

1975 WL 11955
United States District Court, N.D. Ohio.

The Shield Club, et al.
v.
The City Of Cleveland, et al.

No. C 72-1088. | Mar. 17, 1975.

Attorneys and Law Firms

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for plaintiffs.

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Opinion

WILLIAM K. THOMAS, District Judge:--

***1** On February 14, 1975, the Shield Club and other
plaintiffs moved this court

For an order enjoining any further
promotions by the City of Cleveland
Police Department from the 1972
eligible list.

Alternatively, plaintiffs requested a stay pending a full
hearing on plaintiffs' request for injunctive relief. At an
oral hearing held later on the same day, this court treated
the motion of the plaintiffs as a motion for a modification
of the prior order of this court dated July 6, 1974. Upon
admissions of the City defendants and with the consent of
the City defendants, this court stayed the matter pending
an evidentiary hearing.¹ A three-day hearing beginning
March 13, 1975, has been held; witnesses have testified;
exhibits have been received; and oral argument has been
presented.

I.

In this court's Memorandum of July 6, 1974, it was
concluded and determined that statistically significant
differences between the mean examination scores of
minorities and whites created a prima facie case that the

1972 sergeant's promotion examination had a racially
disproportionate impact. Therefore, to justify the use of
the 1972 sergeant's promotion examination it became
essential for the City defendants to show that the 1972
sergeant's promotion examination was substantially
related to job performance. Upon findings set forth in the
Memorandum and by a preponderance of all the evidence
it was concluded and determined

That although the examination has
some validity, the test is not shown to
be "substantially job related."

Further use of the test and the eligible list based thereon
was enjoined except as ordered in Part IV of the
Memorandum. In Part IV orders were entered

to govern sergeants' promotions
during the time remaining until the
CSC certifies a new sergeant's
promotion list based on a new
sergeant's promotion examination.

Previously it had been noted

Through its chairman, Vincent
Francioli, the CSC has informed the
court of the Commission's intention
to conduct a new promotional
examination with a target date for
giving the test and certifying the
eligibility list set for November 30,
1974.

Part IV further declared:

As the testimony of Dr. Henderson disclosed, the 1972
sergeants' promotional examination has utility as a
predictor of successful job performance only within the
10 percent of those who took the sergeant's exam. Thus
within this limited range of highest scores there is a
likelihood that persons appointed will be qualified.
However, as he stated, "Starting from the top, each
succeeding person has a slightly higher probability of
being inappropriate for the job."

Using these conclusions of Dr. Henderson as guidelines,
this court sought to fashion interim orders that would
permit the Cleveland Police Department to make essential
promotions from the 1972 sergeant's promotion eligible
list while enjoining any further use of the list. Therefore,
this court authorized that

*2 not more than 10 officers may be appointed from said list on or before September 15, 1974; not more than six additional officers may be appointed from said list between September 16 and October 30, 1974, inclusive; and not more than six additional officers may be appointed from said list after October 30, 1974 and until the replacement of said list by a new sergeant's promotional eligibility list.

[APPOINTMENTS]

During the first 15 months of the list's existence, from February 14, 1973 through May 18, 1974, 19 sergeants had been appointed from the list. In a case charging sex discrimination by the Cleveland Police Department, Clayton v. City of Cleveland, No. C73-784, Judge Green on May 9, 1974, enjoined further promotions in the Police Department; on November 26, 1974 he relaxed his injunction to permit the filling of existing vacancies. Eleven sergeants' vacancies then existed. On December 6, 1974, this court overruled a motion to enjoin filling these vacancies. Plaintiffs had tied their request to the patrolmen reduction-in-force, asserting this eliminated the need for more supervisory officers. On December 9, 1974, the 11 sergeant vacancies were filled from the 1972 list. On January 20, 1975, Judge Green again modified his existing order

to permit a maximum of three appointments to be made to the rank of captain in the Cleveland Police Department, and to permit such vacancies as result from the filling of the captain's positions to also be filled.

Consequently, to fill the resulting sergeant vacancies appointments of three sergeants were made from the list on February 8, 1975.

II.

