1988 WL 147603
United States District Court, District of Columbia.

Angel G. LUEVANO et al., individually and on behalf of all others similarly situated, Plaintiffs,
v.
Constance HORNER, Director, U.S. Office of Personnel Management et al., Defendants.

No. 79–0271.
|
June 27, 1988.

Opinion and Order

JOYCE HENS GREEN, District Judge.

***1** Presently before the Court is plaintiffs' motion to enforce the applicant-reporting provisions of the Consent Decree entered in this case. For the reasons outlined below, this motion will be granted in part and denied in part.

Suing on behalf of a nationwide class of Blacks and Hispanics, plaintiffs instituted this action contending that use of the Professional and Administrative Career Examination (PACE) to assess applicants for 188 professional and administrative entry-level positions in the federal government violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* Two years of litigation and settlement negotiations culminated in the January 15, 1981 preliminary approval and notice to class members. This Court gave final approval on November 19, 1981 to a Consent Decree that sought to eliminate adverse impact in hiring against class members by phasing out the PACE over three years and replacing it with alternative examining procedures in each of the job categories. *See Luevano v. Campbell,* [27 EPD ¶ 32,322] 93 F.R.D. 68 (D.D.C.1981).

Paragraph 25(a) of the Decree is particularly relevant for present purposes. It states in pertinent part:

> In order to enable plaintiffs effectively to monitor compliance by the various agencies and by OPM with their obligations as to alternative examining procedures, and to use, to the greatest extent feasible, the special programs described in ¶ 16, OPM shall require each federal agency to collect, maintain and compile the following statistics ... and to submit such information to OPM and to plaintiffs annually:
>
> (a) The number of non-Hispanic white applicants, the number of black applicants, and the number of Hispanic applicants for a GS–5 or GS–7 entry-level job category listed in Appendix A which is filled on the basis of a competitive procedure.

In their motion, plaintiffs contend that defendants have violated paragraph 25(a)'s requirement to "collect,, maintain and compile" statistics on the racial background of applicants for the 118 positions at issue in the Decree because the data supplied by defendants to date is far from complete.[1] They further point out that the form given to prospective applicants by defendant Office of Personnel Management (OPM) contains a section where applicants may indicate their racial background but also states, in words that are underlined, that "[s]ubmission of this information is voluntary." Plaintiff's Motion, Attachment F. Plaintiffs observe that a different form used in an OPM study of PACE applicants (the Northrup study) was able to identify the race of the applicant 96% of the time. *See* Attachment H. Finally, observing that the Department of Health and Human Service's Social Security Administration (SSA) will state, for a given pool of applicants, which applicants are white and which are black, plaintiffs contend that defendants could have—but did not—request this information in order to supplement the data they have collected.

***2** Plaintiff seek broad relief. They ask this Court, *inter alia,* to find that defendants have violated the terms of the Decree, to order defendants to replace their current form for collecting race data with the one used in the Northrup study, and to compel defendants to make use of the SSA data for black applicants in job categories in which defendants have not achieved an 80% reporting rate.

[*Incomplete Race Data*]

Defendants do *not* dispute that the racial data compiled to date is incomplete, as only fragmentary racial data has

been provided for many job categories.[2] Two graphic examples will suffice. For 1983, the Army's Maintenance Management Specialist position does not have race information for 341 of the 476 applicants, a 72% failure rate; for OPM-sponsored applicants in the Computer Specialist position in 1984, racial information is lacking in 60% of the cases (3,037 of 5,079 applicants). The only question, then, is whether the lack of racial data amounts to a violation of the Consent Decree.

Defendants dispute that they have violated paragraph 25(a)'s requirement that they "collect, maintain and compile" information on the racial composition of job applicants. They maintain that the current form to designate race has been distributed to all of the defendant agencies, accompanied by instructions that the form be provided to each job applicant. They further assert that plaintiffs have no evidence that any agency has willfully failed to collect race-related information. Rather, defendants attribute the low rates of reporting to the fact that submission of race data is voluntary and that "many applicants for federal employment, given the choice, prefer not to reveal their race." Opposition at 1–2.

