1976 WL 736
United States District Court, N.D. Ohio, Eastern Division.

Shield Club et al., Plaintiffs
v.
City of Cleveland et al., Defendants.

Civil Action No. C 72-1088
|
September 27, 1976
|
Order of October 20, 1976

THOMAS, D.J.

[Background of Proceedings]

***1** The Shield Club's discrimination suit against the Cleveland Police Department is based on the Fourteenth Amendment Equal Protection Clause. A set of rulings on July 6, 1974, dealt with promotional examinations, screening procedures for police applicants who have passed the civil service entrance examination, recruitment, and assignment and transfer procedures. Concerning the last issue, the plaintiff claimed that assignments within the department are made in a discriminatory manner and that, as a result, certain departments are unrepresented or underrepresented in terms of participation by minority personnel.

While this court concluded that "the plaintiffs have [not] established a historic pattern of racial discrimination in the Cleveland Police Department," it was found that minority participation (8.9 percent for the entire department) exceeded the overall percentage in some units, was less in some units, and was zero in some other units.[1] It was then determined:

The procedure for requesting and obtaining assignments within the CPD appears to be administered in a haphazard and subjective fashion. Thus, minority participation varies substantially from unit to unit. The court realizes that there may well be job related reasons for the uneven distribution of minorities throughout particular units in the CPD. Nevertheless, it is determined that in order for assignments to be administered in a constitutionally permissible manner that the CPD will be required to submit an objective written plan for administering and publicizing available assignments throughout the CPD. It is further determined that the CPD should submit a plan to this court for the integration of those units within the CPD where marked underparticipation exists.

After events discussed below intervened, a report of recommendations on "Minority assignment and transfer," prepared by court appointed consultants, was the subject of a hearing on June 28-29, 1976. The issue is now ready for a final decision.

[Transfer and assignment plan]

I. Chief of Police Gerald J. Rademaker, on October 30, 1974, filed with this court a proposed plan for "Implementation of Order of United States District Court With Respect to the Transfer and Assignment of Police." It commenced by quoting a pertinent portion of section 116 of the Cleveland City Charter that gives the Chief of Police

> ***2** . . . exclusive control of the stationing and transfer of patrolmen and other officers and employees constituting the police force, under such rules as may be established by the Mayor or by the director of the department to whom the said Chief of Police may be immediately responsible [the Director of Public Safety].

No rules have been promulgated either by the Mayor or the Director of Public Safety. In a "Statement of Criteria for Transfers Within the Department," the knowledge and skill expected of sworn members of the Department in Basic Patrol assignments (lasting at least two years) was described in five generalized criteria. It then stated:

> [W]hen warranted by the level of his

> performance as measured by positive results in terms of arrests, absence of complaints, satisfactory Superior Officers' reports and recommendations, and the development of the special skills and capabilities needed for the specialized Units, [a patrolman] may be considered for transfer to such assignment, if there is a vacancy, and provided he is amenable and/or requests it.

The Plan next stated:

> Normally, Detective Bureau assignments are made in accordance with the foregoing process, but with an additional intermediate assignment in the Impact Task Force.

An associated provision stated:

> Transfer to the Detective Bureau and/or its various specialized Units may follow, provided the member demonstrates the necessary investigative ability and a continuing high level of performance.

Identifying a General Police Order and a Departmental Notice that set forth "existing procedure for requesting transfer," paragraph 3 of the Plan declared:

> The Chief of Police will cause full publication to be made to all police personnel of existing procedures for requesting and effecting a transfer or other change in assignment, including such procedures as shall be approved by the Court.

Paragraph 4 announced that transfers of personnel would be scheduled at 90-day intervals commencing December 1, 1974.

Under the heading "Transfer Procedures," paragraph 5 obviously attempted to conform to the court's order to integrate units "where marked underparticipation [of minorities] exists." It stated:

> Prior to effecting any transfers, the Chief of Police will review each pending application for transfer and will, prior to making each scheduled transfer of personnel, review the distribution of minority personnel within the Police Department for the purpose of evaluating the distribution of minority personnel within the Department and of effecting transfers to various units within the Division of Police in which minority members of the police force are markedly underrepresented.

This paragraph next listed "additional factors" that the Chief of Police was to bear in mind in making transfers:
a) The requirements of the City of Cleveland for effective law enforcement.

b) Consideration of the demonstrated skills and abilities as set forth in paragraph 2 hereof.

c) The expressed desires of minority members of the Department with respect to their assignments. For example, there should not be forced dispersal of minority personnel for the sole purpose of achieving racial integration if such dispersal is contrary to the desires of the minority personnel.

***3** By October 23, 1975, when a hearing was held on the plan, Chief Rademaker had retired. Assistant Chief Lloyd F. Garey, appointed Chief of Police on May 15, 1975, was called as a witness by the city defendants. Asked whether he had effected any change of policy concerning transfer of personnel, he answered:

> I can't say that there's a basic change in policy. I reissued and slightly revised a general police order that dealt with and treated the subject of requesting transfers and assignments.

Chief Garey's testimony made it evident that he interpreted and treated the plan submitted by Chief Rademaker as requiring no change in the previously existing assignment and transfer policy and procedure. Chief Garey first testified that, with some exceptions, he was basically in agreement with the Plan's "statements, representation, [and] propositions." Understandably he noted that all references to the Impact Task Force should be deleted, since that unit was abolished when its federal funding ceased. But he then retracted the only proposals of the Plan that changed existing policy and procedure. The Plan's 90-day schedule of transfers was explained in Chief Rademaker's proposal as affording

> . . . members of the Department desiring transfers to other units with an opportunity to request a transfer prior to the scheduled transfer date.

However, Chief Garey testified that the periodic 90-day intervals for transfer could not be utilized because such schedule "would interfere with the administrative operation of the department," and that transfers "might very well be made oftener."

A major retraction surfaced on cross-examination. Chief Garey was asked about paragraph 5 of the Plan:

> So do I understand that you are disavowing the portion of this submitted plan that purports to obtain an objective of integrating the units of the department?

He answered:

> I'm afraid when I said I was familiar with this document I was wrong, I wasn't familiar with it anymore in total, it's been a while since I read it completely. And that paragraph completely eluded me.

At the end of a later colloquy concerning paragraph 5 he was asked:

> You find that there are some units in the department that you are totally without minority personnel, what do you do then? You have got a vacancy in one of those units, what do you do?

He answered:

> I don't just automatically transfer a minority member into the unit. If there is a minority member that requested it, if he has the qualifications he will certainly be considered. If there is someone that is better qualified, and the best interests of the departments demand it, he would be transferred.

This statement, he testified, summarized "the procedure as set forth here in this plan."

On analysis, this assessment is not borne out by his previously quoted testimony. Moreover, that testimony provided insight into his thinking that convinced this court of the unacceptability of the Plan, as interpreted by Chief Garey. In part, the court understands the Chief to have meant that it is in the best interests of the department to pick the best qualified person for an open job. This is a statement of sound personnel policy, but paragraph 5 does not mention or deal with this truism. Therefore, when the Chief said that a minority member with "qualifications "who requested the transfer, "will certainly be considered," and then gratuitously added that "If . . .

someone . . . is better qualified, and the best interests of the department demand it, he would be transferred," he is understood to have been saying that when a qualified minority member requests transfer the Chief is likely to find and transfer another officer whom the Chief considers to be "better qualified." In any event, since Chief Garey, in his testimony of October 23, 1975, did not approve paragraph 5, it is concluded that he retracted its promise "[to evaluate] the distribution of minority personnel with the Department" and "[to effect] transfers to various units with the Division of Police in which minority members of the police force are markedly underrepresented."

***4** At the end of the hearing this court found:

> I don't think it is possible for the Cleveland Police Department to come up with a plan relying on their own resources . . . I am satisfied, having listened to [Chief Garey], with all due deference to his best intentions, that the order as proposed by Chief Rademaker and then ratified by Assistant Chief Garey, and as now interpreted by Chief Garey from the witness stand, is not sufficient to accomplish a workable plan that we can really put into a court order.

After discussion with counsel and the court's own search for appropriate consultants, this court appointed a consultant team[2] to make a study and prepare a recommended plan pursuant to the Memorandum and Order of July 6, 1974.[3]

Finding "that the Cleveland Police Department does not possess a comprehensive and consistent personnel transfer $^{and}/_{or}$ assignment process," the consultants recommended the adoption of new procedures in their report. A week after the report was filed with the court, with copies sent to the parties, a hearing was held on June 28-29, 1976, at which the consultants were interrogated by the court and counsel concerning their report. Chief Lloyd F. Garey also testified, voicing objections to most of the report's recommendations.

