of income and benefits lost by the claimants eligible for priority hire (*i.e.*, the income and benefits the five police officer applicants and nine firefighter applicants would have earned had they been hired between the time the challenged practices were used by the City and the date of the Decree), less an estimate of the amount these claimants would have earned in mitigation. Of the \$450,000, a total of \$51,965 will be distributed to the four police officers whose hiring was delayed. Decree at ¶38. The remainder of the settlement fund represents approximately \$28,431 per shortfall position. The total amount of monetary relief available for African-American applicants will be divided among all eligible claimants.

Each claimant's share of the total amount will be determined after the Decree is entered and the potential claimants have been given an opportunity to make a claim for relief. Decree, ¶¶ 41.

Because there may be more eligible claimants than the estimated hiring shortfall of 14 (five police officers and nine firefighters) and because it is not possible now – several years after the fact – to determine which claimants would have been hired by the City absent the challenged selection practices, each eligible claimant likely will receive substantially less than the full value of the police

officer or firefighter salary and benefits the claimant might have obtained but for the challenged practices. Accordingly, dividing the amount of monetary relief available under the Decree among all eligible claimants is fair and is the “best that can be done under the circumstances.” *Chicago Miniature*, 640 F. Supp. at 1298-1300 (pro rata shares appropriate); see also *EEOC v. Andrew Corp*, 1990 WL 92820 at *2 (N.D. Ill. 1990) (because of difficulty or impossibility of determining which applicants would have been hired, claimants may be required to accept a pro-rata share). In sum, the Court finds that the monetary relief proposed is fair, reasonable and adequate, and no meritorious objections have been made to that relief.

iii. Retroactive Seniority

The Decree also provides for retroactive seniority and an opportunity for retroactive pension credit to make whole both individuals hired as priority hires under the Decree and the two African American police officers whose hiring was delayed as a result of the City’s rank order use of the written police officer examination. The award of retroactive seniority puts qualified individuals who would have been hired (or hired earlier) but for the challenged practices in the position they would have occupied but for those practices. Such retroactive seniority relief achieves the “make whole” purpose of Title VII. *Franks*, 424 U.S. at 764-65.

The Supreme Court has recognized that seniority affects pay, job assignments, the order of layoff and recall, length of vacation and pension benefits. *Franks*, 424 U.S. at 767. It also may affect promotions and eligibility for other benefits. Thus, the Court stated, “rightful place” seniority, which includes both benefits and competitive seniority, “cuts to the very heart of Title VII’s primary objective of eradicating present and future discrimination in a way that backpay, for example, can never do.” *Id.* at 767-68 n.28. “[S]eniority, after all, is a right which a worker exercises in each job

movement in the future, rather than a simple one-time payment for the past.” *Id.* (citation omitted).

Therefore:

[w]ithout an award of seniority dating from the time when he was discriminatorily refused an employment, an individual who . . . obtains employment . . . pursuant to the District Court’s order will never obtain his rightful place in the hierarchy of seniority according to which these various employment benefits are distributed. He will perpetually remain subordinate to persons who, but for the illegal discrimination, would have been in respect to entitlement to these benefits his inferiors.

Id. at 767-68. Accordingly, the Court “take[s] as [its] starting point the presumption in favor of rightful-place seniority relief.” *Id.* at 779 n.41.

Moreover, the limitations on the retroactive seniority relief in the Decree assure that implementation of the relief will not “unnecessarilytrammel” the legitimate interests of incumbent employees. *See Local 28 of the Sheet Metal Workers Intn’l Assoc. v. EEOC*, 478 U.S. 421, 479 (1986) (citing *Teamsters*, 431 U.S. at 352-53). First, eligibility for retroactive seniority relief is limited to those individuals who have been or will be identified as victims of the discriminatory employment practices challenged by the United States. *See* Decree, ¶ 32; Joint Mem. at 23.

Second, the number of priority hires is limited to the estimated hiring shortfall, and represents a small portion of the City’s large police officer and firefighter workforce. The Decree provides for a maximum of five priority hires into police officer positions – less than 2% of the more than 400 members of the City’s current sworn police force; and a maximum of nine priority hires into firefighter positions – approximately 3% of the more than 300 members of the City’s sworn firefighting force.

Third, the retroactive seniority may not be used to satisfy applicable time-in-grade requirements for eligibility for promotion. Decree, ¶66. Thus, the award of retroactive seniority will

not result in the promotion or assignment of claimants hired under the Decree into positions for which they do not have the necessary on-the-job experience, and will not render those claimants eligible for promotion before incumbent police officers or firefighters who have met those time-in-grade requirements.