Although one may safely assume that a certain percentage of job applicants will not provide racial data when told that there is no compulsion to do so, that argument cannot provide the whole story. Defendants' explanation fails to account for the wide discrepancies in data that exist from year to year within similar job categories. In 1984, for example, OPM had no data on 22% of the applicants for the General Investigator position; in 1985, however, that figure *doubled* to 44%.[3] Nor does defendants' position describe why the reporting rates vary so much within the same job category for the same year and within the same agency. *See* Plaintiffs' Motion at 12–13. Finally—and most significantly—applicant reluctance to provide racial information cannot be the sole explanation for the lack of data because defendants have been able, in some categories, to identify the race of *every* applicant for a particular job category. *See, e.g.,* 1984 Internal Revenue Officer (Treasury Department) (data compiled in 8,622 of 8,622 applicants); 1985 Contract and Procurement position (Department of the Navy) (data compiled on 1,081 of 1,081 applicants).

Although plaintiffs have no direct evidence of noncompliance by defendants, these numbers (gleaned from data submitted by defendants) speak for themselves.[4] The nature and breadth of the discrepancies revealed by the reported data clearly demonstrates that it is far more likely that administrative attitude has played the major role in the incomplete race data assembled thus far, rather than the suggested human reluctance. Simply put, it is clear that some agencies and managers are collecting and reporting race data and others are not. Accordingly, without making a determination as to whether this failure constitutes intentional willfulness or not, the Court concludes that defendants have not fulfilled the terms of the Consent Decree requiring them to "collect, maintain and compile" information on the race of job applicants.

[*Social Security Data*]

***3** What remedy would most appropriately address this failure? Plaintiffs initially suggest that the Court order defendants to replace their current form with the form employed in the Northrup study, which achieved a 96% success rate in identifying the race of applicants that used it. This suggestion shall be rejected for several reasons. At the outset, it is clear that comparing the Northrup form to the one currently in use is an "apples and oranges" affair: the Northrup study involved "assembled" testing, with applicants gathered together and guided through the examination procedures by a proctor, while most of the jobs formerly subject to the PACE use "unassembled" testing, in which applicants fill out their forms without the aid of a proctor. *See* Attachment I at 2. It is logical to assume that an individual is more likely to provide race data in the former situation than the latter.

A more significant reason exists for refusing to supplant one race data form with another: plaintiffs have failed to show that the Northrup form would better achieve the important reporting goals set forth in the Decree. Plaintiffs object to the underlining of the statement in the current form that tells applicants that submission of race data is voluntary, but defendants have stated that they are willing to remove that underlining from the current form.[5] Another objection raised by plaintiffs to the current form is that it places its warning about voluntariness at the top of the page, while the Northrup form's statement is located at the bottom. Suffice it to say that this objection provides little basis to determine the impact of compelling OPM, the federal agency charged with developing testing exams and personnel procedures, to use one form rather than another. For the present, and in the expectation that there will be substantial improvement in the applicant reporting data, the form currently in use can continue to be employed with the underlining removed. Should there be a continued failure of improvement over the next

several months, plaintiffs may then move to substitute the Northrup form or another form to achieve the mandate of the Consent Order provisions.

Plaintiffs next seek to require that defendants obtain the SSA aggregate of race data for job categories with more than 100 applicants and in which at least 20% of the applicants were unidentified. Given the inadequacy of the data that defendants have adduced thus far, there is no reason why the SSA information should not be collected, as this additional material may demonstrate whether adverse impact occurred in a particular job category without plaintiffs' knowledge. *See* Plaintiffs' Motion at 21. *More* information, not less, will enable this Court to determine whether class members have suffered adverse impact in a given case.

