1995 WL 1943013
United States District Court, D. New Jersey.

UNITED STATES of America, Plaintiff,
v.
STATE of New Jersey, New Jersey State Department of Personnel and Anthony J. Cimino, Commissioner of Personnel, New Jersey State Department of Personnel, Defendants.
Armandina TAHANEY, Plaintiff,
v.
NEW JERSEY DEPARTMENT OF PERSONNEL and MERIT SYSTEM BOARD, Defendants.
Donna ROMAN, Mary Vasquez, Cecilia A. Shinn, and Carrie E. Reed, Plaintiffs,
v.
NEW JERSEY DEPARTMENT OF PERSONNEL and CITY OF NEWARK POLICE DEPARTMENT, Defendants.

No. CIV. 88–5087 WGB, CIV. 88–4080(MTB), CIV. 87–2331(HAA). | March 14, 1995.

Attorneys and Law Firms

United States Department of Justice, Civil Rights Division, Employment Litigation Section, By James P. Turner, Acting Assistant Attorney General, Katherine A. Baldwin, A.U.S.A., Barbara E. Thawley, A.U.S.A., Barbara A. Landress, A.U.S.A., Eric L. Siegel, A.U.S.A., Washington, D.C. for Plaintiff United States of America.

Reitman, Parsonnet & Duggan, By Bennet D. Zurofsky, Esq., Newark, for Individual Plaintiffs: Donna Roman, Mary Vasquez, Cecilia A. Shinn, Carrie Reed and Armandina Tahaney.

Attorney General of the State of New Jersey, By Douglass L. Derry, Deputy Attorney General, Richard J. Hughes Justice Complex, Trenton, for the State Defendants.

Newark Department of Law, By Joann Johnson–Watson, First Assistant Corporation Counsel, Newark, for Defendant City of Newark.

Opinion

OPINION

TABLE OF CONTENTS

BASSLER, District J.

***1** These consolidated actions involve allegedly discriminatory hiring practices for entry-level law enforcement positions engaged in by the State of New Jersey, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* ("Title VII").

On February 17, 1994, this Court provisionally entered a consent decree that had been agreed to by the United States; the individual Plaintiffs; and the Defendants, the State of New Jersey, the New Jersey State Department of Personnel, and the Commissioner of Personnel, New Jersey State Department of Personnel. The settlement set forth in the consent decree resolved all issues raised in the Complaint filed by the United States. This Court conditioned final entry of the consent decree upon future hearings, to be held to consider objections to the fairness of the decree.

Prior to the fairness hearings, approximately 5,300 persons who were identified as possibly having been subject to the allegedly discriminatory hiring practices, as well as approximately 45,000 other persons identified as potentially affected by the consent decree, were provided with notice of the decree and an opportunity to object to its terms. In response, approximately 2,200 objections and comments to the consent decree were submitted.

The Court held public hearings on the fairness of the consent decree on November 16 and 17, 1994. At the fairness hearing, those persons and counsel for those persons who had timely filed written objections were permitted to address the Court. Moreover, those persons who appeared at the fairness hearing were instructed that they should exercise the opportunity to address the Court only if they had something to add, not merely to reiterate his or her written objection. As a result, the consent decree is now before the Court for final approval and entry.

In evaluating the fairness of the consent decree, the Court will focus primarily upon the objections raised by potentially affected members of the public. For the reasons set forth in this Opinion, none of the objections raised prevents this Court from finding that the settlement reached by the parties is fair, adequate, and reasonable. As a result, the Court approves the consent decree and orders the Clerk of the Court to enter it as a final resolution of the claims asserted by the United States, Armandina Tahaney, Donna Roman, Mary Vasquez, Cecilia A. Shinn, and Donna E. Reed.

I. BACKGROUND

A. Procedural History

On November 23, 1988, Plaintiff, the United States of America (hereinafter "United States" or "Plaintiff") brought this action against the State of New Jersey, the New Jersey State Department of Personnel and the Commissioner of Personnel, in his or her official capacity (hereinafter referred to collectively as the "State of New Jersey" or the "State"). In its Complaint, the United States alleges that the State pursued hiring practices which discriminated against blacks, Hispanics and women, and which deprived blacks, Hispanics and women of opportunities for appointment to entry-level law enforcement positions in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* ("Title VII").

***2** In particular, the Complaint alleges that the State utilized unlawful written and physical performance ("PPT") examinations and other procedures in processing and selecting candidates for appointment to State law enforcement positions, as well as county and municipal positions that are covered by State civil service laws. The entry-level law enforcement positions covered by the Complaint are: Municipal Police Officer; County Police Officer; Park Police Officer (County and Municipal); Housing Police Officer (Municipal); Police Officer -State; Police Officer—Palisades Interstate Parkway (State); Police Officer—Human Services (State); and Campus

Police Officer (State). With the permission of the Court, the United States filed an Amended Complaint on January 25, 1991 to include the additional entry-level law enforcement positions of Sheriff's Officer (County), County Correction Officer, and Correction Officer Recruit (State).

For five and one-half years, the parties engaged in extensive discovery, including the exchange of documents, depositions and interrogatories. Before trial, which was scheduled to begin on March 1, 1994, the parties reached agreement on the terms of the consent decree. This Court provisionally entered the consent decree on February 17, 1994, subject to future hearings to consider any objections to the fairness of the decree.

B. Overview of the Consent Decree

1. ***General Injunctive Relief***
Although the State did not concede any wrongdoing, it agreed to comply with a series of obligations. Decree at 4. Under the terms of the consent decree, the State agrees not to use job qualifications that are unlawful under Title VII in the processing, selection or certification of candidates for appointment to any of the entry-level law enforcement positions covered by the consent decree. Decree at ¶ 3.

Specifically, the consent decree prohibits several hiring practices previously employed by the State. The State is prohibited from using the written examinations for entry-level law enforcement positions that were administered prior to December 1990, with the exception of the Law Enforcement Candidate Record ("LECR") written examination. Decree at ¶ 14. Additionally, the State cannot use the physical performance test ("PPT") administered to candidates for entry-level police officer positions from 1980 to 1988 and to candidates for entry-level sheriff's officer positions from 1987 to 1988. Decree at ¶¶ 22–23. Lastly, the State cannot restrict hiring based on gender for the State correction officer recruit job title, except as provided for in the consent order entered in *Csizmadia v. Fauver* and *Allen v. Fauver*[1] (consolidated cases), Civil No. 88–786 (D.N.J.). Decree at ¶¶ 3, 36.

[1] These private actions dealt exclusively with assignment practices in State correctional facilities which were challenged by incumbent correction officers and male prisoners. The gender-based practices challenged by the United States in this Title VII action involve the selection and appointment of State correction officers and not the assignment of correction officers on the job.

2. ***Relief for Individuals***
The consent decree identifies three groups of victims entitled to relief: (1) blacks who scored too low on the written exam to be considered for appointment; (2) women who failed the police officer PPT; and (3) women who were passed over for appointment to State correction officer jobs on the basis of their gender. The method used to identify the individuals who fall into each of these three groups and are eligible for relief is set forth in greater detail in Section C below.

***3** The decree provides monetary relief of $6.5 million for back pay ("the settlement fund") and $625,000 for retroactive pension credits. Decree at ¶¶ 28–29. If the decree is approved by the Court, the United States will make recommendations concerning the amount of monetary relief to be awarded to those persons who are eligible to receive relief under the decree. Decree at ¶¶ 43, 61, 80. Those individuals who are identified by the United States as being entitled to remedial relief, including monetary awards and/or priority job offers and any benefits associated with a job, will be notified of the United States' recommendations at the same time as the Court. Decree at ¶¶ 57, 74, 92.