The details of the recommendations will not be considered until it first is determined whether the factual record given the present state of section 1983 and Fourteenth Amendment law relating to police departments, warrants remedial action of the type recommended.

[Racially Discriminating Policy]

***5** II–A. Oral argument was presented by counsel for the Shield Club, the City defendants, and the Fraternal Order of Police at the conclusion of the presentation of evidence on June 29, 1976. Only counsel for the City defendants (the Mayor, the Director of Public Safety, and the Chief of Police) registered opposition to the Plan of the consultants. Succinctly, he stated this fundamental objection:

> . . . the operative law today . . . and particularly in conjunction with the *Rizzo* decision, I do think that it precludes the imposition of an order implementing the procedures suggested by the court appointed panel.

In his argument City counsel cited the recent cases of *Rizzo v. Goode,* 423 U.S. 362 (1976), and *Washington, Mayor of Washington v. Davis,* [11 EPD P 10,958] 44 U.S.L.W. 4789 (U.S. June 7, 1976). In *Rizzo,* a class action was brought under 42 U.S.C. § 1983 on behalf of all citizens of Philadelphia, and an included class of all black residents, against the Mayor, City Managing Director, and the Police Commissioner (petitioners in the Supreme Court). The Court reversed rulings of the courts below which it thus synopsized:

The District Court . . . entered an order requiring petitioners "to submit to the [District] Court for its approval a comprehensive program for improving the handling of citizen complaints alleging police misconduct" in accordance with a comprehensive opinion filed together with the order. . . . Petitioner City Police Commissioner was thereby required, *inter alia,* to put into force a directive governing the manner by which citizens' complaints against police officers should henceforth be handled by the Department. The Court of Appeals for the Third Circuit, upholding the District Court's finding that the existing procedures for handling citizen complaints

were "inadequate," affirmed the District Court's choice of equitable relief: "The revisions were ordered because they appeared to have the potential for prevention of future police misconduct." [*Goode v. Rizzo,*] 506 F.2d 542, 548 (CA 3 1974).

423 U.S. at 365-66.

Central in *Rizzo* is the Court's ruling that in such a case brought under section 1983, claiming a deprivation of constitutional rights based upon police brutality or other police misconduct, the conduct complained of could only serve as the basis for an order against the Mayor and the Chief of Police if they were found by their own conduct to have denied the constitutional rights of the persons claiming the constitutional deprivation. The Court found absent the necessary "affirmative link between the occurrence of the various incidents of police misconduct and the adoption of any plan or policy by petitioners–express or otherwise–showing their authorization or approval of such misconduct." 423 U.S. at 371. Therefore, the Court held that there was no occasion for the district court to grant equitable relief against the petitioners.

Rizzo's interpretation of section 1983 confirms this court's conclusion in its July 6, 1974, decision and also limits that conclusion to its context that a "historic pattern of racial discrimination in the Cleveland Police Department" was not established by the "degrading and discriminatory experiences" which Sergeant Lynn Coleman "suffered in some of his assignments, or by "certain additional instances testified to by others." The evidence did not show that these instances of discrimination were attributable to the Chief of Police.

***6** Furthermore, this court's findings and conclusions, based on the Chief's responsibility for all transfers and assignments, conform to *Rizzo's* rule that section 1983 only imposes liability on administrators for their own conduct. After making the findings previously quoted (see n.1), this court concluded and determined that

> . . . the procedure for requesting and obtaining assignments with the CPD appears to be administered in a haphazard and subjective fashion. Thus minority participation varies substantially from unit to unit.

These findings and conclusions amounted to a holding that the Chief was maintaining a racially discriminatory policy in making assignments and transfers. However, it was treated as a prima facie holding, it being stated, "there may well be job related reasons for the uneven distribution of minorities throughout particular units in the CPD."[4] The Chief was thereby held, although not stated in these words, to have deprived minority members of their constitutional right to equal protection of the laws in the making of assignments and transfers. Consequently, the Chief was directed to submit a remedial plan, including provisions for the integration of units "where marked underrepresentation [of minority members] exists." What was thought to be the applicable law, however, has changed since 1974. *Washington v. Davis, supra,* decided June 7, 1976, discussed hereafter, delineates the elements now required for a finding of constitutionally based racial discrimination in public employment. The requirements for a finding of constitutionally based racial discrimination in public employment, as declared in *Washington v. Davis,* were not previously considered in this case. It therefore becomes essential to consider anew whether a racially discriminatory policy of assignments and transfers by the Chief of Police is shown in the evidence, including the evidence received subsequent to July 6, 1974.

[Discriminatory Purpose]

B. The Shield Club's suit charging discrimination in various aspects of the Cleveland Police Department, filed October 11, 1972, was brought under 42 U.S.C. § 1983. It charged deprivation under color of state law of righ ts guaranteed by the Equal Protection Clause of the Fourteenth Amendment. While Title VII of the Equal Employment Opportunity Act, 42 U.S.C. § 2000 *et seq.,* was extended by Congress, effective March 1972, to apply to state, county, and municipal agencies of government, the Shield Club did not pros ecute a race discrimination charge under Title VII against the Cleveland Po lice Department.

In *Washington v. Davis, supra,* on June 7, 1976, the Supreme Court decided that the court of appeals (D.C. Circuit) erroneously applied the legal standard applicable to Title VII cases in resolving the Fifth Amendment issue before it. The district court granted summary judgments

against the petitioners on both the Fifth Amendment claim that Civil Service Test 21, the initial test given applicants to determine their qualifications to be police officers denied the equal protection component of the Due Process Clause, the constitutional violation charged. The suit was brought under 42 U.S.C. & 1981 and D. C. Code § 1-320.

***7** On appeal, 512 F.2d 956 (D.C. Cir. 1975), the court of appeals in considering the constitutional issue relied on *Griggs v. Duke Power Co.,* [3 EPD P 8137] 401 U.S. 424 (1971). *Griggs* had interpreted and applied Title VII of the Civil Rights Act of 1964. As summarized by the Supreme Court,

> The court [of appeals] went on to declare that lack of discriminatory intent in designing and administering Test 21 was irrelevant; the critical fact was rather that a far greater proportion of blacks–four times as many–failed the test than did whites. This disproportionate impact, standing alone and without regard to whether it indicated a discriminatory purpose, was held sufficient to establish a constitutional violation, absent proof by petitioners that the test was an adequate measure of job performance in addition to being an indicator of probable success in the training program, a burden which the court ruled petitioners had failed to discharge.

44 U.S.L.W. at 4791. Putting aside as not material proof of the department's substantial efforts to recruit blacks and the rough equivalence of recent hirings and of the racial makeup of the department itself to the racial makeup of the surrounding community, broadly conceived, the court of appeals reversed the district court's judgment and directed that respondents' (the police applicants) motion for partial summary judgment be granted.

Reversing the court of appeals, the Supreme Court reviewed its cases involving discrimination based on the Equal Protection Clause. Although Justice White's opinion conceded that there is some dicta to the contrary in recent cases, the *Davis* opinion established "that the invidious quality of a law claimed to be racilly discriminatory must ultimately be traced to a racially discriminatory purpose." 44 U.S.L.W. at 4792. However, the Court acknowledged:

> This is not to say that the necessary discriminatory racial purpose must be express or appear on the face of the statute, or that a law's disproportionate impact is irrelevant in cases involving Constitution-based claims of discrimination. . . .

Continuing,
It is also clear from the cases dealing with racial discrimination in the selection of juries that the systematic exclusion of Negroes is itself such an "unequal application of the law . . . as to show intentional discrimination." *Akins v. Texas,* [325 U.S. 398, 400, 404 (1945)].

44 U.S.L.W. at 4792.

Considering how a racially discriminatory purpose is proved, the Court recognized

> Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another. It is also not infrequently true that the discriminatory impact–in the jury cases for example, the total or seriously disproportionate exclusion of Negroes from jury venires–may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds. Nevertheless, we have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a

> greater proportion of one race than of another.

***8** *Id.* at 4792-93. The Court examined *Palmer v. Thompson,* 403 U.S. 217 (1971), and *Wright v. Council of City of Emporia,* 407 U.S. 451 (1972), which held that in certain circumstances the racial impact of a law rather than its discriminatory purpose is the critical factor. But the Court observed that *Keyes v. School District No. 1,* 413 U.S. 189 (1973), "where the principal issue in litigation was whether and to what extent there had been purposeful discriminaton resulting in a partially or wholly segregated school system," 44 U.S.L.W. at 4792, and subsequent cases make it clear that neither *Palmer* nor *Wright* "had worked a fundamental change in equal protection law."