The Court urges defendants to continue to devote *full* efforts at gathering this critical racial data. It bears mentioning that plaintiffs, while suggesting that there would be merit in the proposal, have not yet sought contempt sanctions for defendants' violation of the Consent Decree. Because of the substantial anomalies that exist in the racial reporting data, it appears appropriate that defendants file quarterly status reports with the Court describing the progress they have made toward improvement of the current reporting problems.[6]

***4** For the reasons set forth above, it is

Ordered that plaintiff's motion to enforce the applicant-reporting provisions of the Decree be and it hereby is granted in part. In accordance with this Opinion and Order, defendants shall remove the underlining from the race data form currently in use, shall obtain and make available to plaintiffs within sixty (60) days the SSA breakdown of racial data for job categories with more than 100 applicants and in which the race of 20% or more of the applicants is unknown, and shall, commencing October 1, 1988, file quarterly status reports with the Court describing their progress in achieving more complete reporting of race data. In all other respects, plaintiffs' motion be and it hereby is denied.

Opinion and Order

Presently pending is plaintiffs' motion asking this Court to determine that defendants' use of Schedule B hiring authority does not constitute a permissible alternative examining procedure within the meaning of the Consent Decree entered in this action. For the reasons outlined below, this motion will be granted in part and denied in part.

I. Background

Suing on behalf of a class of Blacks and Hispanics, plaintiffs brought this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.,* challenging the federal government's use of the Professional and Administrative Career Examination (PACE) as a means of assessing applicants for positions in 118 entry-level job categories. On November 19, 1981, this Court granted final approval to a Consent Decree that sought to eliminate adverse impact in hiring against class members by phasing out the PACE over a three-year period and replacing it with "alternative examining procedures" for each of the 118 job categories. *See Luevano v. Campbell,* 93 F.R.D. 68 (D.D.C.1981).

Rather than gradually reduce its reliance on the PACE over the three-year time span provided in the Decree, defendant Office of Personnel Management (OPM) decided in May 1982 to exempt the 118 positions from the competitive service and place them under Schedule B hiring authority.[1] In explaining its decision, OPM noted that

Excepting these positions from the competitive service and placing them in Schedule B is appropriate because (1) there are no alternative written tests and other merit selection procedures, other than the PACE, currently available, (2) restrictions in federal employment will result in substantially reduced external hires in many former PACE occupations, and (3) the cost of developing validated competitive examinations consistent with the decree would be prohibitive, especially for the occupations where relatively few hires are expected. Thus, it is not practicable to hold competitive examinations for those positions. OPM will, of course, continue to explore the development of competitive selection procedures where appropriate.

47 Fed.Reg. 38,257, 38,257 (1982). Although OPM has developed competitive procedures in 16 job categories, it has chosen to rely on Schedule B for hiring in the remaining 102 positions.

***5** In their motion, plaintiffs first contend that Schedule B does not qualify as a permissible alternative examining procedure because the Consent Decree requires that all such procedures be conducted on a competitive basis. Building on this argument, plaintiffs also assert that the five-year period for retention of jurisdiction, established under paragraph 7 of the Decree, did not begin running when Schedule B was introduced in 1982. As relief, plaintiffs seek an injunction coverting all Schedule B hires to competitive status and ordering defendants to conduct a survey to determine whether any Schedule B appointees have been or will be laid off as a result of their inferior employment status. Each of these matters will be considered in turn.

II. Discussion

A. Is Schedule B a Permissible Alternative Examining Procedure Under the Consent Decree?

As defendants correctly observe, it is well-settled that "the scope of a consent decree must be discerned within its four corners ... and not as it might have been written." *United States v. Armour & Co.,* 402 U.S. 673, 682 (1971). Resort to the plain language of the Consent Decree, however, demonstrates that Schedule B may *not* be used as an alternative examining procedure.

Paragraph 8(j) of the Decree is the starting point in any inquiry into the propriety of Schedule B. It states:

The phrase "alternative examining procedure" shall mean the group of factors, including test scores and any other criteria which are considered, and the relative use made of each such factor, in making an appointment decision with respect to an applicant ... for employment at the GS–5 or GS–7 level in a job category listed in Appendix A.