Under the consent decree, no person is required to accept an offer of appointment in order to receive back pay. Decree at ¶¶ 45, 63, 81. Individuals who are appointed and entitled to receive retroactive pension credits will not receive those credits, however, until after completing the working test period. Decree at ¶¶ 50, 67, 86. In addition, those individuals appointed to State law enforcement jobs will receive retroactive seniority. Decree at ¶¶ 50, 67, 86.

The accrual date for monetary and other remedial relief, including retroactive seniority and pension relief, varies depending upon which of the groups entitled to relief an individual falls into. Since passing the written exam is only the first of several steps in the selection process for law enforcement jobs, substantial uncertainty existed in attempting to determine the date when any single individual would have been deemed qualified and hired. Responding, in part to this difficulty, the parties reached a compromise and agreed that for individuals who failed the written examinations challenged in the United States' Complaint, relief would not accrue prior to March 1, 1988. Decree at ¶ 28. In contrast, female victims of the PPT and the State's gender-based appointment practices who are entitled to receive retroactive seniority shall be given full seniority relief because their dates of hire can be determined with more precision.

3. ***Notification of Persons Eligible for Relief***
Approximately 4,800 black candidates whom the United States identified as potentially adversely affected by the State's written examinations were notified by the State by

letter (Appendix D to the decree) in April 1994. The letter informed those candidates of the opportunity to establish their entitlement to individual relief by taking the LECR written examination. Decree at ¶ 52. Those black candidates who have already passed the LECR written exam during a previous test administration, however, are not entitled to relief and will not be permitted to retake the exam. Decree at ¶ 40. Those individuals who failed the LECR written exam after August 1993, 12 months before the special administration of the LECR conducted pursuant to the decree, also are excluded from taking the LECR exam and are not entitled to relief under the decree. Decree at ¶ 39.

***4** In addition, the State also notified approximately 500 female candidates who meet the criteria for eligibility for relief as victims of the PPT or gender-based appointment practices, offering them monetary relief.[2] Decree at ¶¶ 69, 88; Consent Order 11. Of these 500 individuals, 167 also will be notified at a later date that they are entitled to a priority job offer.

[2] The State notified these women using Appendix G, H, or L to the decree, depending on the individual.

Finally, the State notified approximately 45,000 other persons identified as potentially affected by the consent decree. Those persons included: all sworn employees of any State or local appointing authority who may be affected by the decree; all unions who represent such employees; all appointing authorities where priority job offers will be made under the terms of the decree; and all persons on existing eligibility lists who may be affected by the decree.

In May 1994, the State sent these 5,300 candidates, as well as the approximately 45,000 other persons potentially affected by the consent decree, written notice (in the form of Appendix O to the consent decree) summarizing the decree, advising them of their right to object to fairness of the decree, and setting forth the procedures for doing so. Decree at ¶ 95(2). This notice was sent in preparation for the "front end" fairness hearing, held on November 16 and 17, 1994.

Furthermore, all candidates and potentially affected individuals were notified that complete copies of the consent decree (with appendices and subsequent consent orders attached) have been available for inspection and copying at four New Jersey State Department of Personnel regional offices since provisional entry of the decree in February, 1994. Two thousand one hundred copies of the text of the decree have thus far been made available at these four locations.

4. *The Court's Jurisdiction and Role*

Under the decree, the Court retains jurisdiction for the purpose of entering all orders, judgments and decrees which may be necessary to implement the relief provided and to ensure the State's compliance with the prospective terms of the decree. The decree expires five years from the date of final entry unless the United States demonstrates that the State has not complied with the consent decree in all material respects.

C. Classes of Victims Entitled to Relief

1. *Victims of Written Examinations for Entry–Level Law Enforcement Positions Covered by the Consent Decree*

In April 1991, the State provided the United States with all available computerized applicant information and written test results for entry-level law enforcement positions. In addition, the State provided the "symbol numbers" used by the State to identify each test administration date for a job title in a given jurisdiction. The State also produced hard-copy certification lists for the symbol numbers and positions covered by the United States' Complaint, showing who was appointed and who was rejected or withdrew for reasons other than performance on the written test.

***5** For purposes of identifying potential victims of the written examinations, the United States reviewed all available data and conducted statistical analyses comparing by race and ethnicity the number and percentage of test takers with the number and percentage of those who were appointed for each symbol number. The United States computed the "shortfalls", the difference between the number of test takers actually appointed to a job and the number of test takers one would expect to be appointed if a written exam were unbiased. If a written exam were unbiased and race-neutral, one would expect the percentage of those appointed to approximate the percentage of test takers by race and ethnicity. For example, if 30% of the test takers for a given symbol number are black, one would expect that an unbiased exam would result in approximately 30% of those black test takers being appointed.

The United States computed the shortfalls by symbol number of blacks and Hispanics separately in the following manner: for each group, the number of appointments actually made was subtracted from the number of expected appointments based upon the representation of the group in the pool of test takers. For blacks and Hispanics separately, the United States summed all test administrations to obtain the overall shortfall.

Based upon these analyses, the United States determined that Hispanic candidates were appointed overall in about

the numbers that one would expect[3] given the percentage of Hispanics who sat for the written exams. As a result, the consent decree does not include relief specifically for Hispanics.

[3] There was a shortfall of four Hispanics, but it was not statistically significant. Therefore, this shortfall could have occurred by chance.

Under the consent decree, black candidates are eligible for relief if they meet five criteria. To be eligible, he or she must have: (1) taken a written exam designated by a symbol number listed in Appendix A to the decree; (2) obtained a score below the lowest score received by a candidate who was appointed; (3) at the time of taking the written exam, met all lawful requirements for taking the exam; (4) not subsequently been appointed from one of the symbol numbers referred to in Appendix A; and (5) if he or she received a notice of certification of appointment based upon the results of the written exam in question, replied to the notice indicating an interest in the position. In addition, any black candidate who filed an actionable complaint with the Equal Employment Opportunity Commission ("EEOC") or other action involving the written exams is potentially entitled to relief.

These black candidates have been offered an opportunity to establish their entitlement to remedial relief by taking and passing a new examination entitled the "LECR" written exam. As stated earlier, however, candidates who already have passed the LECR written exam for the specific title in question will not be permitted to retake the LECR exam to establish their entitlement to relief or to improve their score on the test. Additionally, those who failed the LECR exam after August 1993 are not entitled to relief. Those black candidates who have been invited to take the LECR written exam are listed in Appendices B and N.

***6** Each black candidate who takes and passes the LECR exam or who took and passed the LECR exam in the past for that title will then be placed in rank order of their scores on a special eligibility list for the position and jurisdiction (*i.e.,* symbol number) that he or she originally sought. Appendix A to the consent decree sets forth the number of appointments to be made from the special eligibility lists for each symbol number. Once the special eligibility lists are issued, the priority appointments will be made before all other appointments. Up to 287 priority appointments will be made.

Individuals appointed to State law enforcement jobs will be entitled to retroactive seniority dating back no earlier than March 1, 1988, some pension credits, and other job benefits. Individuals appointed to county and municipal jobs are entitled to all benefits of the job in question, but are not entitled to retroactive seniority. Retroactive seniority relief was not provided for persons who applied for county and municipal jobs, in part, because providing such relief would have required joining as parties and reaching settlement with approximately 280 county and municipal civil service jurisdictions that would have borne the costs associated with retroactive seniority, *e.g.,* salary increases and benefits based on years of service.

2. ***Female Victims of the PPT for Police Officer Jobs***

During discovery, the United States obtained information about candidates for police officer to whom the PPT was administered between 1982 and 1987. As noted previously, the United States also obtained certification lists containing additional information about the women who failed the PPT beginning in approximately 1984.