Because of the retirements of police Captains Raymer (2-7-75) and Shillat (2-10-75), two vacancies exist in the

position of captain. The retirement of police Lts. Kreps (1-15-75), Waterwash (1-28-75), and Stimson (2-5-75), have created three vacancies in the position of police lieutenant. In addition, there are two vacancies in this position that will result from the promotion of two lieutenants to fill the captain vacancies.

By virtue of the retirements of police Sergeants Sawyer (1-7-75), Singell (1-29-75), and Kahoe (2-13-75), three vacancies exist in the position of police sergeant. In addition, five vacancies in this position will result from filling the lieutenant vacancies. Thus presently at issue are a total of two captain vacancies, five lieutenant vacancies, and eight sergeant vacancies.

[POWER TO MODIFY]

Inherently a court of equity retains the power to modify an injunctive order, United States v. Swift & Co., 286 U.S. 106, 114 (1931). In this case this court's order expressly was made subject to the further order of this court. In Swift, the Court set the conditions under which a decree of equity may be modified. As phrased by Mr. Justice Cardozo, "a continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need." He noted,

*3 The distinction is between restraints that give protection to rights fully accrued upon facts so nearly permanent as to be substantially impervious to change, and those that involve the supervision of changing conduct or conditions and are thus provisional and tentative.

In System Federation v. Wright, 364 U.S. 642, 647, 47 LRRM 2388, 2390 (1961), the Court approved and applied its holding in United States v. Swift & Co. It stated:

There is also no dispute but that a sound judicial discretion may call for the modification of the terms of an injunctive relief if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have since arisen.

Conditions that existed on December 6, 1974, when this court denied plaintiffs' motion to enjoin further

appointment from the promotion list, unless unknown to the court, would not be grounds upon which to modify the earlier order of July 6, 1974. But new conditions arising thereafter would justify modification if otherwise warranted.

At the hearing of December 6, 1974, the court was aware that the CSC had engaged Dr. Henderson and his associates to prepare promotional examinations for the supervisory ranks. Indeed, on November 8, 1974, the court had received testimony of Dr. Henderson, and had concluded that the proposed examinations were acceptable. Also at that time the court had been informed that promotion exams for sergeant and lieutenant were scheduled for December 9-10, 1974; that Part I of the promotion examination for captain was scheduled for December 17, 1974; and that Part II was scheduled for January 31, 1975. However, neither court nor counsel on December 6, 1974, had any way of knowing when Dr. Norman Henderson would be able to report the results of the examinations. Actually it was not until the beginning of this hearing on March 13, 1975, that Dr. Henderson's preliminary report concerning the sergeant exam was first made available to court and counsel.

[HENDERSON'S REPORT]

In assessing the extent to which conditions have changed since December 6, 1974, when the court had denied modification of its order, it is essential to emphasize information, not known on December 6, 1974, and only gained by reading Dr. Henderson's preliminary report on the sergeant examination, and by hearing him testify on March 13, 1975.

The evidence indicates that reliability estimates were computed for each section of the exam. Dr. Henderson reports that the composite reliability for the police knowledge section of the test was .93, for the communication skills section .86, for the general aptitude section .93, and for the leadership section .61. Applying the appropriate formula the overall examination reliability is computed at .92. Confirmed by his testimony, his report stresses that

The importance of high reliability for screening and promotional tests cannot be overemphasized. Reliability provides a direct measure of the precision of each person's obtained score, as described by the relationship:

*4 Estimated standard error of a score = standard deviation x $1 - \text{reliability}^{\frac{1}{2}}$

Applying this formula, Dr. Henderson testified that a test with a composite reliability of .92 would provide an error range of plus or minus $2\frac{1}{2}$ points. Thus it is likely that if a person took the same or similar test his score would have an error range of no more than $2\frac{1}{2}$ points above and below the original score. In contrast, a test with a reliability of .5 would produce a standard error of plus or minus $7\frac{1}{2}$ points.

[MCCANN TEST]

The 1972 sergeant's eligible promotion list is based on the McCann Test. At the main trial in this case, Dr. Henderson found that the McCann Test has a reliability of above .2, although exactly how far above that he could not say without further reliability studies. In his testimony at this trial he stated that on the basis of one part of his test as administered, he estimates the McCann Test would not exceed .5. He further testified that "today he would have to give the McCann Test a reliability of .3 to .5."