This definition is, or course, silent on the question whether alternative examining procedures must be within the competitive service. Seizing on this fact, defendants invoke the "four corners" rule of *Amour* and contend that this Court may not construe the Consent Decree to impose a requirement (use of competitive procedures) to which they did not expressly agree.

[Use *of Schedule B*]

Although the Court agrees with defendants' premise, their conclusion must be rejected. While paragraph 8(j) neither compels nor precludes the use of competitive procedures, defendants have drawn the four sides of their *Amour* box without regard to the other provisions of the Consent Decree. As plaintiffs point out, the rest of the Decree is replete with references to make clear that alternative examination procedures must be competitive in nature. Paragraph 1, for example, states that "[t]his Decree does not resolve the claims of any class member involving any use of the PACE or of PACE scores for any purpose other than *competitive external hiring* " (emphasis added), thus recognizing by implication that noncompetitive methods would not permitted. In addition, paragraph 13(a) reinforces this view more directly: "No later than three years after the effective date of this Decree, every job category which is presently subject to the PACE requirement shall, *when filled by competitive examination,* be filled on the basis of an examining procedure which is designed to examine for that particular job category" (emphasis added). Paragraph 25(a) likewise requires the reporting of information on applicants "for a GS–5 or GS–7 entry-leve job category listed in Appendix A which is filled on the basis of a *competitive procedure* " (emphasis added). In addition, the Decree also speaks of Veteran's Preference Act requirements providing "a defense to the determination of adverse impact with respect to any *competitive* procedures," *see* paragraph 9 (emphasis added), and calls for reporting of data on applicants appointed "by any *competitive* selection procedure." Paragraph 24(b). Finally, paragraph 2(b) of the Decree calls for the development of procedures "which validly and fairly test the relative capacity of applicants to perform the jobs listed in Appendix A." Thus, the plain language of the Consent Decree, taken as a whole, clearly indicates that alternative examination procedures must be instituted on a competitive basis.[2]

***6** Defendants offer a second reason why they believe Schedule B hiring is appropriate under the Decree. If alternative examining procedures must be competitive, they claim, OPM's authority under 5 U.S.C. § 3302(1) to make "necessary exceptions of positions from the competitive service" will be compromised, a condition that was not expressly stated in the Decree. This contention, however, also lacks merit.

In paragraph 2(a) of the Consent Decree, the parties agreed that the two main purposes of the Decree were "to eliminate adverse impact against blacks and against

Hispanics" and "to establish alternative examining procedures which are consistent with Title VII, for those job categories which are subject to the PACE requirement." Paragraph 2(a) concluded with the statement that "[t]he parties intend that this agreement be construed to effectuate the foregoing policies and purposes." To construe the Decree as defendants suggest would undermine, not effectuate, the Decree's important goals. In adopting Schedule B, defendants have eliminated all 118 job categories from the competitive service, have developed competitive exams for only 16 of those positions and have indicated that they will not devise competitive procedures for the remainder. If this Court placed its imprimatur on their interpretation, defendants would be free to ignore—as they have done thus far—their obligation to implement alternative examining procedures that will reduce adverse impact in hiring. This the Court will not do.

Even assuming, however, that the Court agreed with defendants' position and found that alternative examining procedures need not be conducted within the competitive service, there is another, independent reason defendants' reliance on Schedule B is inappropriate. Simply put, Schedule B is not an "alternative examining procedure" as that term is defined in the Consent Decree. Paragraph 8(j) defines alternative examining procedure as "the group of factors, any other criteria which are considered, *and the relative use made of each such factor,* in making an appointment decision with respect to an applicant" (emphasis added). Moreover, paragraph 13(a) requires that each job category "be filled on the basis of an examining procedure which is designed to examine *for that particular job category* " (emphasis added). Under Schedule B, however, each agency is free to establish its own set of hiring criteria within a given job category, in contravention of paragraph 13(a).[3] Moreover, the representative Schedule B procedures now before the Court, *see* Exhibit 2 to Defendants' Opposition, lack any discussion of the relative weight given to each of the hiring factors, in violation of paragraph 8(j). Thus, the *ad hoc* quality of Schedule B hiring—with individual managers making decisions according to their own set of factors and without having to indicate the importance of each criterion—contravenes express language in the Consent Decree, language which neither defendants nor this Court can conveniently ignore.[4]