The police officer PPT was administered to individuals after they had passed the written examination and were under consideration for appointment from the eligibility list. The cut-off passing score was set at 202 seconds. From 1987 to 1988, the State administered the same PPT used for police officer candidates to candidates for entry-level sheriff officer positions. The cut-off passing score was 237 seconds, which was more liberal than the cut-off score for the police officer PPT (202 seconds).

The United States analyzed the PPT results for all police officer symbol numbers together, since the identical test and the same scoring was used for all administrations. The analysis revealed a statistically significant disparity between male and female pass rates on the PPT for police officer candidates. In contrast, there was insufficient data to determine whether the more liberal PPT administered to sheriff officer candidates had a discriminatory impact against women. Consequently, the consent decree does not include remedial relief for women who failed the sheriff officer PPT.

As a compromise made to facilitate settlement, the United States and the State initially agreed to limit the number of females who would be eligible to receive relief as a result of the PPT. To this end, paragraph fifty-nine of the decree established three eligibility criteria. Any female is eligible for relief if she: (1) took and failed the PPT for a police officer position; (2) was not subsequently offered or was delayed in obtaining the position; and (3) prior to March 14, 1991, (a) had been interviewed by the United States Department of Justice or by attorneys for the private plaintiffs in the consolidated actions; or (b) had filed an actionable complaint with the EEOC regarding the PPT.

***7** Based on the eligibility criteria, thirty-nine women were originally listed in Appendix E as entitled to relief. Since provisional entry of the decree, two additional women who meet the eligibility criteria have been added

to Appendix E.

After provisional entry of the consent decree and upon further review, the United States proposed and the State agreed to include more than 200 additional women listed in Appendix E–1 in the settlement for back pay relief only. Consent order No. 19 (filed Oct. 26, 1994), Consent Order No. 19 (filed Jan. 9, 1995), Consent Order 22 (filed March 8, 1995). This list of women who also failed the PPT was compiled from all available data sources concerning the PPT.

Female candidates listed in Appendix E will be placed on a special eligibility list for the position and jurisdiction (*i.e.,* symbol number) that they originally sought when they failed the PPT and will be further processed for appointment before all other applicants as vacancies become available and in the order set forth in Appendix F. The three female candidates listed on Appendix E for State positions are entitled to monetary relief, offers of appointment, retroactive seniority, pension credit and other job benefits. Female candidates for county or municipal positions are entitled to monetary relief, priority appointment, and other job benefits. As previously discussed, female candidates for these non-State jobs and will not be entitled to retroactive seniority because the municipal and county appointing authorities are not parties to this lawsuit.

Women listed in Appendices E and E–1 must elect to receive relief by filling out the appropriate individual relief form mailed to them by the State. Anyone who fails to return the form in a timely manner will be barred from recovery.

3. ***Female Victims of Gender–Restricted Hiring and Assignment Practices in State Correctional Facilities***

Under the consent decree, women who were denied appointment to State correction officer recruit positions because of gender-restricted hiring practices in the State's correctional facilities are entitled to remedial relief. These women are listed in Appendix I.

The United States located female victims of the State's allegedly discriminatory hiring practices on certification lists for the State correction officer recruit position. Under the decree, any female candidate who meets the following seven criteria is eligible for relief as a result of the State's gender-based hiring practices. A female candidate is eligible if she: (1) took and passed any of the written exams designated by the symbol numbers listed in Appendix J; (2) achieved a score on the exam equal to or higher than the lowest score received by a candidate who was appointed from the same symbol number; (3) was not subsequently appointed; (4) at the time of taking the exam, met all lawful requirements for the exam; (5) if she received a notice of certification for appointment based upon the results of the exam in question; (6) replied to the notice indicating an interest in the position; and (7) was not eliminated from further consideration based on any lawful requirement for employment and did not eliminate herself from consideration. Decree at ¶ 76. In addition, any female candidate who filed an actionable complaint with the EEOC or other action involving the appointment practices is entitled to relief as well. Based on these criteria, approximately 450 women have been identified in Appendix I as being eligible for relief.

***8** The approximately 450 female candidates listed in Appendix I are entitled to monetary relief and 126 of them are also entitled to offers of appointment, retroactive seniority, pension credit and other benefits of the correction officer recruit job. Appendix J sets forth the number of appointments for each symbol number.

Each female candidate for a correction officer recruit position shall be offered appointment in the order that they appear on the special eligibility list for that symbol number. Female candidates will be ordered on each special eligibility list by random selection from the pool of disabled veterans, veterans, and non-veterans, respectively. Disabled veterans will be given preference over veterans, and veterans will be given preference over non-veterans for appointment purposes. Once the special eligibility lists have been formulated, female candidates on those lists will be further processed for appointment before all other applicants for the position in question.

D. Summary of Objections and Comments

During the public comment period, the United States received approximately 2,200 objections challenging the fairness of the consent decree. For purposes of responding to those objections, the Court has reviewed and adopted the United States' strategy of grouping the objectors into the following fifteen categories:

(1) six hundred fifty-three blacks claim entitlement to relief under the decree as a result of the written exams[4] (the United States' response to this group of objectors is provided in Section II.C.3.);

[4] Of the six hundred fifty-three blacks, two hundred fifty-five are already listed in Appendices B and N and, therefore, would be eligible to establish their entitlement to relief under the decree by returning Appendix Form D and by taking and passing the LECR written examination. The United States' records indicate that all two hundred fifty-five were notified of the opportunity to take the LECR written exam. Accordingly, four hundred two blacks are not included in Appendices B and N and, as a result, are not eligible for relief under the decree.

(2) thirty-three Hispanics claim entitlement to relief under the decree as a result of the written exams and object that Hispanics are not covered by the decree (the response is provided in Section II.C.3.);

(3) eighteen blacks complain about having to take another written examination (the LECR written exam) in order to establish their eligibility for relief (the response is contained at Section II.C.3.);

(4) seventy women claim entitlement to relief as a result of the police officer PPT[5] (the response is provided in Section II.C.5.);

[5] Of these seventy women, thirty-five are already listed on Appendix E or Appendix E–1 to the decree and have been notified by letter (in the form designated Appendix G, H or H–1, depending on the individual) of their entitlement to individual relief. Assuming that they return the claim form in a timely manner, they are entitled to relief under the decree.

(5) twelve women claim entitlement to relief as a result of the sheriff officer PPT (the response is provided in Section II.C.5.);

(6) two hundred seventeen women claim entitlement to relief as a result of the State's gender-based appointment practices[6] (the response is provided in Section II.C.4.);

[6] Of these two hundred seventeen women, twenty-five are already listed on Appendix I to the decree and have been notified by letter (in the form designated Appendix L) of their entitlement to relief.

(7) nine women allege that they were denied a county correction officer position based on their gender and that they are therefore, entitled to relief under the decree (the response is provided in Section II.C.4.);

(8) five objectors argue that the monetary amount of the settlement in the decree is inadequate (the response is provided in Section II.B.);

(9) David Field, Esquire, on behalf of his client Mr. David Crawford, objects that his client's procedural due process rights have been violated because he did not receive enough information about the decree in order to determine how it affects him (the response is provided in Section II.C.2.);

***9** (10) Mr. James Derco claims that the decree will conflict with a prior consent decree filed in the case of *N.A.A.C.P. v. City of Clifton, et al.,* which created special eligibility lists for minorities to remedy the alleged effects of past discrimination (the response is provided in Section II.C.6.);

(11) fourteen persons object to the wording of various provisions of the decree (the response is provided in Section II.C.6.d.);

(12) two hundred ninety-eight persons claim that the decree adversely affects their interests, *i.e.,* retroactive seniority for victims appointed pursuant to the decree may adversely affect the seniority rights of incumbent employees and priority appointments may affect the employment status of persons on existing eligibility lists. This category also includes a small number of blacks who claim that the special eligibility lists will delay their appointment date. In addition, sixteen of the objectors in this group arguably allege a violation of their constitutional rights and that the consent decree is "illegal" and thus should not be entered by this Court (the response is provided in Section II.C.1.);

(13) twenty-four persons claim that this lawsuit has caused a hiring freeze that has prevented them from being hired or has delayed their permanent appointment because they were either held on a certification list for a prolonged period or were hired provisionally without pension benefits or seniority (the response is provided in Section II.C.6.b.);

(14) six hundred sixty-one persons have made irrelevant objections, *i.e.,* raising issues not covered by this lawsuit or objecting to the decree without stating reasons for the objection (the response is provided in Section II.C.6.c.); and

(15) four hundred sixty-one persons have filed objection cover sheets only, giving no reasons for the objection[7] (the response is provided in Section II.C.6.c).