Fourth, individuals hired as priority hires will not be credited with retroactive seniority until they complete their probationary period. Under the Decree, when a priority hire completes his/her probationary period, the City will award the claimant retroactive seniority to a “constructive hire date.” Decree, ¶¶ 7, 67. Specific constructive hire dates for individuals employed under the priority hire provisions of the Decree, but will be determined during the United States’ evaluation of claims submitted following the Court’s approval of the Decree. Additionally, the delayed hire claimants identified in Paragraph 36 of the Decree will be given retroactive seniority to a constructive hire date of May 14, 2007. This is the date on which the City began the first academy class that was held based on the results of the 2006 written examination, and it is the date the United States alleges that the delayed hire claimants should have been hired if the City’s use 2006 written examination in descending rank order did not have a disparate impact on African American applicants. *See* Joint Mem. at 3.

Fifth, because the constructive hire dates assigned to priority hires under the Decree are dates *on or after* the City’s use of the challenged practices, the award of retroactive seniority to priority hires will have no impact on the majority of incumbent police officers and firefighters. Specifically, the award of retroactive seniority to the police priority hires will not affect any incumbent hired prior to the administration of the 2006 written examination. Similarly, the award of retroactive seniority to firefighter priority hires will not affect anyone hired prior to the City’s institution of heightened

minimum qualifications in 2004. This is because no priority hire claimant would receive a constructive hire date that is earlier than the date on which the City used the challenged practices.

Sixth, any claimant awarded retroactive seniority under the Decree will rank *behind* all incumbent employees who were hired on the same date as a claimant's constructive hire date. Decree, ¶¶ 43, 66. For example, the constructive hire date for the police officer delayed hire claimants – May 14, 2007 – is the date of hire for the first academy class that was held following the administration of the 2006 written police officer examination. The relative seniority of incumbent police officers hired into this academy class on May 14, 2007 will not be affected by implementation of an award of retroactive seniority to the delayed hire claimants because the Decree provides that the two delayed hire claimants “will rank behind all other individuals appointed as police officers” in the first academy class. *See* Decree, ¶ 43. Therefore, the delayed hire claimants will not, as a practical matter, have greater seniority than any police officer who was actually hired before them. The same limitation will apply to the priority hire claimants' rank relative to incumbents hired on their constructive hire date. *See* Decree, ¶ 66.

For these reasons the Court finds that the relief provided by the Decree is remedial in nature, and is lawful, fair, reasonable, adequate, and in the public interest.

3. Public Interest

If the Court declined to enter the Decree and the case proceeds to trial, the costs for both the United States and the City will be substantial. The resources saved through a voluntary resolution that furthers the objectives of Title VII is consistent with the public interest.

B. The Unions' Objection to Retroactive Seniority Relief

The Unions object to the retroactive seniority relief provided by the Decree on the ground

that it violates their collective bargaining agreements with the City and interferes with the seniority rights of incumbent police officers and firefighters, and, as a result, they claim the Court cannot award such relief without either the Unions' consent or a full trial on the merits. *See Union Obj.* at 6, 9-10.

The Unions assert that the retroactive seniority provided under the Decree violates the applicable CBAs and interferes with the seniority rights of incumbent police officers and firefighters. *See Union Obj.* at 7-9. The Unions assert that the Decree will affect benefits that are accrued using seniority "in a competitive sense," such as promotions, shift preference, overtime assignments, vacation scheduling and lay offs, as well as benefits that are accrued based on "longevity," such as salary levels and accrual of vacation, sick and other types of leave. *Id.* at 7-9. As an initial matter, the "longevity"-based benefits of incumbent police officers and firefighters are not impacted in any way by the Decree. For instance, providing a priority hire claimant with accrued vacation leave as part of his/her relief does not affect the leave balances or leave accrual rates of incumbent employees.

More importantly, the "competitive" retroactive seniority benefits provided by the Decree are essential to make-whole the African Americans harmed by the City's discriminatory selection practices. *Truskoski v. ESPN, Inc.*, 60 F.3d 74, 77 (2d Cir. 1995) ("both 'competitive status' seniority and 'benefit' seniority . . . are important components of 'make whole' relief under Title VII."). "[S]uch relief may not be denied on the abstract basis of adverse impact upon the interests of other employees but rather on the basis of unusual adverse impact arising from facts and circumstances that would not generally be found in Title VII cases." *Franks*, 424 U.S. at 779 n.41. Thus, retroactive seniority – including competitive seniority – should be awarded even though, as

the Supreme Court acknowledged in *Franks*, it may affect incumbent employees. “Denial of [competitive] seniority relief to identifiable victims of racial discrimination” because such relief would “diminish[] the expectations of other, arguably innocent, employees would if applied generally frustrate the central ‘make whole’ objective of Title VII.” *Id.* “If relief under Title VII can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the [statute] is directed.” *Id.* at 775 (quoting *United States v. Bethlehem Steel Corp.*, 446 F.2d 652, 663 (2d Cir. 1971)). Such relief is particularly appropriate where, as here, eligibility for the relief is limited to those individuals who have been or will be identified as victims of the discriminatory employment practices challenged by the United States, see Decree, ¶ 32, and the Unions have not asserted that any of the categories of individuals eligible for relief are not victims of the challenged practices.