The Court thereupon took issue with many rulings of lower federal courts, both at the trial and appellate levels, which, like the D.C. Circuit's ruling in *Washington v. Davis,* had applied the Title VII racial impact test as sufficient to show a constitutional equal protection violation. The Court stated:

> Both before and after *Palmer v. Thompson,* however, various Courts of Appeals have held in several contexts, including public employment, that the substantially disproportionate racial impact of a statute or official practice standing alone and without regard to discriminatory purpose, suffices to prove racial discrimination violating the Equal Protection Clause absent some justification going substantially beyond what would be necessary to validate most other legislative classifications.[12] The cases impressively demonstrate that there is another side to the issue; but, with all due respect, to the extent that those cases rested on or expressed the view that proof of discriminatory racial purpose is unnecessary in making out an equal protection violation, we are in disagreement.

Id. at 4793-94, n. 12 omitted.

The Court then proceeded to consider Test 21 and its impact. Noting that Test 21 "concededly seeks to ascertain whether those who take it have acquired a particular level of verbal skill," the Court declared:

> [I]t is untenable that the Constitution prevents the government from seeking modestly to upgrade the communicative abilities of its employees rather than to be satisfied with some lower level of competence, particularly where the job requires special ability to communicate orally and in writing.

A few lines later it held:
Nor on the facts of the case before us would the disproportionate impact of Test 21 warrant the conclusion that it is a purposeful device to discriminate against Negroes and hence an infringement of the constitutional rights of respondents as well as other black applicants. As we have said, the test is neutral on its face and rationally may be said to serve a purpose the government is constitutionally empowered to pursue. Even agreeing with the District Court that the differential racial effect of Test 21 called for further inquiry, we think the District Court correctly held that the affirmative efforts of the Metropolitan Police Department to recruit black officers, the changing racial composition of the recruit classes and of the force in general, and the relationship of the test to the training program negated any inference that the Department discriminated on the basis of race or that "a police officer qualifies on the color of his skin rather than ability." 348 F.Supp. at 18.

***9** 44 U.S.L.W. at 4794. Accordingly, the Court determined that it was error for the court of appeals to direct summary judgment for respondents.

Applying the teachings of *Washington v. Davis,* it is now manifest that a racially discriminatory purpose or policy in making assignments and transfers must be shown in order to establish the Shield Club's claim that assignments are made within the CPD in a discriminatory

manner. But it is plain that the Court did not hold that overt racial discrimination, or express statement of racially discriminatory purpose, need be shown to establish a violation of the Equal Protection Clause. Indeed it held

> Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another.

Id., at 4792.

[Workforce Representation]

Evidence essential to considering the present claim of discriminatory assignments is tabularized in Charts 1, 2, and 3.

CHART I

TABULAR OR GRAPHIC MATERIAL SET AT THIS POINT IS NOT DISPLAYABLE
Source: Figures for the years 1962 through January 1, 1973, obtained from tables "Personnel Distribution by Racial Break-Down," prepared by the CPD. Each bears the explanation, "Represents approximate data, gleaned from personnel assignments and Departmental Distribution Reports." The remaining figures are obtained from similar tables for the dates specified.

CHART 2

TABULAR OR GRAPHIC MATERIAL SET AT THIS POINT IS NOT DISPLAYABLE
Source: Figures for the years 1962 through June 1, 1976, obtained from tables "Personnel Distribution by Racial Break-Down," prepared by the CPD. Each bears the explanation, "Represents approximate data, gleaned from personnel assignments and Departmental Distribution Reports."

CHART 3

TABULAR OR GRAPHIC MATERIAL SET AT THIS POINT IS NOT DISPLAYABLE
The descriptions of district boundaries reflect in narrative form the district maps in the 1975 annual report of the Cleveland Police Department.

The population figures in this chart are those used by the Cleveland Police Department in its 1975 annual report. The source of these population figures is unspecified in the report, but it should be noted that the total Cleveland population figure arrived at by adding together the figures for the six individual districts–741,340–differs from the most recent Bureau of the Census data available. The 1973 census update lists Cleveland's population as 678,615, down from the 1970 census figure of 750,903.

The population percentage figures have been calculated by using census tract data from the 1970 U.S. census.

Members of the Division of Police (the Department) have no tenure in any position. They are subject to transfer by the Chief at any time. The record reflects that transfers occur constantly, involving varying numbers of positions. Hence, the racial composition of each unit in the Department is a direct function of the Chief's exercise of his authority to make transfers and assignments.

***10** Because there were no more than 170 minority members of the Department before the court's order of December 21, 1972, and no more than 216 (a percentage of 8.9) in 1974, obviously the number of minority personnel available for assignment is limited. Therefore, just as this court did in its Memorandum and Order of July 6, 1974, *supra,* and n. 1, the present discussion will deal only with marked overrepresentation or underrepresentation of minority members in any unit. It is only these marked discrepancies that would give rise to the inference that in making his assignments and transfers the Chief acted with a racially discriminatory purpose.

The Police Department's assignment and transfer

practices and policies must be considered in the context of the racial compositions of the populations residing in the six Cleveland police districts. Using 1970 census data, it become strikingly obvious that almost all of Cleveland's black population lives east of the Cuyahoga River. Thus in the two police districts west of the Cuyahoga River, Districts 1 and 2, blacks in 1970 constituted 2% and 1% of the respective total district populations. These figures are in sharp contract with the black population figures in the police districts east of the river; in these districts blacks respectively constitute 40% (3rd District), 59% (4th District), 82% (5th District), and 54% (6th District) of the total district populations.

Chart 2 shows that before January 1, 1968, no minority personnel were assigned to the almost entirely white 1st and 2nd Districts. In the years 1962 through 1967, minority personnel were assigned only to the districts with substantial black population.

On November 7, 1967, Carl B. Stokes was elected the first black mayor of the City of Cleveland. Reelected in November 1969, he served until November 1971. The tabularized minority assignments plainly show, and it is found that as a direct result of the Stokes mayoralty, six minority members were assigned to the 1st District and six to the 2nd District on January 1, 1968. Substantially the same number (not less than four) assignments of minority personnel were made to those districts through January 1, 1972. Since January 1, 1972, the number of minority personnel assigned to the 1st and 2nd Districts has declined noticeably. This is true even though the total number of minority personnel in the Department increased in 1973. As of June 1, 1976, there were two minority officers in the 1st District and zero in the 2nd District. At the same date the number of white officers in these districts had risen to 148 in the 1st District and 186 in the 2nd District. During this same period substantial numbers of minority officers were being assigned to the 4th, 5th, and 6th Districts, which have sizeable minority populations.

Absent a countervailing justification–which the City has not even attempted to show–the foregoing record of assignments by the Chief of Police permits but one inference: The marked decline in the assignment of minority personnel to the overwhelmingly white 1st and 2nd Districts,[5] contrasted with the rise in white assignments to those same districts and the assignment of substantial numbers of black officers to the 4th, 5th, and 6th Districts, with largely minority populations, is regrettably due to racially discriminatory assignments by Chiefs Rademaker and Garey. This conclusion is reinforced by the fact that the number of minority personnel assigned to the 1st and 2nd Districts has further declined even though this court's Memorandum of July 6, 1974, called attention to the minimal assignments of black officers thereto.

***11** Assignment tabulations of minority and white personnel, in evidence, were broken down as to some but not all special units through 1973, and for all special units in the 1974, 1975, and 1976 tabulations. For the latter years, and it is presumed that the same conditions prevailed in prior years, no minority members were assigned to a number of special units.[6] Three of these units, named in the Memorandum of July 6, 1974, are Headquarters Staff, Planning & Research, and Police Academy. These units still have no minority members.

The Chief was asked if he had considered putting a black officer in the Police Academy. In addition to training recruits, the academy operates a video tape service, an important internal communications and inservice training function. Chief Garey answered "No." He was then asked if there are black officers in the Department who are qualified to serve in that unit. He answered, "I haven't analyzed their capabilities, but there may be and there may not be." When asked if he had any objections *per se* to placing a black officer in that unit, he responded:

> I would object to removing anyone that is in there just to replace him with a black officer, yes, because the men that are in there have experience. I know the caliber of their performance, and I require that the performance be of the highest caliber, that it must remain that way.