[7] The United States has also received statements from seventy-nine persons, indicating that they either agree with the terms of the consent decree or do not object.

Although these categories were forumulated by the United States based upon the written objections received, the Court finds that these same categories accurately reflect and encompass the types of verbal objections that were raised at the fairness hearings held on November 16 and 17, 1994.

After careful consideration of each category of objections, the Court concludes that none of the objections have overcome the presumption of validity that this Court must accord to the consent decree. Consequently, none of the

objections prevent this Court from finding that the settlement set forth in the consent decree is fair, adequate, and reasonable, and should be approved for final entry.

II. DISCUSSION

As a threshold matter, it is important to note the United States' role as a Plaintiff in this action. This is not a class action but a suit brought by the United States. The United States represents the interests of all citizens, including, but not limited to, those women and blacks who were denied employment opportunities as a result of the allegedly discriminatory hiring practices engaged in by the State. *See e.g., United States v. City of Miami,* 614 F.2d 1322, 1332 n. 18 (5th Cir.1980), *modified,* 664 F.2d 435 (5th Cir.1981) (per curiam).

***10** The individual blacks and women subjected to allegedly illegal discrimination were free to assert their own rights by filing their own lawsuits, although at this point, most, if not all of the individual claims that have not been filed would be time-barred.

The United States must seek to obtain justice for as many victims as possible while balancing its limited resources. As the Third Circuit observed:

> The Attorney General's prosecution of a [Title VII] suit is governed by desire to achieve *broad public goals and the need to harmonize public policies that may be in conflict;* practical considerations, such as where limited public resources can be concentrated most effectively, may dictate conduct of a suit inimical to the immediate interests of the discriminatee, who presumably seeks full satisfaction of his individual claim regardless of the effect on other cases.

Bryan v. Pittsburgh Plate Glass Co., 494 F.2d 799, 803 (3d Cir.1974) (emphasis added), *cert. denied,* 419 U.S. 900 (1974). While the United States may seek to compensate individuals believed to be victims of discrimination, it also seeks to protect public rights, which may conflict at times with the interests of individuals.

Therefore, the United States' decision to settle its claims through the consent decree cannot be evaluated solely in terms of the remedies that it provides to those persons subject to allegedly illegal discrimination, but rather, must be considered in light of the public policy of eradicating noncompliance with Title VII and furthering its purpose of providing equal employment opportunity for all.

A. The Standard of Review

Courts have long recognized that cooperation and voluntary compliance are the preferred means of achieving Title VII's goals of ensuring equal employment opportunities and eliminating discriminatory practices. *Alexander v. Gardner–Denver Co.,* 415 U .S. 36, 44 (1974), *Equal Employment Opportunity Commission v. American Telephone and Telegraph Co. ("AT & T"),* 419 F.Supp. 1022, 1038 (E.D.Pa.1976), *aff'd,* 556 F.2d 167 (3d Cir.1977), *cert. denied,* 438 U.S. 915 (1978). Accordingly, a district court should have a deferential attitude towards agreements reached by consent in Title VII suits. *City of Miami,* 614 F.2d at 1332–33.

At a fairness hearing, the district court's role is limited to determining whether the "settlement is fair, adequate and reasonable." *Walsh v. Great Atlantic & Pacific Tea Co., Inc.,* 726 F.2d 956, 965 (3d Cir.1983) (approving of settlement involving case alleging violations of ERISA). "The district court has considerable discretion in determining whether a settlement is fair and reasonable, and its determination will be reversed only for abuse of discretion." *Bryan,* 494 F.2d at 801, *accord, Officers for Justice v. Civil Service Commission of the City and County of San Francisco,* 688 F.2d 615, 625–26 (9th Cir.1982), *cert. denied,* 459 U.S. 1217 (1983).

***11** When deciding whether to approve a consent decree, a court must evaluate the fairness of its terms against the twin objectives of Title VII: "eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 421 (1976). Accordingly, a district court, when it reviews the settlement of an employment discrimination action for fairness, must be conscious of the public policies embodied in Title VII. *AT & T,* 419 F.Supp. at 1039.

Furthermore, a consent decree negotiated in a Title VII action "carries with it the presumption of validity that is overcome only if the decree contains provisions which are unreasonable, illegal, unconstitutional, or against public policy." *United States v. City of Alexandria,* 614 F.2d 1358, 1361 (5th Cir.1980), *see also, E.E.O.C. v. Hiram Walker,* 768 F.2d 884, 889 (7th Cir.1985), *cert. denied,* 478 U.S. 1004 (1986), *Williams v. Vukovich,* 720 F.2d 909, 921 (6th Cir.1983, *Berkman v. City of New York,* 705 F.2d 584, 597 (2d Cir.1983), *Officers for Justice v. Civil Serv. Comm'n,* 688 F.2d 615, 625 (9th Cir.1982), *cert. denied,* 459 U.S. 1217 (1983). The "fair, adequate and reasonable" standard has also been phrased in the negative, as meaning "not unlawful, unreasonable, or inequitable". *See United States v. City of Alexandria,* 614 F.2d 1358, 1361, n. 6 (5th Cir.1980).

Once a district court has provisionally approved a consent decree resolving a Title VII action, as this Court did on February 17, 1994, the decree becomes presumptively reasonable, so that an individual who objects to entry of the decree "has a heavy burden of demonstrating that the decree is unreasonable." *Williams v. Vukovich,* 720 F.2d at 909, 921 (6th Cir.1983), *City of Miami,* 614 F.2d at 1333–34.

With these general legal principles in mind, a district court must consider many factors in deciding whether a consent decree is fair and reasonable. The Third Circuit in *Girsh v. Jepson* enumerated some of those factors:

> "... (1) the complexity, expense and likely duration of the litigation...; (2) the reaction of the class to the settlement...; (3) the stage of the proceedings and the amount of discovery completed...; (4) the risks of establishing liability...; (5) the risks of establishing damages...; (6) the risks of maintaining the class action through the trial...; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery...; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation...."

521 F.2d 153, 157 (3d Cir.1975) (citing *City of Detroit v. Grinnell Corp.,* 495 F.2d 448, 463 (2d Cir.1974). Two additional factors include: (1) presence of collusion in reaching a settlement and (2) the opinion of competent counsel. *Armstrong v. Board of School Directors of the City of Milwaukee,* 616 F.2d 305, 314 (7th Cir.1980) (citing Manual for Complex Litigation § 1.46, at 56 (West 1977) and 3B Moore's Federal Practice ¶ 23.80[4] at 23–521 (2d ed.1978)). Further, the Ninth Circuit has identified one additional factor: the presence of a governmental participant. *Officers for Justice,* 688 F.2d at 625.