The composite reliability of .92 of the 1974 sergeant's eligible promotion exam takes on added importance in light of testimony of Dr. Henderson at the earlier trial. At one point he testified that .9 reliability is "about as good as you can get." He cited the Stanford-Binet Intelligence Test as a test with a reliability of .9. He made the further point that the less reliable a test is the less valid it is.

On July 6, 1974, and until the present, the McCann Test results have provided the single source of candidates for promotion. Yet that test had the frailties of not being shown to be "substantially job related," and having only a reliability of .3 to .5. Now, for the first time this court knows that upon certification of the test results of the 1974 sergeant's promotion exam there will be a job related and job validated examination with composite test results having a reliability of .92. Judged by Dr. Henderson's earlier appraisal the new test has achieved a reliability "about as good as you can get."

In addition, it could not be anticipated on December 6, 1974, that the results of the 1974 sergeant's promotion exam would disclose that apparently only 3 blacks scored in the top 10 percent of the approximate 900 test takers. Thus, it could not then have been known, that filling at least some of the present sergeant vacancies from the 1975 eligible list may have a direct bearing on whether any black is appointed sergeant from that list.

[THIRD RESPECT]

In at least a third respect conditions have substantially and materially changed since this court's hearing of December 6, 1974. The premise of this court's interim order was that vacancies in the position of sergeant needed to be filled in sufficient numbers to preserve the efficient functioning of the Police Department. The closer the department has come to the certification of a new promotion list the less urgent has become the need to make interim appointments from the 1972 eligible list. This need approached zero in the waning days of the old list, particularly since the early certification of the new list could then have been expected.

*5 The Civil Service Commission was under specific direction "to accomplish their previously announced intention of preparing new promotional examinations for the position of sergeant of police." Its announced intention was to give and certify the new sergeant's promotional test by November 30, 1974. The Commission was free to terminate the 1972 list before its two-year expiration date

1) because the Cleveland City Charter provides that an eligibility list "shall remain in force not longer than two years;" and

2) by its rule 5.20 "the commission may abolish any eligible list created by a promotional examination which has been in force for one year or more."

It is evident that by skilled and thorough steps, Dr. Henderson and his associates have devised and attained a content validated and job related promotional examination.² But the time thus required together with the time needed to first secure LEAA funding of the project have made it impossible for the CSC to meet its target date of November 30, 1974. As a result the promotional examinations which were held on December 9-10, for sergeants and lieutenants, could not be completed for the upper ranks until Part II of the examination for captains, deputy inspectors, and inspector were given on January 31, 1975.

[GRADING PROCEDURE]

In the time since February 1, 1975, various steps in the grading procedure have been taken. Once the examinations were graded electronically, except for some 50 cases that required hand grading, data files were established indicating the response of each candidate on

each item. The next step was to carry out an item analysis on all items in the police knowledge portion of the exam. In his report, Dr. Henderson explains the detailed nature of this procedure. The remaining time has been consumed in making the reliability estimates for each section of the exam; in determining the mean score differences for blacks and whites; and in preparing the other reported statistical summaries. As a result it has not been possible for the Commission, as directed by this Court, to accomplish its announced intention to certify new lists by November 30, 1974. Clearly implicit in that order the CSC was directed to give the test and certify new eligible promotion lists as soon as possible after November 30, 1974, if not then accomplished.

The court's interim orders of July 6, 1974, may not be read as a direction that 22 sergeants should be appointed by the Director of Public Safety. As the orders reveal, granting him the right to make further appointments was permissive not mandatory. Thus the Director of Public Safety was only permitted to make additional appointments of sergeants as needed, to prevent any interim breakdown in the efficient performance of essential police functions. As it turns out, by December 6, 1974, only 11 vacancies in the position of sergeant existed, even though this court had given authority to appoint 16 by October 30, 1974. It is evident that the permission given exceeded the need. Further, it should be stressed that the main purpose and subject of the relief ordered by this court on July 6, 1974, has now been accomplished by the preparation and taking of a content validated job related sergeant's promotion examination with a reliability of .92. Therefore, the benefit of this exam should be derived by the City of Cleveland at the earliest reasonable time. This court therefore concludes that an appropriate modification in the prior order of this court is essential to put into effect at the earliest practicable date the results of the new sergeant's promotion examination. Making such a modification falls within this court's discretion as explicated in *United States v. Swift & Co.*, *supra* and *System Federation*, *supra*.