The Court has already noted that the retroactive seniority relief in the Decree will have a minimal impact on incumbent police officers and firefighters. Moreover, the limited burdens the retroactive seniority relief imposes on incumbent police officers and firefighters is typical of the relief awarded in Title VII cases, and well within that permitted under Title VII. As the Supreme Court noted in *Franks*:

[D]enial of seniority relief to identifiable victims of racial discrimination on the sole ground that such relief diminishes the expectations of other, arguably innocent, employees would, if applied generally, frustrate the central “make whole” objective of Title VII. These conflicting interests of other employees will, of course, always be present in instances where some scarce employment benefit is distributed among employees on the basis of their status in the seniority hierarchy.

Franks, 424 U.S. at 774 (footnotes omitted); *see also Williams*, 720 F.2d at 922 (“simple reduction in non-minority ‘expectations’” does not render consent decree unfair or unreasonable); *State of New Jersey*, 1995 WL 1943013 at *20.

In the instant case, the retroactive seniority relief provided by the Decree impacts incumbent employees in two ways: eligibility for promotion for police officers and firefighters, and shift preferences vacation schedule and unrequested transfers for police officers. With respect to eligibility for promotion, the impact of the Decree is – as a practical matter – minimal. Under the CBAs for FOP and IAFF members, competitive seniority has an impact on eligibility for promotions because both CBAs require the addition of “service points” awarded based on seniority to the written examination score of applicants for promotion. Specifically, the IAFF CBA states that an applicant for promotion will receive 0.625 points for each year of service beyond the first five years added to his or her written promotional examination score, up to a maximum of five service points. See Union Mot. to Intervene, Ex. 1B at 54. The FOP CBA is similar, except that service points are calculated beginning in the third year of service and applicants can receive a maximum of eight service points. *Id.*, Ex. 1A at 43.

The practical impact on Union members’ promotional opportunities is limited because the Decree does not permit claimants who are hired to use their constructive hire dates to satisfy any time-in-grade requirements for promotion. Therefore, the earliest any police officer or firefighter priority hire would be eligible to compete for promotion is five years after his or her actual date of hire by the City. As a result, incumbents who were hired as a result of the 2006 police officer selection process, or the 2004 and 2005 firefighter selection processes, are either already eligible or nearly eligible to be considered for promotion, and they will likely have at least two opportunities

to compete for promotion before any priority hire would be competing in any promotional selection process. *See* Union Mot. to Intervene, Ex. 1A at 42 (eligibility lists from promotional examinations expire after two years); Ex. 1B at 53 (same). Under these circumstances, where numerous factors independent of service points will determine whether any current incumbent is outranked for promotion by a priority hire, the incumbents' interests are not strong enough to justify departure from the established precedent for the award of make-whole relief in this case, including retroactive seniority.

The retroactive seniority relief also impacts shift preferences, vacation scheduling and unrequested transfers for police officers, which are determined by competitive seniority, *see* Union Mot. to Intervene, Ex. 1A at 15, 17, because priority hires may ultimately outrank some recently hired current incumbents once the constructive hire dates are implemented under the Decree. The practical impact on incumbents is, however, minimal in light of the relatively small number of priority hires compared to the City's sworn police and firefighter forces. Moreover, shift preferences and transfer rights are the type of rights the Supreme Court in *Franks* understood would be affected by awarding retroactive seniority to victims of discrimination. *See Franks*, 424 U.S. at 767.

For all of these reasons, the actual burden on any particular incumbent from the award of retroactive seniority provided in the Decree is minimal and not atypical of burdens normally found to be acceptable in Title VII cases, and the Court will overrule the Unions' objection.

IV. CONCLUSION

For the foregoing reasons, the Court finds the terms of the Consent Decree are fair, reasonable, adequate, and consistent with the public interest, and that none of the objections raised

has merit. Accordingly, the Court **APPROVES** the Consent Decree as a final resolution of all claims asserted by the United States against the City of Dayton.

DONE and **ORDERED** in Dayton, Ohio this Monday, November 30, 2009.

s/Thomas M. Rose

THOMAS M. ROSE
UNITED STATES DISTRICT JUDGE