***12** In addition, the Court must determine whether the remedial relief provided under the decree meets Title VII standards for lawfulness. *See AT & T,* 419 F.Supp. at 1039. Since a small number of white incumbent law enforcement officers have filed objections to the decree alleging that it infringes upon their constitutional rights, the Court must pay particular attention to whether the relief satisfies constitutional standards. Constitutional standards of equal protection require that the remedies provided by the consent decree are sufficiently narrowly tailored to remedy the discrimination alleged in this case. *See e.g., Int'l. Brotherhood of Teamsters v. United States,* 431 U.S. 324, 376 (1977).

In evaluating the fairness of a settlement, "the relative degree of importance to be attached to any particular factor will depend upon and be dictated by the nature of the claim(s) advanced, the type(s) of relief sought, and the unique facts and circumstances presented by each individual case." *Officers for Justice,* 688 F .2d at 625.

Nonetheless, the strength of plaintiff's case on the merits balanced against the settlement offer is generally regarded as the most important factor in determining whether a settlement is fair and equitable. *Walsh,* 726 F.2d at 965, *accord Armstrong,* 616 F.2d at 314 (citations omitted). In assessing the strength of the United States' case, the Court need not weigh evidence to address the merits of the underlying claims. Instead, the Court:

> need only evaluate the probable outcome of the litigation and is not required to weigh and decide each contention; further, the probable result at trial must be balanced against the probable costs, in both time and money, of continued litigation.

Bryan v. Pittsburgh Plate Glass Co., 494 F.2d 799, 801 (3d Cir.1974), *cert. denied,* 419 U.S. 900 (1974). "The principles favoring negotiated settlements in general, and especially in Title VII cases, dictate that the merits of the underlying claims will remain unresolved". *Moore v. City of San Jose,* 615 F.2d 1265, 1271 (9th Cir.1980).

B. The Consent Decree is Fair, Adequate and Reasonable

To determine whether the consent decree is fair, adequate and reasonable, the Court now evaluates the relevant factors set forth above.

Typically, the strength of the plaintiff's case on the merits balanced against the amount offered in settlement is the most important factor in deciding whether a consent decree should be approved. *Walsh,* 726 F.2d at 965, *accord Armstrong,* 616 F.2d at 314 (citations omitted).

The State, in its answers to the United States' requests for admissions and associated answers to interrogatories filed on June 22, 1993, admitted that black test takers passed the State's written examinations at statistically significant lower rates than whites. For police officer written exams, the difference in pass rates for whites and blacks, measured in units of standard deviations, was 14.48. *See* State's Answers to Requests for Admissions, Appendix 3.

For sheriff officer and correction officer exams, the difference in pass rates for whites and blacks was 27.59 and 20.57 standard deviations, respectively. *See* State's Answers to Requests for Admissions, Appendices 4 and 5.

***13** In addition, the State, in its answers to the United States' requests for admissions and associated answers to interrogatories filed on June 22, 1993, admitted that women passed the State's PPT at statistically significant lower rates than men. The difference in pass rates on the PPT between male and female candidates was 19.30 standard deviations. *See* State's Answers to Request for Admissions, Answer to Request No. 6(9).

Based upon these facts, the United States could have established a *prima facie* case of adverse impact discrimination for both blacks and women under Title VII. *See Teamsters,* 431 U.S. at 339, *Griggs v. Duke Power Co.,* 401 U.S. 424, 430–431 (1971); *Bryant v. International School Services,* 675 F.2d 562, 573 (3d Cir.1982), *Hazelwood School District v. United States,* 433 U.S. 299, 311 n. 17 (1977).

Moreover, this assessment of the strength of the United States' case is bolstered by the advanced stage of the proceedings and the completion of discovery prior to entering into this settlement, factors that weigh in favor of a finding that the consent decree is fair and reasonable. *See Girsch,* 521 F.2d at 157. As noted by the Third Circuit, "post-discovery settlements are more likely to reflect the true value of the claim and be fair." *Bell Atlantic Corp. v. Bolger,* 2 F.3d 1304, 1314 (3d Cir.1993). This Court provisionally entered the consent decree after discovery was completed and shortly before the scheduled start of trial. At this advanced stage of the proceedings, the Court is convinced that the parties were in an excellent position to evaluate the merits of their respective cases and to agree to a settlement that accurately reflected the value of the United States' claims.

Regarding the amount offered by the State in this settlement, the State has agreed to pay $6.5 million for back pay and $625,000.00 for pension contributions. The settlement fund was established based upon the parties' best estimate of the monetary loss suffered by the group of victims entitled to relief, taking into account the risks of litigation and the desirability of resolving this matter sooner rather than later. Five objectors to the consent decree, Douglas Boone, Jill Coughlan, Sharon Eleby, Elaine Smokes, and Fred Thompson, argue that the monetary amount of the settlement is inadequate to compensate those who have suffered discrimination. The "range of reasonableness of the settlement fund in light of the best possible recovery", however, must be weighed against "... all the attendant risks [and costs] of litigation". *Girsh,* 521 F.2d at 157.

Among the factors to be considered in reviewing a consent decree, the complexity, expense, and likely duration of the litigation if it had gone to trial weighs in favor of approving the consent decree. *See Girsch,* 521 F.2d at 157. At trial, the validity of the challenged examinations would have been a key issue and would have involved lengthy expert testimony. The United States identified three expert witnesses and the State designated at least nine experts to testify regarding the validity of the tests. For purposes of settlement, the State stipulated that there was insufficient evidence that challenged examinations were "job-related or otherwise significantly serve[d] legitimate business goals." Decree at ¶¶ 5, 17. By agreeing to this stipulation, the parties avoided the need for complex, probably expensive, and lengthy expert testimony concerning whether the State's challenged testing procedures were sufficiently job-related to withstand scrutiny. *See e.g., Griggs,* 401 U.S. at 430–31.

***14** In addition, assuming the United States prevailed on some or all of the liability issues, the Court, having granted the United States' renewed motion to bifurcate for trial the issues of liability and individual relief in 1992, would have had to conduct separate hearings on the issue of individual remedial relief. Even if the State's liability were established, this second set of hearings on individual damages would have substantially added to the duration and the expense incurred by the parties in resolving this litigation. The settlement fund reflects the uncertainty of calculating a combined back pay amount for all three groups of victims. By entering into the consent decree, the parties avoided much of the risk, time and expense associated with the liability phase of resolving the United States' claims. Therefore, the time and resources saved as a result of the settlement weigh in favor of this Court's approval of the consent decree.

Moreover, the involvement of two governmental agencies in this matter also weighs in favor of this Court finding that the $7.125 million settlement amount established by the consent decree is fair, adequate, and reasonable. *See Officers for Justice,* 688 F.2d at 625. The Justice Department, which entered into the decree on behalf of the United States, is a federal agency charged with enforcing federal law and has no pecuniary interest in the settlement of this lawsuit.

"To the extent that financial concerns enter the decision-making process at all ... at the Justice Department, it is likely to be in the form of resource limitations tempting the responsible officials to accept compromise settlements providing relief short of what might be obtained at trial, in order that litigation resources may be marshalled for use against more recalcitrant offenders." *City of Miami,* 614 F.2d at 1332 n. 18. The $7.125 million settlement amount satisfies the United States' desire to provide a reasonable amount of

compensation to identifiable victims of alleged discrimination and sends a strong message to deter discrimination by other employers.

As this Court has already noted, the United States represents not only the interests of those persons who have allegedly been subject to discrimination, but also "must represent the interests of all citizens...." *City of Miami,* 614 F.2d at 1332 n. 18. Therefore, it is entirely appropriate for the Justice Department to consider the usefulness of expending additional enforcement resources on a case in deciding whether to enter into a settlement.