Thus, even though the Police Academy was named in the court's Memorandum of July 6, 1974, as one of the units without a minority member and which should be integrated, the Chief testified on June 28, 1976, that he has not yet "analyzed [black officers'] capabilities" to see if an officer is qualified for assignment to the Police Academy. The question of whether a qualified black officer should replace a present officer, or should be added, a matter wholly within the Chief's prerogative, was not the question he was asked to answer. But his admitted failure after two years to look into the

capabilities of a black officer for appointment to the Police Academy indicates to this court that he is not willing to implement his "committment, total and in fact," professed at another point in his testimony, "to a fair and equal assignment within the Department regardless of race." It is fair to conclude that this same attitude explains his failure, evident in other testimony, to see whether qualified black officers are available for assignment to other special units.

This attitude of the Chief, just recounted, is weighed along with his retraction of the affirmative promise, in the Department's Plan, "[to evaluate] the distribution of minority personnel within the Department and [to effect] transfers to various units . . . in which minority members . . . are markedly underrepresented." This continuing attitude of Chief Garey, while perhaps not perceived by the Chief for what it is, requires and reenforces the conclusion that he has, regrettably, administered the assignment of minority personnel within the Police Department with a racially discriminatory purpose. Thus such discriminatory purpose exists not only with reference to the 1st and 2nd Districts but also concerns at least some of the special units where there are no minority personnel presently assigned.

***12** The continuing underrepresentation of minority police officers in the 1st and 2nd Districts and in certain designated special units is unlike the disproportionate racial impact of a facially neutral test, which alone does not raise an inference of a racially discriminatory purpose. Rather, it is an affirmative administrative act, like the continuing absence of blacks from jury venires, that raises a prima facie case of racially discriminatory purpose and shifts the burden to the government to show "that permissible racially neutral selection criteria and procedures have produced the monochromatic result." *Alexander v. Louisiana,* 405 U.S. 625, 632 (1972). Hence, the continuing marked underrepresentation of minority police officers, existing on July 6, 1974, when it was called to the attention of the administrators of the Cleveland Police Department, in the 1st and 2nd Districts and certain special units, without explanation or justification, requires the conclusion, now made, that the Chief of Police had and continues to have a racially discriminatory purpose in perpetuating such marked underrepresentation, and in administering the transfer and assignment process.

[Scope of Remedy]

C. Concluding that the administration of the assignment and transfer policies of the Cleveland Police Department–first by Chief Rademaker–has caused since at least as early as January 1, 1972, and–by Chief Garey since May 15, 1975–*continues to* cause an equal protection violation of the rights of the minority members of the Department, the court is mindful of *Rizzo's* admonition concerning

. . . the settled rule that in federal equity cases "the nature of the violation determines the scope of the remedy," [*Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 at 16.]

423 U.S. at 378. The court is mindful, too, of the final ground on which the Supreme Court rested *Rizzo's* reversal of the district court injunction. The district court had ordered a "comprehensive program for dealing adequately with civilian complaints," including (1) "appropriate revision of police manuals" and (2) "revision of procedures for processing complaints against police, including . . . (d) adjudication of nonfrivolous complaints by an impartial individual or body," 357 F.Supp. 1289, 1321 (E.D. Pa. 1973). The Court concluded:

Contrary to the District Court's flat pronouncement that a federal court's legal power to "supervise the functioning of the police department . . . is firmly established," it is the foregoing cases and principles [concerning sensitive questions of federalism and the hesitation of the courts to interfere with the internal affairs of the executive branch] that must govern consideration of the type of injunctive relief granted here. When it injected itself by injunctive decree into the internal disciplinary affairs of this state agency, the District Court departed from these precepts.

423 U.S. at 380.

The limitation imposed by this last sentence is not general. It applies to the *Rizzo* court's power to issue an injunctive decree against the Mayor of Philadelphia and administrators of Philadelphia's police Department, and must be read in the light of "the sort of injunctive relief granted [t]here," *i.e.,* the district court's orders regulating the processing of civilian complaints against the Philadelphia police, and requiring the adjudication of "nonfrivolous complaints" by an "impartial individual or body." The last quoted sentence also must be read in the context of the Court's previous finding that the Mayor of Philadelphia and the administrators of the Philadelphia

police department were simply not liable for the acts of their subordinates under the circumstances of that case.

***13** It is concluded therefore that *Rizzo v. Goode* does not categorically bar, as City counsel urges, equitable relief in a section 1983 case against a mayor and the administrators of a municipal police department. Indeed, if that were so, *Washington v. Davis, supra,* could have been decided on the threshold proposition that *Rizzo* prohibited any equitable order against the chief of the District of Columbia Metropolitan Police Department concerning the qualifying test administered to applicants for positions as police officers. Instead, *Rizzo* is not even cited in *Washington v. Davis.*

In recommending "objectification and formalization of transfer and assignment practices," the consultants concluded:

> Minority police personnel simply do not trust the present system to provide them with a fair opportunity for transfer and assignment to a select number of specialized units.

The consultants expressed the belief that

> . . . the installation of the proposed transfer and/or assignment system will provide a long term solution to the twin problems of discrimination and underrepresentation.

The consultants, referring to their interviews with Chief Garey, noted that he "expressed strong reservations as to whether a standardized process could be designed and adopted." Noting also his belief that "such an approach would limit his authority and interfere with his ability to administer the department efficiently and effectively," the consultants disagree. They feel "that it is mandatory that the process be formalized and objectified" even though "such action may reduce the Chief's flexibility."

Chief Garey in his testimony reaffirmed his opposition to the proposed "formalized and objectified" changes in the present transfer and assignment system. The present subjective system, administered at the sole discretion of the Chief pursuant to orders and notices he issues, is possible only because neither the Mayor or the Safety Director has established rules, as the City Charter permits, to objectively govern and standardize the Chief's "exclusive control over the stationing and transfer of policemen . . ." But although the Chief's control is "exclusive" under the City Charter, it is still subject to the Equal Protection Clause of the Fourteenth Amendment. Measures affecting the chief's exclusive control may be ordered if a police department engages in purposeful racial discrimination toward its employees, applying *Washington v. Davis,* and provided the intrusion into a chief of police's discretionary or local authority is warranted by and to the extent of the established deprivation of constitutional rights, applying *Swann v. Charlotte-Mecklenburg, supra.* Hence the frontal attack of the City defendants upon the power of this court to adopt injunctive relief embodying any of the proposed recommendations of the consultants is rejected.

A remedy proportionate to the racially discriminatory condition, previously found, is determined to be necessary. It should direct sufficient compensatory relief to correct the most urgent minority underrepresentation in the Department's units. But mainly it should seek to accomplish a racially neutral assignment and transfer system by establishing objective and reasonable elements of such a system.

[Proposed Assignment System]

***14** III. The Report of the consultants is 25 pages long. Eight principal recommendations are made and discussed. A summary of each proposal, mainly in the words of the consultants, is used to introduce the discussion of the particular proposal under consideration.

[Policy Statement]

A. The consultants recommend that the Cleveland Police Department's "attitude toward and commitment to equal opportunity must be set forth in a policy statement." Chief Garey's position is that the adoption of such a statement "is unnecessary" since equal opportunity is the policy of the Police Department. Notwithstanding this contention, it

has been found that with reference to the indicated areas of the Department, equal opportunity is, indeed, not the practice of the Department. It is, therefore, ordered that an equal opportunity notice be posted at each district headquarters. It shall state in substance that it is the policy of the Department to make transfers and assignments on the basis of qualifications and merit, without regard to race or national origin. However, compliance with this notice requirement may be satisfied by posting notices by the Police Department pursuant to Title VII, § 711 (a), 42 U.S.C. § 2000e-10, 21 C.F.R. § 1601.27, as extended to the City of Cleveland by Title VII, § 701 as amended, Pub.L. 92-261, § 2, March 24, 1972, 86 Stat. 103.

[Job Identification]

B. Finding that the Cleveland Police Department does not have a system of job identification and description, the consultants recommend:
1. Each job or position must be given a designated number.

2. A job analysis survey must be undertaken.

3. All position descriptions should be compiled and maintained in a master file available for employee review.

In support, the consultants say:

> The cornerstone of public personnel management is a system of job identification and description. [Chief Garey said he had no quarrel with this statement, thought he does not know "if it is the cornerstone."]

Continuing,

> Job discriptions are particularly invaluable when seeking new personnel, developing a process to select from candidates for promotion, or most significantly insofar as this report is concerned, when seeking the most qualified individual for a specific assignment.

Following up, the consultants state:
Unfortunately, the Cleveland Division of Police does not maintain such a system. Although a few rank descriptions were developed in connection with earlier phases of this suit and the Chief recently directed the development of "detailed descriptions of types of duties to be performed" in General Police Order 27-76, no comprehensive system seems to be existent or proposed.

Continuing this justification the consultants say, "Such an effort must be undertaken if a rational and fair transfer $^{and}/_{or}$ assignment process is to be adopted."