***7** Defendants' justification for their decision not to develop competitive examinations for all 118 job categories warrants brief comment. Defendants point out that, although they have constructed alternative examining procedures for only 16 positions, those positions are "big-fill" jobs that account for approximately 55–60% of all Schedule B hiring. It would be overly expensive and time-consuming to develop examinations for the rest of the 102 former PACE positions, defendants contend, because there are few (and often no) hires in many of these job categories.

Defendants' rationalization is wholly unpersuasive. As an initial matter, it is far from obvious that the 16 "big-fill" jobs do in fact comprise 55–60% of defendants' Schedule B hiring. *See* Plaintiffs' Reply Brief at 13 (suggesting 30% as the level of hiring under the 16 categories). Moreover, plaintiffs have persuasively demonstrated, using OPM's reporting data, that many of the "small-fill" jobs for which examining procedures were not devised have *more* hires than some of the "big-fill" jobs that do have competitive exams. *Id.* at 11–13. Finally, although defendants assert that they have already expended $4.5 million just to develop the 16 "big-fill" jobs that now are being tested, paragraph 13(a) of the Decree recognized that "[s]ome PACE job categories have relatively few vacancies and OPM may develop an alternative examining procedure for a group of all such job categories." Rather than avail themselves of that opportunity, defendants chose to abrogate their duties under the Decree by failing to produce examinations for *any* of the other approximately 100 PACE positions.[5] Their partial adherence to the terms of the Consent Decree is an unacceptable substitute for the full and adequate compliance that they promised, and committed, themselves to do.

B. Retention of Jurisdiction

Paragraph 7 of the Consent Decree provides:

In order to ensure compliance with the terms of this Decree, to provide a framework for implementation of this Decree, and to receive reports concerning the government's actions hereunder, the Court shall retain jurisdiction over this case. The period of retention of jurisdiction shall expire, with respect to any job category listed in Appendix A, five yers after the cessation of the use of PACE results for the job category and the implementation of an alternative examining procedure for that job category at the GS–5 or GS–7 level.

In their Opposition (at 18), defendants argue that the

five-year period for retention of jurisdiction began running on November 9, 1982, the date on which federal agencies were required to begin using Schedule B authority, rather than the PACE, for external hiring. In light of this Court's conclusion that Schedule B does not constitute an alternative examining procedure under the Decree, the period for retention of jurisdiction did not begin running when Schedule B was announced in 1982 or when new employees were first hired under Schedule B authority. In fact, because OPM has implemented alternative examining procedures in only 16 job categories, the five-year countdown has not started running for *any* of the remaining PACE positions.

Citing an attempt by the Navy to layoff 11 Schedule B employees at its Jacksonville, Florida facility and the difficulty in discovering whether similar actions have been taken at other agencies, plaintiffs also seek an order compelling defendants to conduct a survey of every agency using Schedule B hiring to determine whether there have been or will be layoffs of other Schedule B appointees. Inasmuch as defendants' opposition does not contest this point, see Opposition at 21–22, and since such a survey would be a sensible and appropriate method of assuring that past violations of the Decree will be uncovered and future violations will be deterred, defendants will be ordered to conduct the requested survey.[7]