While individuals, like the five objectors who argue that the $7.125 million settlement is inadequate, may feel shortchanged by the United States' decision to settle, which conserves enforcement resources, the United States' determination that $7.125 million is adequate to resolve its claims weighs in favor of approving the consent decree.

In addition to assessing the adequacy of the settlement fund, this Court must also determine whether the non-monetary relief established by the decree, specifically, race and gender based priority hiring lists meet the standards of lawfulness established by Title VII and the Fourteenth Amendment to the Constitution.

***15** When fashioning appropriate relief for identifiable victims of discrimination, a court must be guided by one of the central purposes of Title VII, "... to make persons whole for injuries suffered on account of unlawful employment discrimination." *Albemarle Paper Co.,* 422 U.S. at 418. To achieve this goal, "Congress took care to arm the courts with full equitable powers", so that " '[t]he injured party ... [shall] be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed." ' *Id.* at 419 (quoting *Wicker v. Hoppock,* 6 Wall. 94, 99 (1867)).

Specifically, the Supreme Court has directed that a district court's "broad equitable discretion" to effectuate the "make whole" objective embodied in § 706(g) includes the authority "to 'order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay ..., or any other equitable relief as the court deems appropriate." ' *Franks v. Bowman Transportation Co.,* 424 U.S. 747, 763 (1976) (quoting Section 706(g) of Title VII, 42 U.S.C. § 2000e–5(g)). In fact, " 'the [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future ." ' *Albemarle Paper,* 422 U.S. at 418 (quoting *Louisiana v. United States,* 380 U.S. 145, 154 (1965)). *See also Teamsters,* 431 U.S. at 361 n. 47, n. 51 ("The federal courts have freely exercised their broad equitable discretion to devise prospective relief designed to assure that employers found to be in violation of § 707(a) eliminate their discriminatory practices and the effects therefrom").

According to the Supreme Court, a district court:

> [i]n devising and implementing remedies under Title VII, no less than in formulating any equitable decree ... must draw on the "qualities of mercy and practicality [that] have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims." [(Citations omitted)] Especially when immediate implementation of an equitable remedy threatens to impinge upon the expectations of innocent parties, the courts must "look to the practical realities and necessities inescapably involved in reconciling competing interests,' in order to determine the 'special blend of what is necessary, what is fair, and what is workable." *Lemon v. Kurtzman,* 441 U.S. 192, 200–201 (opinion of Burger, C.J .).

Teamsters, 431 U.S. at 375.

Applying these standards of lawfulness and fairness, the Court, in its broad equitable discretion, concludes that the general injunctive and remedial relief provisions comply with both Title VII and the Constitution. *See Franks,* 424 U.S. at 763. The decree's injunctive provisions clearly meet Title VII's objective of "eradicating discrimination throughout the economy" because the State is prohibited from using the selection devices challenged as unlawful in this action and engaging in any discriminatory selection practices in the future.

***16** Furthermore, only identifiable victims of the State's alleged discriminatory employment practices will receive remedial relief. Some persons will receive back pay, priority job offers and other job benefits, while others will receive only a monetary award, as dictated by the particular circumstances of each person's claim. The relief for victims of the State's written examinations is narrowly tailored because appointments will be made only where there are identifiable effects of the discriminatory practice, in other words, only for those symbol numbers where shortfalls in the expected number of appointments for blacks existed. Similarly, appointments of female victims of the State's PPT and gender-based appointment practices also are made in a limited number of instances: 41 and 126 priority job offers, respectively. *See* Pl. Br. Attachment 1.

Thus, the rights of white male incumbents and other candidates for appointment, who are not included in the consent decree, are disrupted only to the limited extent necessary to provide relief to identified victims. *See Sheet Metal Workers v. EEOC,* 478 U.S. 421, 481 (1986) (upholding court's order requiring employer to use lists

which select blacks before whites to remedy past discrimination as consistent with the equal protection safeguards of the Constitution, where there is no absolute bar to white advancement but rather a delay in advancement). *See also* Section II.C.1. (providing a detailed discussion of the rights of third party incumbent officers and candidates for appointment). Indeed, these individuals profited from the allegedly unlawful practices rectified by the decree and, upon entry of the decree, will simply return to the relative position they would have been in but for those practices. *See Franks,* 424 U.S. at 768.

C. The Court's Response to Objections and Comments

In Section II.B. above, this Court concluded that the consent decree meets the criteria for determining fairness, as well as Title VII standards of lawfulness. Accordingly, the Court will grant final approval and enter the consent decree as a "fair, adequate and reasonable" resolution of the allegations raised in the United States' Complaint.

Even so, the Court pauses to address specifically the approximately 2,200 timely-filed objections to the fairness of the decree. None of these objections provides any justification for the Court to reject the consent decree as unfair or unreasonable. The Court will address each of the categories of objections set out at Section I.D., *supra.*

1. ***Objections Claiming that the Decree Causes Reverse Discrimination Against White Men Lack Merit. The Decree is an Appropriate and Constitutional Resolution of the Allegations of Discrimination Raised by the United States' Complaint.***

Two hundred ninety-eight persons object to the fairness of the decree, arguing that the decree adversely affects their interests. These objectors can be subdivided into two groups: (1) incumbent officers who allege that retroactive seniority for victims awarded jobs under the decree may adversely affect their relative seniority rights; and (2) persons on existing eligibility lists who allege that priority job appointments may affect their status for a job appointment. The second group includes a small number of blacks who claim that the use of special eligibility lists will delay their appointment date.

***17** In addition, sixteen of the two hundred ninety-eight objectors arguably allege a violation of their constitutional rights and that the consent decree is "illegal". These objectors argue that the decree should not be entered by this Court without an adequate showing by the United States that the remedial relief required by the decree is appropriate.

a. ***The Consent Decree Meets Constitutional Standards.***

Among those persons who object that the decree will adversely affect their interests, the most common claim of unconstitutionality is that the decree provides jobs and other forms of remedial relief for minorities and women solely on the basis of race or gender which, in turn, discriminate against white men on the basis of race and gender. These objections do not preclude this Court from approving the consent decree because race-conscious relief is indisputably appropriate to remedy past discrimination. *Wygant v. Jackson Board of Education,* 476 U.S. 267, 277 (1986), *Franks,* 424 U.S. at 775 and n. 35., *AT & T,* 556 F.2d at 179.

Although this Court has not made a finding of discrimination in this case, this does not preclude the Court from ordering race and gender conscious relief. Where a consent decree exists, the purposes of Title VII would be unattainable if courts permitted the absence of evidence of discrimination and the standard denial of liability by defendants contained in decrees to stand as obstacles to the ordering of relief. *AT & T,* 419 F.Supp. at 1038–40 (rejecting objections to consent decree that evidence of discrimination was lacking). To hold otherwise would frustrate Congress' intent that voluntary compliance and settlement be the preferred means of enforcing Title VII and eliminating unlawful employment discrimination. *Id.* at 1038–40 (stating that to avoid making "a mockery" of Congress' preference for using voluntary settlement to meet Title VII goals, the public policies embodied in Title VII require treating the government's allegations in a pattern or practice discrimination case as if proven at trial).

Specifically, a public employer wishing to enter into a consent decree providing for race and/or gender conscious relief must only have "sufficient evidence to justify the conclusion that there ha[d] been prior discrimination." *Wygant,* 476 U.S. at 277.

> Whether race-conscious relief serves a remedial purpose with respect to past discrimination is an evidentiary issue. The court need not make "formal findings" of discrimination; rather, there must be a "strong basis in evidence" for the conclusion that the decree remedies past discrimination.

Shuford v. Alabama Board of Education, 846 F.Supp. 1511, 1521 (M.D.Ala.1994) (citing *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 500 (1989)). This standard for ordering race-conscious relief is met where there is "sufficient evidence" to establish " 'a *prima facie* case of a constitutional or statutory violation'." *Shuford,* 846 F.Supp. at 1521 (citations omitted).