Responding, Chief Garey stated, "We have developed job descriptions." When asked by the court where these could be found, he answered:

> Job descriptions have been prepared . . . for this case, and have been submitted as such . . . I don't have them here. I couldn't cite them specifically . . . .

***15** It is not clear what the Chief referred to. No such descriptions were offered in evidence.

It was the opinion of Prof. Galvin that, by grouping positions, probably not more than 200 job descriptions are needed. He estimated that 18 man-months would be required. With two professionally trained persons spending full time, as recommended, the project would take less than a year. He had no feelings "whether [the work] has to be done by Civil Service or the police department. I just hope a qualified person . . . if you can find a qualified policeman, that's fine."

It is concluded that job identifications and descriptions do not now exist for the entire department, that it is feasible to prepare them, and that they must be prepared and completed as the essential foundation of a "rational and fair transfer $^{and}/_{or}$ assignment process." A master file of job descriptions should be compiled and maintained available

for employee review. As observed in the consultants' report,

> . . . each officer will be able to determine his interest in individual positions, judge whether he possesses the necessary skills, and whether he wishes to attempt to prepare himself for the position.

It was the belief of Chief Garey that is was not feasible, as proposed by the consultants, to prepare job descriptions as openings occur. He said, in effect, that this means job descriptions must be prepared for all positions. The City of Cleveland has exhibited initiative in engaging competent experts at earlier stages of this litigation. This court believes the City will be able to decide whether there are city employees (Police Department, Civil Service Commission, or other department) sufficiently trained in personnel management to undertake the project of preparing competent and sufficient department-wide job identifications and descriptions. If not, it will be necessary to engage outside professionals to perform the task. However, whichever way it is done, the personnel doing the work, after consultation with Chief Garey or his designate, will be in a position to determine whether it is feasible, as the consultants recommend, to prepare the job descriptions as the positions open up, or whether it is necessary to complete the entire project without reference to which positions may become vacant. The time of completion shall be fixed pursuant to part IV.

[Status of Vacancies]

C. The consultants recommend:
When an opening occurs the "Chief should announce the status of the position," *i.e.,* "whether the position is to be eliminated, held open, revised, or filled." The Chief's announcement of openings should be "posted for a minimum of ten days."

The consultants recognize that because of the City's fiscal problems "the Division of Police has suffered a significant loss of personnel over the past few years." Hence, once a position becomes vacant, a decision, clearly the Chief's prerogative, must be made whether the position is to be eliminated, maintained but left vacant, revised, or filled without change. The consultants, however, recommend that "once [the Chief] has decided which is the appropriate action, the state of the position's availability should be made known within the Department."

***16** Commenting on this proposal, Chief Garey declared that advertising made him think of a "job supermarket." He believes it will "encourage individuals to preoccupy themselves with seeking other positions rather than to be concerned about performance of their duties."

In contrast to Chief Garey's views, and consistent with the consultants' recommendation, the Guidelines for Police Performance Appraisal, Promotion and Placement Procedures," issued by the U. S. Department of Justice, LEAA National Institute of Law Enforcement and Criminal Justice recommend as a placement basic condition that there be procedures for "announcements of job openiings or of competitions to develop lists of eligibles for appointment to future job openings." The National Advisory Commission on Criminal Justice Standards and Goals, *Task Force on Police* (1973), recommending agency-wide announcements "when vacancies for specialized assignment positions are anticipated," declares:

> These announcements will stimulate employees who desire specialized assignment, for which they are not presently qualified, to attempt to achieve the necessary qualifications.

Id. at 214.

Chief Garey at both the October 1975 and the June 1976 hearings expressed the opinion that announcement of openings would be impractical. Asked to elaborate why publicizing openings would be "impractical," he testified at the October 23, 1975, hearing, "[It is an] excessive administrative burden to begin with." Because of the generality of this objection, which is also directed to other recommendations, the court concludes that it really reflects the Chief's resistance to any change in the present system. Pressed for a further explanation of how notification of opening would be "impractical," he agrees that it was not a new function for him to determine

whether an officer's leaving the department creates a real vacancy. But he added,

> No, but I don't have to determine that until the time the transfer is made; whereas if I am locked into a schedule whereby I have to keep abreast of this and past vacancies, it's imposing an obligation with a time frame.

The present procedure, as described by the Chief, is performed in a marathan day and night operation. It includes these steps: Determine what vacancies should be filled; consider existing officer requests for transfer; consider requests of commanding officers for transfer of officers, presumably to their command; evaluate the arrest records and other personnel data pertaining to the qualifications of officers seeking or to be considered for transfer; and decide on other officers to be transferred to a vacancy or away from a presently held position. It has not been shown in the evidence that this inherently rush operation would afford enough time or opportunity for the Chief to know or to weigh the comparative attributes or wishes of the officers considered for transfer or assignment. Surely the caliber of judgments as to what to do about vacancies can only be increased if such decisions are made more deliberately.

***17** To the extent that a requirement that openings be announced once he has decided to fill a vacancy would thus handicap the later exercise of his transfer or assignment power, it can be avoided by preserving the Chief's authority to withhold the filling of a particular open position even though he previously may have decided to fill the position and thereafter announced the opening.

The other objection of the Chief to announcement of openings that requires consideration is the need that he expressed to fill priority positions without waiting to announce an opening or for the steps that would follow. This objection must be considered in conjunction with the recommendation of the consultants that

> If a list doesn't exist, the Chief can make a temporary appointment, but such an appointment should not be in effect for more than sixty days . . . . If no list exists and none can be developed because of a lack of qualified applicants, the Chief may then make an appointment from anywhere within the Department at his discretion.

Chief Garey, while recognizing the provision for filling positions on a 60-day temporary basis, went on to say:

> . . . however, and at that time, the requests that are made must be evaluated and honored, and this individual would then have to then be removed and replaced by whomever is first on the list, and that process, along with this, neither is workable, and when the vacancy occurs, if the position is of high priority and it is essential that it must be filled, and we could not–the administrative head of this department, whoever he might be, could not function in this manner.

The "first on the list" recommendation, considered in the next subpart, is apparently at the heart of this objection. Nonetheless, there is merit in the Chief's position that he must be able to fill a high priority vacancy without delay. If an eligibility list existed, it would be available for his use in making a regular appointment. If no eligibility list existed, the position could be filled by the Chief at least temporarily under the consultants' recommendation. This is found to meet the expressed need to fill a priority vacancy quickly. Use of an eligibility list, from which assignments are made, is deemed essential to the objectification of the transfer and assignment process, and the necessity of replacing a temporary appointee if he is not on a later developed eligibility list cannot be avoided. However, 90 days, rather than 60 days, is deemed to be a more reasonable period in which to announce the opening, prepare the eligibility list, and make the appointment on a permanent basis.

It is concluded that an essential element of an objectively structured and, therefore, racially neutral, transfer and assignment process is a requirement that once the Chief

has concluded that a vacancy should be filled, the openings for the positions should be announced and posted within the department for a minimum period of 10 days. Motivation for better performance should result if all members who might be qualified to apply for the open positions are advised by department-wide announcements of the openings. In his earlier testimony, Chief Garey himself recognized the importance of such motivation. He had indicated that he had issued a departmental notice reaffirming the right of officers to submit transfer requests. Asked why, he answered:

> ***18** One does not get maximum performance out of an individual who in transferred to a type of duty that is undesirable to him.

Similarly he testified that "Individual preference and qualifications are . . . important factors to minimize . . . assignments . . . assignments . . . unsuited to individuals."

The National Advisory Commission recommendation that there be dissemination of information of openings is limited to specialist positions. The recommendation of the consultants that there be announcements of openings, on the other hand, would apply broadly to basic patrol positions as well. In view of the findings this court has made that there has been a racially discriminatory limitation of assignments of police officers (basic patrol) to the 1st and 2nd Districts, it is essential that the requirement that openings be announced apply to basic patrol as well as to the specialized unit positions.

In requiring the announcement of an opening–after the Chief has determined to fill it–in specialized positions and in any particular basic patrol positions, whether the opening is caused by attrition or other reason, it is only intended that this requirement, and the others ordered hereafter, be applied to transfers or assignments made to fill open positions. It is not intended that these requirements be applied to transfers connected with the exchange of personnel between occupied positions, which might arise, *e.g.,* during a departmental reorganization.[7] In short, subject to compliance with the announcement of openings and other elements of the transfer and assignment process here ordered nothing is intended in this remedial order to otherwise restrict the exercise of the Chief's power to transfer personnel as granted to him by the Cleveland City Charter.