C. Relief

***8** Plaintiffs seek broad relief to remedy defendants' failure to comply with the Consent Decree. Pointing out that Schedule B hirees do not enjoy all of the employment rights to which competitively-selected federal employees are entitled, *see* Motion at 11–13,[6] plaintiffs ask this Court to enter an injunction requiring the immediate conversion of all Schedule B appointees to competitive status. Defendants do not dispute plaintiffs' entitlement to this relief. Rather, the only argument they offer for denying the requested injunction (Opposition at 21–22) is based on language in *National Treasury Employees Union v. Horner,* No. 84–2573 (March 30, 1987) (*NTEU*), where this Court stated, in staying similar relief that had been awarded in a suit challenging OPM's decision to remove the former PACE positions into the excepted service, that "the rights of excepted service status employees are not so inferior that this court must deprive the court of appeals of an opportunity to address the important questions raised by this case." Order at 6. Granting an injunction in this case, defendants contend, would undermine the stay entered in *NTEU.*

The Court agrees that requiring defendants to convert Schedule B hires to competitive status immediately would interfere with the appellate litigation now pending in *NTEU.* That does not mean, however, that plaintiffs are not entitled to the injunction that they seek. Rather, the Court will enter the injunctive relief that has been requested by plaintiffs but will, *sua sponte,* stay the effect of that injunction pending the outcome of the appeal in *NTEU.* In this way, the interests of justice will best be served.

III. Conclusion

The Court is well-aware that the obligations imposed on the parties under the Consent Decree are substantial. It was *defendants,* however, who voluntarily made the decision to enter into the Decree and abide by its terms rather than proceed to a trial on the merits in this action. Defendants must now live up to the bargain that they struck.

Accordingly, it is hereby

Ordered that plaintiffs' motion be and it hereby granted in all respects except insofar as it seeks relief for the Jacksonville, Florida naval employees, as to which it be and hereby is denied; it is

***9** Further Declared that the use of Schedule B hiring authority is not an "alternative examining procedure" within the meaning of the Consent Decree; it is

Further Declared that the five-year period for retention of jurisdiction provided for in paragraph 7 of the Decree did not start running with the promulgation of Schedule B authority in 1982 or with its implementation for any job category formerly subject to the PACE; it is

Further Ordered that defendants are enjoined to convert all Schedule B appointees to competitive service status; it is

Further Ordered that the injunction enjoining defendants to convert all Schedule B appointees to competitive service be and it hereby is stayed pending the outcome of

the appeal in *NTEU v. Horner;* and it is

Further Ordered that defendants shall inquire of each agency and facility given Schedule B authority at any time from 1982 to the present whether there have been layoffs of Schedule B appointees in the past and whether any such layoffs are now pending. Defendants shall report the results of this survey to plaintiffs and to the Court within 120 days of the date of this Order.

Order

Plaintiffs, suing on behalf of a nationwide class of Blacks and Hispanics, brought this action alleging that the Professional and Administrative Career Examination (PACE) discriminated against class members in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* On November 19, 1981, this Court gave final approval to a Consent Decree that called for gradual phaseout of the PACE and, in its place, establishment of alternative examining procedures for particular job categories. *See Luevano v. Campbell,* 93 F.R.D. 68 (D.D.C.1981).

This Court retained jurisdiction over this action under Paragraph 7 of the Decree, which also stated:

The period of retention of jurisdiction shall expire, with respect to any job category listed in Appendix A, five years after the cessation of the use of PACE results for the job category and the implementation of an alternative examining procedure for that job category at the GS–5 or GS–7 level. This period of time may be extended for any such job category by agreement of the parties, or upon motion for good cause shown.

On July 2, 1987, plaintiffs filed a motion seeking to extend the period of retention of jurisdiction, and defendants' obligations under the Decree, during the pendency of any enforcement or remedial proceeding relating to a particular job category. The parties are now in agreement, however, that this Court may extend the period for retention of jurisdiction to consider plaintiffs' challenges to defendants' hiring decisions and to enter appropriate remedial orders if necessary. *See* Stipulations and Orders of December 18, 1987 and December 23, 1987. Only one issue therefore remains to be resolved: whether, after plaintiffs have raised a question of noncompliance in a particular job category and after the five-year period of retention of jurisdiction has expired, defendants must continue to abide by their other obligations under the Decree until entry of a remedial order. For the reasons set forth below, that question will be answered in the affirmative.