***18** As discussed in Section II.B., *supra,* there is ample evidence in the record to establish that the State engaged in illegal race and sex discrimination in violation of Title VII. During discovery, the State admitted that a statistically significant disparity exists between black and white test takers who passed the written exams, as well as between male and female police officer candidates who passed the PPT. In addition, the State also provided certification lists and deposition testimony that could have established that the State unlawfully restricted hiring of female state correction officer recruits based on gender. Therefore, "sufficient evidence" exists to justify the conclusion that the State had to take some action to remedy the alleged prior discrimination. *See Wygant,* 476 U.S. at 277.

Furthermore, the relief in the decree is narrowly tailored to remedy the alleged discrimination. A number of objectors mistakenly believe that this consent decree contains race-conscious affirmative action relief (*e.g.,* race-based hiring for unidentified class members). This consent decree contains no affirmative action relief provisions. Instead, the specific relief contained in the consent decree is limited to identifiable victims of discrimination.

To remedy the State's alleged racial discrimination, only those black candidates who meet the eligibility criteria set forth in paragraph thirty-seven of the decree are potentially entitled to relief. Identified victims come only from those symbol numbers where there is a statistically significant shortfall of black appointments. To correct the shortfall, a maximum of 287 priority job appointments will be made.

As a remedy for the State's alleged gender-based discrimination, a maximum of 41 women satisfy the eligibility criteria set forth in paragraph fifty-nine of the decree and are entitled to priority job offers as a result of the PPT. In addition, based on the eligibility criteria set forth at paragraph seventy-six of the decree, approximately 450 women, identified in Appendix I, are entitled to back pay relief as a result of the State's hiring practices. Of these women, a maximum of 126 women will receive appointments as a remedy for the alleged discrimination.

As negotiated by the parties, the criteria for victim eligibility ensures that: (1) identifiable victims of discrimination will be the sole beneficiaries of individual relief under the decree; and (2) only those persons who are qualified for law enforcement positions will receive appointments. Nothing in this decree requires the State to hire anyone who is unqualified to perform the job tasks required of the law enforcement positions covered.

b. *The Relief Provided in the Consent Decree is Appropriate and Fair.*

In contrast to the small number of objectors who arguably claim that the consent decree is unconstitutional, the overwhelming majority of objectors alleging reverse discrimination challenge neither the underlying factual predicate of the consent decree, namely that blacks and women were victims of alleged unlawful discrimination, nor the concept that the victims identified are entitled to relief. Rather, most objectors take issue with the scope of relief, particular the award of priority appointments and seniority relief to identified victims.

***19** The objections to seniority relief do not relate to "benefit" seniority (*i.e.,* merit increases, salary, pension, accumulated sick and vacation leave), but rather, focus on "competitive" seniority (*i.e.,* order of promotion or layoffs and order for choosing shift assignments and vacation schedules). "Competitive" relief could allow a victim to get a benefit at a point in time when the objector would otherwise have received it.

As stated earlier in Section II.B., the central purpose of Title VII is to provide make-whole relief for victims of unlawful discrimination. *Albemarle,* 422 U.S. at 418, *Kunda v. Muhlenberg College,* 621 F.2d 532, 549 (3d Cir.1980) (discussing gender discrimination in promotion and failure to grant tenure). To ensure that the purposes of Title VII are accomplished, Congress provided the courts with great discretion in designing remedial relief and granted them the full equitable powers necessary to implement the relief. *Franks,* 424 U.S. at 770, *Albemarle,* 422 U.S. at 418.

Although district courts possess the power to order "make whole" relief such as seniority awards and priority appointments, in determining whether such individual relief is appropriate under the circumstances, the impact on third parties is a relevant factor. *E.g., Teamsters,* 431 U.S. at 375. Given that this "make whole" relief is available, the Court's inquiry is limited to whether the awards of seniority and priority appointments are appropriate in scope. *AT & T,* 556 F.2d at 177. When analyzing the competing interests between making victims of unlawful discrimination whole and the interests raised by third parties, the Court must determine the "special blend of what is necessary, what is fair, and what is workable." *Teamsters,* 431 U.S. at 375 (citing *Lemon v. Kurtzman,* 411 U.S. 192, 200–01).

1. *The Seniority Relief Provided in the Decree is Fair, Necessary and Workable.*

Although the award of seniority relief was one of the more common objections to the consent decree, the Supreme Court prohibits this Court from denying "seniority relief to identifiable victims of racial

discrimination on the sole ground that such relief diminishes the expectations of other ... employees." *Franks,* 424 U.S. at 774. As the Supreme Court observed:

> These conflicting interests of other employees will, of course, always be present in instances where some scarce employment benefit is distributed among employees on the basis of their status in the seniority hierarchy.... "If relief under Title VII can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed." [(Citation omitted)]

424 U.S. at 774–75.

Furthermore, the Supreme Court held that:

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

***20** 424 U.S. at 767–68.

Accordingly, circuit courts have repeatedly upheld lower court decisions granting seniority relief as a remedy in Title VII cases. *Association Against Discrimination in Employment v. City of Bridgeport,* 647 F.2d 256, 287–88 (2d Cir.1981) (equalizing promotional seniority by delaying promotional eligibility of incumbents), *cert. denied,* 455 U.S. 988 (1982), *Air Line Stewards and Stewardesses Association, Local 550 v. Trans World Airlines, Inc.,* 630 F.2d 1164, 1169 (7th Cir.1980) (granting full retroactive seniority), *aff'd sub nom. Zipes v. Trans World Airlines, Inc.,* 455 U.S. 385, 401 (1982), *Moore,* 615 F.2d at 1272. In fact, circuit courts have reversed or vacated lower court decisions that denied seniority relief. *Equal Employment Opportunity Commission v. Rath Packing Company,* 787 F.2d 318, 335 (8th Cir.) (holding that denial of seniority relief constituted abuse of discretion), *cert. denied,* 479 U.S. 910 (1986). *But see Romasanta v. United Air Lines, Inc.,* 717 F.2d 1140, 1156 (7th Cir.1983) (upholding lower court decision not to grant seniority relief because of the "unusual adverse impact" on incumbent work force), *cert. denied,* 466 U.S. 944 (1984).

In order to remedy the State's allegedly discriminatory hiring practices, retroactive seniority is necessary to place the victims of alleged discrimination, "so far as possible, ... [in] a position where they would have been were it not for the [alleged] discrimination." *See Franks,* 424 U.S. at 764.

When evaluating whether proposed seniority relief is fair and workable, courts have considered several factors, including the number of victims of unlawful discrimination, the size of the incumbent workforce that will be affected, and the impact granting seniority relief would have on the incumbent workforce. *See Teamsters,* 431 U.S. at 376 n. 62; *Moore,* 615 F.2d at 1272.

Although the decree entered into by the parties provides for priority appointments to state, county and municipal jobs, only those persons appointed to state jobs are entitled to receive seniority relief. The maximum number of persons who could receive seniority relief under the decree is 219 out of the 454 priority appointments. *See* Pl. Br. Attachment 1. Two hundred sixteen of these state appointments will be spread out among state correctional facilities throughout the state according to the symbol number where the priority appointee originally applied.

These 216 priority state appointments can be compared to the total number of all incumbent correction officers in state facilities throughout New Jersey; as of June 30, 1991, the total number of correction officers in state adult institutions in New Jersey was 4,902. American Correctional Association, *1992 Directory: Juvenile & Adult Correctional Departments, Institutions, Agencies & Paroling Authorities* at xliv. Therefore, the impact of granting seniority relief to 216 victims of alleged discrimination on the incumbent State correction officer workforce will be minimal. *See Teamsters,* 431 U.S. at 376 n. 62, *Moore,* 615 F.2d at 1272.