[Handling of Transfer Applications]

***19** D. The fourth recommendation provides:
Under the present system receipt of transfer or assignment is by direct application to the Chief's office, by request from a commanding officer, or by initiation of the Chief. The consultants recommend instead:

A. All applications for transfer $^{and}/_{or}$ assignment should be forwarded directly to the Chief's office.

B. Applications should be "time and date stamped and reviewed to determine whether the applicant does in fact meet the basic requirements."

C. If he is qualified and there are no other requirements to be met he should be placed upon an eligibility list. His position on the list should be determined by the time and date of his application.

Applications need to be received and processed in the Chief's office (or by the personnel office which is an adjunct), since the preparation and administration of eligibility lists (later discussed) is the responsibility of the Chief's office and the personnel office. Requiring applications for assignment or transfer to be filed personally by the applicant in the Chief's office still would not preclude a fellow officer or a commanding officer or the Chief from suggesting to a member of the Department that he ought to apply for an open position. It would also not prevent fellow officers or superiors from sending the Chief unsolicited letters of recommendation that describe the qualifications of an applicant for an open position. Hence the fourth recommendation, subparagraph A is approved and ordered.

The portion of subparagraph B that requires that applications should be "time and date stamped" is conducive to good record keeping. But it is clear that the intended purpose of this requirement goes beyond good record keeping. As seen in subparagraph C, a qualified person would be entitled to have his position on the eligibility list "determined by the time and date of his application." In elaboration the consultants say where

> the job can be handled adequately by any qualified officer . . . the selection

> process consists of certifying eligibility, and the eligibility list should be compiled on a first come, first served basis."

As to the specialized positions, the consultants recommend that qualification and certification on the eligibility list depend on a "relevant and job-related screening process," which needs to be "identified, developed, and adopted." Relative positions on the eligibility list of those thus qualified would be "determined by their date of qualification and then their date of application, or they might be placed in a qualified pool." The consultants then state:

> This latter approach is not recommended in the present situation. As time passes, this approach might gain acceptance, but it does not seem feasible under the present circumstances.

Under the recommendation headed "Assignment," they brush aside this apparent ambivalence and say:

> Insofar as actual selection is concerned, if a list exists for a position, the Chief should pick the first candidate on the eligibility list.

***20** The Report characterizes the process as producing the "Chief's choice." The consultants say:

> The Chief, of course, is the one who makes the transfers $^{and}/_{or}$ assignments. It is he who directs the development of the screening process, so it is he who sets the qualifications. Those who reach the top of the various eligibility lists are qualified by the Chief's own standards. They are, therefore, the Chief's choice.

Asked to comment on this analysis the Chief testified:
If I am bound by a requirement or if any Chief of this Department is bound by a requirement, that he take those on the list in the order that they appear in the list, and they might appear in the list based on the date and time that he made the application, they certainly can't be considered the Chief's choice, or those that are qualified by the Chief's standards.

A computer would certainly do this, or could certainly perform the same function, given all these controls.

It is true that under the recommendations it is the Chief who sets the qualifications and directs the screening process. Therefore, the one who reaches the top of the list, with assignment therefrom required, is "qualified by the Chief's own standards." Yet the controlling factor in the assignment is the date and time the candidate made the application. Because that factor controls who is selected from each eligibility list, the person assigned cannot either wholly or accurately be said to be the "Chief's choice."

The thinking of the consultants leading to this recommendation became apparent in the testimony of consultants Fisk and Sylvester. A retired Deputy Police Chief of Los Angeles, Mr. Fisk thus testified:

> . . . we realized that the answer that we came up with in the ideal world was not the best answer, and that is the one about compelling the Chief to take a person from the top of the list.

He continued:
[W]e realize that this did diminish his options, but at this particular point in time, we felt that we needed to, in a sense, compel the Chief to make certain kinds of choices, and we would like to believe that with the passage of time, that that kind of a requirement could be modified so that, for example, pools could be established, and either the Chief of his designated subordinates could make selections from that pool.

I would say that is the one particular point that we puzzled over the greatest length, realizing that there

wasn't any good single answer to it.

It then developed in his testimony that Los Angeles uses the qualified pool system of filling vacancies in the specialized positions in its police department.[8]

***21** Deputy Chief Sylvester, of the Oakland Police Department, testified that Oakland uses a letter request process which, to that extent, resembles the Cleveland transfer request procedure. Where it differs is that the persons requesting transfers are listed according to the date of their letters and they are transferred in that order. However, a person at the top of the list can be passed over. In such a case a person not selected is given an explanation of why he was passed over before the transfer is made. Deputy Chief Sylvester further stated that there is no limitation on who may be appointed from the list.

On cross-examination, counsel for the FOP asked Chief Sylvester "what reason [he] had for joining a report which recommends for the City of Cleveland a system which you do not have in Oakland?" He answered:

> In my judgment, the mandate of the Court for the consulting team was that we develop a minority, a program for minority assignments and transfers, and in that [con]text after meeting with Chief Garey, his conversation leads me to believe that he will not willingly comply with the program as it has been set forth unless we include some limitations within those guidelines indicated by the Charter of Cleveland upon his flexibility in the area of transfer and assignment.

Thus both Fisk and Sylvester admit that the recommended requirement that the Chief should pick the first candidate on the eligibility list "diminishes his options" and limits his "flexibility . . . of transfer and assignment." While each consultant is obviously recommending the mandatory top-of-the-list selection requirement on his good faith evaluation of the Chief's attitude toward the proposed objectified program, this court concludes that such a proposal, even if shown to be a relevant element of a racially neutral transfer and/or assignment process, should not be considered until and unless the Chief should indeed demonstrate an unwillingness to comply with the court's orders.

[Eligibility Test]

Moreover, no other evidence warrants the adoption of the "first in time, first in right" recommendation. The consultants were unable to name any police department in the country in which the chief of police, in exercising transfer and/or assignment authority, is required to assign the person, albeit qualified, who first applied for the position. Nor was any literature submitted by the consultants that supports the recommendation.[9] Indeed, the "first in time, first in right" principle is not shown on this record to be likely to bring about the "integration of those units within the CPD where marked underrepresentation exists." There is no particular reason to believe that minority officers will be the first to apply for any given position. Absent such a showing such a limitation on the Chief's transfer and assignment power becomes an unjustified and unwarranted intrusion into local executive functions, contrary to the teachings of *Rizzo.*

***22** Nevertheless, to achieve a racially neutral system in exercising his transfer and assignment authority, it is necessary to objectify the Chief's exercise of his authority, eliminating the "haphazard and subjective" assignment procedure found to exist on July 6, 1974, which, upon the updated record, if found to be continuing. It is determined that objectification requires that the Chief make his assignments and transfers from eligibility lists of qualified personnel, *i.e.,* a qualified pool for each position or group of positions. The eligibility lists are the end product of announcements of openings, identification of the job description applicable to the open position, receipt of written applications, and preparation of the eligibility list through an appropriate screening procedure, the components of which screening procedures the Department has publicized by departmental notices once they are developed. Each applicant would be notified whether or not he has been placed on the eligibility list by publication of the eligibility list.

The consultants recommend a right of appeal from denials of eligibility certification, noting

> [W]hen one considers the skepticism presently existing within the department concerning transfers and

> assignments, it is mandatory that such an opportunity be given so as to counteract organizational distrust.

Although several types of appeals are recommended, it is deemed sufficient if an individual denied eligibility certification has the right to obtain a written statement of the grounds for the denial from the responsible officer or unit making the decision, and thereafter has the right to appeal any continued lack of certification to a designate of the Chief.

Adoption of such an objectified transfer and assignment process,[10] it is determined, is proportionate to the constitutional equal protection violations previously found and therefore does not constitute an unwarranted intrusion into the Chief's discretionary authority ("exclusive control") to station and transfer personnel within the Department. The line between warranted and unwarranted court intrusions into local executive authority, while not a bright one, is thus respected.

[Screening Process]

E. The recommendation of a "Screening Process," in summary, provides:

> The department should identify the qualifications required for each position. Where no specific evaluation and/or testing is required, those possessing the basic qualifications for the job should be certified and placed on the eligibility list. In all other cases, a relevant and job-related screening process should be identified, developed, and adopted.

***23** In the Report it is indicated that some jobs "can be handled adequately by an qualified police officer, or qualification may be based on specified amounts of experience." Since there are to be announcements of openings for transfers of basic patrol officers between districts and applications for transfers can be expected, it is important, if possible, to have predetermined and preannounced criteria for establishing eligibility lists for these transfers, to render them racially neutral. The Chief has indicated the importance of an individual's performance record (including arrest record). He also stated that a performance evaluation system (rating) "is nearing completion . . . and it will be in the near future, a formalized rating system." It is evident that in preparing eligibility lists for transfers of basic patrol personnel to nonspecialized positions, the results of a "formalized rating system" could be a paramount factor. Concerning the specialized positions the Report states:

> Determining the qualifications of an applicant for such a position can run the gamut from formal testing to personal interviewing.