***10** As noted above, defendants agreed under the Consent Decree to phase out their use of the PACE and replace it with alternative examining procedures in particular job categories. "[T]o ensure that the obligations assumed by defendants under the Consent Decree are properly implemented," 93 F.R.D. at 81, defendants also agreed to record and report the number of applicants and hires who are White, Black and Hispanic and to use all practicable efforts to impact in hiring within each job category. Plaintiffs now ask that defendants be required to adhere to these duties until this Court can determine whether adverse impact is occurring as a result of defendants' newly-formulated procedures.

Plaintiffs' request is a reasonable method of assuring the implementation of alternative examination procedures that do not adversely impact on class members. First, it recognizes that long periods of time may elapse between an allegation of noncompliance and a finding that the Decree has been violated and guarantees that the crucial safeguards embodied in the Decree will continue unabated until a judicial resolution of plaintiffs' claims. In addition, it removes any incentive on the part of defendants to act in a dilatory fashion by maintaining adherence to the Decree during the interim period. *See* Reply Brief at 4–5. Finally, it avoids the difficulties that would arise if defendants ceased complying with the Decree and were subsequently compelled, through a remedial order, to resume their obligations in a particular job category. *Id.* at 3–4. Weighing these substantial benefits against defendants' only contention to the contrary—that action at this time would be premature (*see* Defendants' Response at 6)—it is clear that plaintiffs are entitled to the relief that they seek.

Accordingly, it is hereby

Ordered that plaintiffs' motion be and it hereby is granted. Where plaintiffs have made a timely *prima facie* showing of a violation of defendants' obligation to use all practicable efforts to eliminate adverse impact in hiring for a job category, and where this showing has been made before the Monitoring Committee or in Court prior to the expiration of the five-year period for retention of jurisdiction but such period would otherwise expire before the Court determines whether defendants have

violated the decree or before the Court decides whether to extend the period of retention of jurisdiction over that job category as part of the remedy for any violation found, the period for retention of jurisdiction over that job category, the defendants' recordkeeping and reporting obligations for that job category, and defendants' obligation to use all practicable efforts to eliminate all adverse impact in hiring for that job category, shall continue until such time as the Court determines whether defendants have violated the Decree or until the Court decides whether to extend the period for retention of jurisdiction over that job category as part of the remedy for any violation found; it is

***11** Further Ordered that this Order shall not apply to a particular job category if plaintiffs inform the Court that they are not seeking an extension of the period for retention of jurisdiction as to that job category as part of the remedy for the violation charged; and it is

Further Ordered that defendants shall have the right to move to exclude any particular job category from the terms of this Order for good cause shown, where the showing of good cause is particularized as to that job category.

All Citations

Not Reported in F.Supp., 1988 WL 147603, 60 Fair Empl.Prac.Cas. (BNA) 1364, 60 Fair Empl.Prac.Cas. (BNA) 1369, 60 Fair Empl.Prac.Cas. (BNA) 1371, 48 Empl. Prac. Dec. P 38,408

Footnotes

[1] Plaintiffs also submit that defendants have violated a similar provision in paragraph 24(a) of the Decree that requires them to provide similar data for applicants taking the PACE exam during the three-year phase-out period.

[2] Plaintiffs have included the data for years 1983, 1984 and 1985 as Attachments C, D and E to their motion but have summarized this material for convenience in Attachment B. All references to reporting data shall be to the summary contained in Attachment B unless otherwise noted.

[3] These examples are illustrative. Other discrepancies are legion and could just as well have been chosen. *Compare, e.g.,* Department of Agriculture, Contracting Administrator, 1984 data (0% unknown) *with id.* 1985 data (23.7% unknown).

[4] It is unclear how plaintiffs would obtain direct evidence of noncompliance with the Decree even if it existed. *See, e.g., Interstate Circuit v. United States,* 306 U.S. 208, 221 (1936).