[EXERCISE OF DISCRETION]

*6 Exercise of this court's discretion in making such a modification leads this court first to rule out any modification that would prevent the filling of vacancies in the positions of captain and lieutenant. The Order of July 6, 1974 did not bar the promotions of these supervisory officers, and there has been no evidence that would justify broadening that order.

[NO UNDUE DELAY]

It is decided, however, that the unfilled vacancies (both actual and resulting) that have arisen in the position of police sergeant during January and the first two weeks of February, 1975, require treatment in two groups. The last date of the several promotional tests was January 31, 1975. It is concluded that any vacancy occurring or resulting before that date falls outside the limits of this court's exercise of its discretion to modify its decree to accomplish the decree's purpose. Moreover, it appears from the evidence that the two sergeant vacancies on January 17 and 29, and the two sergeant vacancies resulting from the retirement of two lieutenants on January 15 and 28 have occurred primarily by reason of retirements due to personal consideration of the officers retiring.

Different conclusions are reached with reference to the February sergeant vacancies, actual and resulting. The three sergeant vacancies resulting from the two captaincy retirements of February 7 and 10, and the lieutenant retirement of February 5, 1975, cause this court to infer and conclude that the timing of these retirements was primarily induced by the impending expiration of the sergeant's eligible list on February 14, 1975. This finding and conclusion renders material and justifiable an exercise of judicial discretion that orders these vacancies filled from the new list when certified. This is true because of the clear inference, now made, that but for the rushed retirements these vacancies would not have occurred until after February 14, 1975. The sergeant vacancy in February occurred by reason of the death of Sgt. William Kahoe on February 13, 1975. It is concluded that this vacancy also would not have been filled the very next day had the eligible list not been due to expire.

In addition, it is self-evident that filling these vacancies from the new list will not unduly delay the time of filling the vacancies. Because of the new list's attributes, previously discussed, the Police Department should benefit from the use of the new list. Having reached these conclusions it is unnecessary to further review the evidence, or make any additional factual findings.

Finally, this court is mindful that these decisions adversely affect Patrolmen Werz, Barberic, Cummins, and Pollutro. However, it is presumed that each took the new examination. It is not presently known how any of these officers fared on the examination. Given the reliability of the new examination it may be presumed that if each of these men is qualified to fill the position of sergeant of police, it seems likely that each will have scored sufficiently high on the new examination to be appointed from the new eligibility list.

*7 With respect to the four February, 1975 vacancies, actual and resulting, in the position of police sergeant, Safety Director Carney and the other City defendants are enjoined from filling those vacancies from the 1972 sergeant's eligible list, and are directed to fill those vacancies from the 1975 sergeant's eligible list, when certified. In all other respects the motion of the plaintiffs to modify this court's Order of July 6, 1974, is denied.

IT IS SO ORDERED.

Footnotes

1 The court's order read:

Upon motion for a modification of the prior order of this Court, dated July 6, 1974, and upon admissions of the City Defendants made during an oral hearing before this Court, and with consent of the City Defendants, IT IS ORDERED THAT:

1. The promotion eligibility lists for the position of sergeant and the ranks above shall remain in full force and effect pending further order of this court, and the Charter of the City of Cleveland provisions requiring termination of said lists at midnight tonight are hereby suspended pending further order of this Court.

2. The City of Cleveland, their agents, officers, and employees are hereby enjoined from making any further promotions based on such eligibility lists for the position of sergeant and the ranks above, pending further hearing of this court and report to this Court on the preparation of new eligibility lists pursuant to this court's prior order of July 6, 1974.

3. The foregoing orders are without prejudice to the right and authority of the City of Cleveland and other City Defendants to subsequently fill the fifteen vacancies in the position of sergeant and the ranks above that allegedly exist.

IT IS SO ORDERED.

/s/ William K. Thomas United States District Judge

- ² Five man months were spent on various assignments by Dr. Henderson and his associates. One of these was to assemble and compile an updated Police Manual. In part, this Manual contains the detailed job analyses of the supervisory ranks, the first prerequisite in constructing a job related promotion exam.
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