The necessity to have a screening process to qualify for the specialized positions seems clear enough. Random examples of these positions are detectives (general duty as well as special unit), photo lab, and field intelligence. Multiple applications, as here described by Chief Garey, demonstrate the need for an objectified and established system of both job descriptions and screening. He stated:
I believe that we must retain as the major standard the qualifications of an individual; the individual that is best qualified, that has the best performance record, should be the individual that receives the assignment.

We have a number of members in the Department that have made many requests for many assignments, and on the face of it, too many might appear qualified. However, based upon their performance record and the recommendations of their superior officers, the nature of the complaints that have been filed against them by the citizens of the City of Cleveland and the people that they deal with, once these are examined, it would be found by anyone that they are not suited for the position, although they might seem otherwise qualified.

First of all, the problem of multiple applications by the same person would be controlled by the recommendation of the consultants that "no officer should be allowed to be an applicant for more than two positions at any one time." In addition, the job descriptions and an established and publicized screening process would provide a method,

known to all, by which eligibility for each position is determined. Unqualified applicants would be weeded out by the combined use of job descriptions and screening. The applicant would be informed of the grounds of disqualification, and the chance that he would feel unfairly treated by the process, a condition existing under the present subjective system, would be minimized or reduced. When asked at the hearing about the testing that would be necessary, Prof. Galvin answered:

***24** I have indicated some testing, but that testing can take a variety of forms. I wasn't referring to paper and pencil testing. I think what you have to do is take a look at the position and decide what is the best way we can determine whether or not that individual, or determine who are the qualified individuals, to fill that slot.

In many cases, that would involve a written testing procedure. In many cases, that would involve a combination of review of work experience. It might involve an interview. It could involve a physical, depending on what the job is, you know, the manner of screening depends upon the task to be performed, and we obviously can't tell you what the manner of screening should be for every one of 200 jobs at this stage of the game.

City counsel then said, "You have no recommendation in that regard?" Prof. Galvin answered:

> We have made only recommendations in regard to the problem. . . .

Prof. Galvin's view concerning the use of "paper and pencil tests" in determining eligibility for specialized positions coincide with the "Placement Recommendations" of the LEAA Guidelines; *supra, at n.9. In elaborating upon the use of paper and pencil tests, it is stated:*

> Determine eligibility. If there are many candidates to process for a particular job, administer whatever paper and pencil tests have been prepared for that job.

Relating to the Report's recommendation of running the "gamut from formal testing to personal interviewing" in determining qualifications for the specialized positions, Chief Garey thus reacted:

When dealing with specialized positions, yes, the process can be much more complex, but the suggestion that there would be a gamut of formal testing to personal interviewing, I believe that to superimpose another and additional testing process upon that of the Civil Service Commission and those that are given in the Police Academy to determine a chief, and, of course, the test of his daily work performance is unnecessary, and it is a process that I don't believe we can handle, but we just can't handle it, and perform police service.

If we had unlimited manpower and unlimited financing, some of this might be undertaken to some extent, but examining this thing on a practical basis, and everything has to be examined from that perspective, we don't have the manpower to do it, and it is just impractical, and can't be done.

The consultants indicate that appropriate tests should be developed, that professional assistance may be required in the development of such tests, and that "most of the resources and information are already available within the department." In addition, the Report states:

> Besides testing, personnel records are invaluable as indicators of officer potential. Present personnel records should be expanded and more methods of measuring personal performance should be adopted. Along these lines, the consultant team was pleased to note that the Chief is expanding the department's performance evaluation program and directing commanding officers to maintain selected productivity figures on officers working in certain specialized assignments.

***25** The court is mindful of the problem of manpower and financing that Cleveland and the Police Department face, and the record does not disclose and it is not known whether or when there will be funds to engage any specially trained personnel to develop formal tests.

However, there may well be personnel presently employed in the Police Department, the Civil Service Commission, or in some other city department, who are qualified to produce or prepare appropriate formal tests.

In any event, giving consideration to the entire record, it is concluded and determined that appropriate screening procedures or methods can be developed and put into operation by the Cleveland Police Department within a reasonable period of time. Therefore, at dates to be fixed pursuant to part IV, the defendants are directed to prepare screening processes capable of producing eligibility lists for both basic patrol and the specialized units. While the screening processes need not be limited to the following elements, the defendants are directed to include elements 3 and 4 in the screening process for positions to be filled by basic patrol, and elements 1 $^{and}/_{or}$ 2 and elements 3 and 4 in the screening process for the specialized units.
1. Oral interviews establishing qualifications for each specialized position.

2. Paper and pencil tests or some other objective examination that test qualifications for each specialized position.

3. Personal performance evaluation as member of the CPD.

4. Prior employment experience and any school training of a nature similar to the specialized position covered by the screening process.

[Compensation Standards]

F. The consultants preface their proposals of certain compensatory actions with a number of related observations. Specifying the standards that guided them, they say:

> In judging minority representation, like positions should be grouped. Patrol operations, as well as investigative activities, should be considered collectively. Assignments within those units should generally be considered as color blind. Of course, recognition should be given to the value of certain racial characteristics in undercover assignments in black neighborhoods and assignments requiring Spanish speaking officers.

They call attention to assignments of certain positions in the districts as follows:

> It is also management's responsibility to see that what are in fact duty assignments, such as, precinct desk officer, mail driver, and district traffic officers under the recent reorganization, rather than specialized assignments, are allocated with great care and without reference to race. Complaints of discrimination in such cases should be given immediate attention by the Chief and the department's command staff.

Reviewing the most recent personnel charts available to the consultants when they prepared the Report, it was concluded that these charts

> . . . seem to indicate a reasonable representation of minority members in Patrol, Task Force, Criminal Investigation, and Services and Communication although the distribution of minority officers in the Districts is uneven and is low in the Tactical Force. The most significant problem areas are the Administrative Group and Internal Affairs.

***26** As "compensatory action," the consultants recommend "the assignment of minority officers to three organizational units within the next sixty days." Explaining the first two, extracts from the Report say:

Internal Affairs–Police Academy

While it is recognized that the Police Academy is operating with a limited staff of only four, the consultant team believes that it is vital that a minority member be immediately assigned to this unit.

Internal Affairs - Complaint Unit

The consultants find it difficult to believe that at least one minority member is not assigned . . . . Having a black officer assigned to handle complaints cannot but encourage Cleveland's minority community to cooperate with the department and in the long run such an assignment might help build trust between the minority community and the department.

These two recommendations are adopted, approved, and ordered subject to part IV-5a, b. Based on the findings of the consultants, previously quoted under subpart E, and further based on the equal protection violations previously found, it is an appropriate remedy that qualified minority personnel should be assigned to these units. Absence of minority members in these critical units exemplifies marked minority underrepresentation in the department.

As the third item of compensatory action, under the heading of "Administrative Group-Personnel and Recruitment," the consultants recommend that "[a] black officer should be immediately assigned to this unit." In support, they first state:

> The complete absence of minority personnel in recruitment can be interpreted as a lack of commitment to minority recruitment.

This statement fails to note that during the 1974 recruitment campaign carried out by the Civil Service Commission a black officer was assigned to Personnel and Recruitment to assist in the recruitment of minority officers. It also appears that if the present effort to hire 53 additional policemen (with the help of federal funding) actually gets underway, the same black officer may be assigned to Personnel and Recruitment, presumably in connection with screening persons certified from the 1974 Patrolman's Eligibility List. However, this third compensatory recommendation calls for the full time, not the part time, services of a minority officer.

At most a black officer has been used in Personnel and Recruitment only to perform recruiting and screening, not personnel, duties. A full time minority officer should be available to perform not just recruitment or screening duties but personnel functions as well. To place a minority officer in this key special unit of the Department, in which none now serve, is a remedy appropriately justified by the equal protection violations previously found. In addition, the consultants properly justify this compensatory assignment of a minority officer by their further statement:

> Further, if the proposed transfer $^{\text{and}}/_{\text{or}}$ assignment program is adopted, one of the new staff members should be black. It is imperative that minority officers should feel that they have input into the new program.