[5] The Court accepts defendants' willingness to modify their race data form and expects that this change will be *immediately* implemented. The parties shall submit a joint report informing the Court as soon as this change has been accomplished.

[6] Over the three-year period from 1983 to 1985, the rates for unknown applicants has gone from 18.7% to 48.7% to 20.8% for OPM-sponsored alternative examining procedures; from 22.7% to 26.6% to 22.7% for delegated

alternative exams; and from 16.5% to 8.7% to 12.9% for Schedule B hiring.

[1] Schedule B does not establish job-specific examinations for each of the 118 job categories formerly subject to the PACE. Rather, it permits OPM to authorize an individual agency to conduct its own external hiring for a particular period of time.

[2] Defendants' present insistence that Schedule B qualifies as an alternative examining procedure is directly contradicted by earlier statements that they have made to the contrary. For example, during the time when the proposed Consent Decree was pending before the Court, defendants offered an affidavit from Richard Post, an OPM official, which indicated that alternative examining procedures would be competitive in nature. See Attachment B to Plaintiffs' Motion. In granting final approval to the Decree, this Court expressly relied on, and cited, the Post affidavit to illustrate the extensive work that would attend the development of competitive testing procedures. See 93 F.R.D. at 79–80 (findings 32–34). More significantly, however, the guidelines drawn up to assist federal agencies in applying for Schedule B authority clearly indicate that OPM believed Schedule B was not an alternative examining procedure. Appendix E to the Federal Personnel Manual, which plaintiffs' have provided as Attachment D to the instant motion, observes at page 213–E–3 that six job categories "were removed from PACE examination coverage prior to the effective date of the consent decree and are presently filled through alternative competitive examinations." It then goes on to state, however, that "[i]f alternative examinations for the positions listed above are discontinued, the positions would become subject to the Schedule B authority. Conversely, if alternative examinations are developed for any positions, those positions would be removed from coverage of Schedule B authority and would be filled by the alternative examinations." Id. One would be hard-pressed to find a clearer statement of plaintiffs' position that Schedule B and alternative examining procedures are mutually exclusive.

[3] Defendants' own affiant does not deny this fact. *See* Declaration of Curtis J. Smith, Exhibit 1 to Defendants' Opposition, at 2 ("Schedule B examining requires that 'each agency establish[ ] its own application procedures' ") (quoting FPM Bulletin 213–54 at 2).

[4] In a December 1984 report, the General Accounting Office summarized studies by the Merit Systems Protection Board and the National Academy of Public Administration that recognized the potential for abuse inherent in Schedule B's agency-specific hiring system and concluded by noting that "[p]ersonnel officials of the agencies we visited believe that their selection practices conform to merit principles, but they also believe that the variety of selection procedures increases the opportunity for abuse." *See* Exhibit 4 to Defendants' Opposition at 5.

[5] Although the requirement for developing alternative examining procedures in each job category may be onerous from a fiscal and administrative standpoint, it was the parties—including defendants—who included that provision in the Decree.

[6] Plaintiff cites inferior rights with respect to entry into the career Civil Service, transfer and reassignment, career ladder promotion and retention and bump-back situations. To this list, one could add the inability to obtain judicial

review of adverse personnel actions for which the Civil Service Reform Act does not explicitly provide a right of review. *See United States v. Fausto,* 108 S.Ct. 668 (1988). *See also Allen v. Heckler,* [38 EPD ¶ 35,791] 780 F.2d 64, 65–66 (D.C.Cir.1985).

[7] Plaintiffs also invite the Court to grant injunctive relief with respect to the Jacksonville employees. It appears from a June 5, 1987 letter from defendants' counsel to plaintiffs' counsel, however, that the planned adverse action against these individuals has been cancelled. *See* Exhibit 5 to Defendants' Opposition. Although plaintiffs claim that this cancellation does not assure that a similar adverse action will not occur in the future, the Court will accept the representation at face value and deny plaintiffs this relief. It should be abundantly clear, however, that plaintiffs are free to seek this relief in the future should a similar problem recur.