***27** This court adopts the consultants' conclusions that no other compensatory assignments, as requested by the Shield Club, need be made, except to the 1st and 2nd Districts. The consultants noted that "the distribution of minority officers in the Districts is uneven." Because of the racially discriminatory purpose this court has found to have pervaded the assignment of minority officers to the 1st and 2nd Districts in the years before 1967 and since 1971, it is determined that a remedy, proportionate to this equal protection violation, is required to root out and reverse this condition. Bearing in mind that during the years 1968 through 1971 assignments of minority officers, although then made for the first time in these districts, nevertheless reached six in number in each district, it is deemed a necessary and appropriate remedy to order the Chief to assign not fewer than six minority officers to each of these districts.

[Monitoring of Plan]

G. The final recommendation of the consultants that will be discussed calls for certain types of oversight over the installation and execution of the program, the complete

implementation of which is forseen as probably requiring a period of 18 months to two years. Specifically, they recommend:

> The oversight should consist of two separate approaches. First, the department should be required to maintain complete documentation on the program. This responsibility should be given to the proposed expanded personnel unit. The unit should issue periodic reports on the program's progress. Second, the consultants recommend that the Court appoint a monitor to assist it in this matter.

While his duties would emanate from "extensive discussion between the court and the other parties to the suit," they further state:

> [The monitor's] major function should be to observe whether the parties to the suit adhere to the spirit as well as the letter of the proposals.

This court adopts and approves the reporting requirement as essential to obtaining compliance with the orders here entered. But at this time the court refrains from adopting the second recommendation. Adherence to the orders of this court when they become final is not only expected but will be required, and this court is not satisfied that appointment of a monitor is necessary to achieve, or likely to further, that objective. Therefore, it is unnecessary to determine whether *Rizzo v. Goode* either precludes or permits appointment of the recommended monitor.

[Schedule for Remedial Actions]

IV. 1. The remedy ordered in part III-A (statement of equal opportunity) shall be put into effect within 30 days from the date of this order.

2. The target date for completion of the remedy ordered in part III-B (job descriptions) shall be 15 months from the date of this order. Within 45 days from the date of this order the defendants shall identify the persons who are assigned to the project, and within 45 days from their selection the defendants shall submit written plans for completion of the project. Every 120 days thereafter a written project progress report shall be filed by the defendants with the court and parties.

***28** 3. The remedies ordered in part III-C (announcement of job openings, and applications for announced positions) shall be put into effect within 30 days from the date of this order.

4. A plan for implementation of the part III-D remedies (assignments from qualified pools (eligibility lists)) and the part III-E remedies (screening and eligibility tests), shall be submitted to the court and parties 120 days from the date of this order, including dates when compliance will begin.

5. The assignment of minority personnel ordered in part III shall take place no later than
a. Internal Affairs - Police Academy: 90 days from the date of this order;

b. Internal Affairs - Complaint Unit: 60 days from the date of this order;

c. Administrative Service - Personnel and Recruiting: 120 days from the date of this order;

d. Transfers to 1st and 2nd Districts: 60 days from the date of this order. Reasons, if any, for inability to meet this date shall be reported to the court and parties within 45 days from the date of this order.

It Is So Ordered.

Order of October 20, 1976

The Court having filed its memorandum and order denying intervenor Fraternal Order of Police's motion to modify this court's orders of March 17 and 19, 1975, therefore, pursuant to Rule 58, Federal Rules of Civil Procedure,

It Is Ordered that the motion of intervenor Fraternal Order of Police to modify this court's order of March 17 and 18, 1975 is hereby denied.

All Citations

Not Reported in F.Supp., 1976 WL 736, 13 Fair Empl.Prac.Cas. (BNA) 1373, 14 Empl. Prac. Dec. P 7763

Footnotes

[1] It was found:

A compilation of minorities' participation in each unit, however, demonstrates that there are certain units with minorities in excess of the 8.9 per cent overall participation of minorities in the CPD. Examples of these units are the Women's Unit (35.5%); Administrative Services (31.6%); Juvenile Unit (30.2%); Vice Enforcement (17.9%); Sixth District (15.7%); and Fifth District (15.5%).

Continuing, it was found:

Similarly there are certain units with minority participation below the 8.9% overall participation of minorities in the CPD. Examples of these units are Communication (1.3%); Second District (1.3%); First District (1.5%) and Impact Task Force (2.3%). Finally, there are some units with small numbers of personnel which have no minorities such as Planning & Research, Headquarter's Staff, and the Police Academy.

[2] The consultant team consisted of Prof. Raymond T. Galvin, Associate Professor, Administration of Justice Department, University of Missouri-St. Louis, who served as project director and coordinator; codirector, James G. Fisk, Adjunct Professor, Department of Political Science, University of California-Los Angeles, Member, Board of Police Commissioners, Los Angeles; and retired deputy chief, Los Angeles Police Department; co-director, Odell Sylvester, Deputy Chief, Oakland Police Department, Oakland, California; and Dr. David L. Smith, Administration of Justice Department, University of Missouri-St. Louis, who collected and analyzed data.

[3] Prof. Galvin, his associate, Dr. Smith, and former Deputy Chief Fisk made four visits to Cleveland, and Deputy Chief Sylvester made three visits. On the first visit all four were present, but other visits were made in different combinations of the consulting team members. During these visits at least four discussions were had with Chief Garey; and discussions were also had with Lt. Cavel of Personnel, command staff members of the Detective Bureau, and with representative officers of the Police Academy and Planning and Research. Several meetings were also had with representatives of the City (including former Chief Rademaker), the Shield Club, Fraternal Order of Police, and the Cleveland Police Patrolman's Association, and with representatives of City Council. All consultants on their first visit met with Dr. Norman Henderson, and Dr. Smith had further meetings with him.

[4] No specific explanation of the uneven distribution of minorities was forthcoming either in Chief Rademaker's Plan of October 20, 1974, or in the testimony of Chief Garey.

[5] The marked decline in assignment of black officers to the 1st and 2nd Districts cannot be justified by the otherwise

unelaborated statement of Chief Garey: "Certainly in areas where there are predominantly minority populations, more minority officers perform a better service than less numbers of minority officers."

[6] These units include Headquarters Staff, Personnel and Recruiting, Planning & Research, Police Academy, Field Intelligence, Photo Lab, Forensic Lab, Fraud-Pawns, Auto Theft Records (1974; abolished thereafter), Records Process Section, Warrant & Suspect Unit, Property Section, Ordinance Section, Complaint Unit (since establishment in 1975).

[7] Lodging the power to make transfers and assignments in the Chief of Police permits the Chief to effect a departmental reorganization such as was executed on April 23, 1976. The Chief testified that this reorganization was necessitated by a lack of manpower through attrition of 350 sworn police officers in the preceding three years. As a result an excessive number of zone patrol vehicles were "being put out of service every day." Redistribution of manpower was consummated principally by transferring members of the traffic division to the districts, thus making those officers available for all types of assignments. Chief Garey said that the number of patrol vehicles on the streets has been increased by about 20%. At the same time response time for all types of assignments by the uniformed personnel has been reduced from "25 minutes per assignment–that is from the time of the receipt of the call until the officers arrived at the scene–to 15 and 16 minutes."

Chief Garey also explained that under his reorganization order, personnel in the Detective Bureau and special squads were reduced and two officers were assigned to the Districts "to make them readily available on a 24-hour basis for onscene crime investigations."

[8] Chief Fisk thus explained the Los Angeles qualified pool: "Persons who have previously qualified and whose names appear on the list of qualified applicants, then may bid for these vacancies. They are required to, on many occasions, to be interviewed by the person, commanding officer who has the vacancy.

"That commanding officer then may make a selection from persons who come from a pool of qualified applicants. Once the commanding officer has made his choice, then he submits that choice to his superior who approves that."

[9] In response to the hearing request of City counsel that he identify any literature approving such a procedure, after trial Prof. Galvin submitted two documents: (1) "Placement Recommendations, Municipal Personnel Administration," published by the International City Managers' Association, and (2) "Guidelines for Police . . . Placement Procedures," issued by LEAA. Only the latter, relating to police placement, need be discussed. Based on paper and pencil tests (but giving such tests a weighting of no more than 25%), quantitative evaluations from past school, employment history, oral interviews, etc., and the grade achieved in a short training course, "candidates should be chosen in strict rank order from the resulting list." A strict rank order according to qualification standards does not involve the "first in time, first in right" principle.

[10] That a fair and objective transfer and assignment system will benefit all police officers emerged in a response of Chief Sylvester under questioning by counsel for the FOP. The Chief testified:

> "In our own conversations, with representatives of the police groups, the various employee groups, it was clear that there was dissatisfaction and that a transfer and assignment policy would be equally effective, or equally needed as it applies to all members of the Cleveland Police Department."