***21** Moreover, none of the objectors who argue that their seniority rights will be affected have demonstrated to this Court that the specific retroactive seniority dates attached to the symbol number corresponding to their state facility (*see* Pl. Br. Attachment 1) will in fact infringe upon their seniority rights. Nonetheless, these incumbent employees typically object to awarding seniority relief under the decree on the ground that such an award violates their own vested rights.

According to the Supreme Court, however, expectations that employees develop under a seniority system can be overridden by statutes that advance important public policy interests, such as providing relief for past unlawful discrimination. *Franks,* 424 U .S. at 778–79, *see AT & T,* 556 F.2d at 179–80. Consequently, the incumbent employees' objection that the consent decree should not

be approved because the award of retroactive seniority impairs their vested rights is without merit.

Having evaluated the relevant factors: the relatively small number of identifiable victims of alleged discrimination who are entitled to state jobs; the dispersement of those appointments throughout the State; and the limited seniority relief, which is retroactive only to the extent set forth in the decree (*see* Pl. Br. Attachment 1); the Court concludes that the overall effect of granting victims seniority relief on the seniority of incumbent employees is fair and workable.

2. *The Creation of Special Eligibility Lists in the Consent Decree is Fair, Necessary and Workable*

As this Court has already noted, the guiding principle in fashioning appropriate relief under Title VII is that victims of allegedly unlawful discrimination should be "made whole". *E.g., Teamsters,* 431 U.S. at 375, *Franks,* 424 U.S. at 767–68. To this end, the consent decree not only provides for awards of retroactive seniority, but also establishes special eligibility lists from which priority appointments will be made.

A number of objectors have complained that they are already on an eligibility list and will have their appointments delayed as a result of the decree. Consequently, they claim that their rights are being violated.

Although a candidate for employment may feel a sense of entitlement when they are placed on an eligibility list, under New Jersey law, this feeling does not constitute a legally enforceable right. Instead, having one's name on an eligibility list is "nothing more than an inchoate right for preferential consideration ." *Schroder v. Kiss,* 74 N.J.Super. 229, 240 (App.Div.1962) (upholding decision not to offer position to person highest on eligibility list), *Lavitz v. Civil Service Commission of the State of New Jersey,* 94 N.J.Super. 260, 264 (App.Div.1967) (same). "The only benefit inuring to such a person is that so long as the eligible [sic] list remains in force, no appointment can be made except from that list." *Schroder,* 74 N.J.Super. at 240 (citations omitted).

***22** Therefore, placement on an eligibility list does not confer "a vested right to appointment". *Id., Nunan v. New Jersey Department of Personnel,* 244 N.J.Super. 494, 497–98 (App.Div.1990), *Lavitz,* 94 N.J.Super. at 264, *Commonwealth of Pennsylvania v. O'Neill,* 100 F.R.D. 354, 360 (E.D.Pa.1983), *aff'd,* 746 F.2d 1465 (3d Cir.1984) (upholding consent decree over objection of white applicants on existing eligibility lists, finding that persons on such lists cannot properly claim a vested right in employment, particularly where racially discriminatory impact of the tests resulting in the eligibility lists is established). For example, the Director of the Division of Civil Rights is authorized under New Jersey law to order the appointment of any individual who has been the subject of unlawful discrimination, which could override a person on an existing eligibility list. *Terry v. Mercer County Board of Chosen Freeholders,* 86 N.J. 141, 152 (1981), *see* N.J.S.A. § 10:5–17.

Furthermore, even if New Jersey law provided persons on existing eligibility lists with a vested right to receive an appointment, federal law under Title VII, which authorizes the creation of priority eligibility lists, would govern. *See Vulcan Pioneers, Inc. v. New Jersey Department of Civil Service,* 588 F.Supp. 727, 731 n. 4 (D.N.J.1984). Where state law prevents the execution of a federal consent decree under Title VII, the state law must fall. *Id.*

Once again, in deciding whether to approve the consent decree, this Court must determine whether the impact of this form of relief, the creation of priority eligibility lists for new hires, is fair and workable. Under the terms of the decree, a person on a priority eligibility list cannot "bump" any incumbent employee out of his or her position. Candidates on priority eligibility lists will be offered jobs only when there is a job vacancy.

While a maximum of 454 persons may receive priority appointments, they will be offered jobs for a number of different positions and in jurisdictions throughout New Jersey. Consequently, the effect of these priority appointments on existing candidates for appointment will be dispersed and not substantial. No persons on an existing eligibility list will be removed from that list. At most, those on current lists, whatever their race or gender, may experience a delay before they are appointed as a result of this decree. A delay in appointment, rather than an absolute bar, is lawful under Title VII. *See Sheet Metal Workers,* 478 U.S. at 481.

Against the interests of those persons whose names appear on existing eligibility lists, the Court must weigh the interests of those blacks and women who were allegedly discriminated against on the basis of their race or gender, who have been waiting a long time for the chance to be employed. On balance, the consent decree creates a structure for priority appointments that is both fair and workable.

2. *The Fairness Hearing Process, Including the Notification Procedures and the Availability of the Consent Decree for Review, Protected the Procedural Due Process Rights of All Individuals Potentially Affected by the Decree.*

***23** Attorney David Field, on behalf of his client Mr. David Crawford, objects that his client's procedural due

process rights were violated because Mr. Field did not receive enough information about the decree in order to determine how it affects him. Initially, Mr. Field does not specify what additional information that his client required. Moreover, there is no evidence that Mr. Field contacted counsel for the State or the United States with his questions or requests for additional information. Finally, complete copies of the decree, with appendices and subsequent consent orders, have been available for review at four New Jersey State Department of Personnel locations since February 1994.

Section 108 of the Civil Rights Act of 1991, which amended Title VII, sets forth procedures for facilitating prompt and orderly resolution of challenges to employment practices implementing litigated or consent judgments or orders. This provision is applicable to the fairness hearings that were held by this Court on November 17 and 18, 1994. *See Landgraf v. USI Film Products,* 511 U.S. 244, 114 S.Ct. 1483, 1505 (1994) (holding that where a change in the law is purely a procedural change of the sort that would ordinarily govern in litigation arising after its effective date and the procedural change is not associated with any substantive change in the law, "... the provision would presumably apply, regardless of when the underlying conduct occurred .)".

In relevant part, section 108 provides as follows:

> (n)(1)(A) Notwithstanding any other provision of law, and except as provided in paragraph (2), an employment practice that implements and is within the scope of a litigated or consent judgment or order that resolves a claim of employment discrimination under the Constitution or Federal civil rights laws may not be challenged under the circumstances described in subparagraph (B).
>
> (B) A practice described in subparagraph (A) may not be challenged in a claim under the Constitution or Federal civil rights laws—
>
> > (i) by a person who, prior to entry of judgment or order described in subparagraph (A), had—(I) actual notice of the proposed judgment or order sufficient to apprise such person that such judgment or order might adversely affect the interests and legal rights of such person and that an opportunity was available to present objections to such judgment or order by a future date certain; and (II) a reasonable opportunity to present objections to such judgment or order; or
> >
> > (ii) by a person whose interests were adequately represented by another person who had previously challenged the judgment or order on the same legal grounds and with a similar factual situation, unless there has been an intervening change in law or fact.

42 U.S.C. § 2000e–2(n)(1)(A).

Consistent with this provision, individuals potentially affected by the consent decree were notified of their right to file an objection. In May 1994, the State mailed Appendix O to the decree to approximately 51,000 persons, including individuals on current eligibility lists for positions into which priority appointments will be made; incumbents in those positions; unions in those jurisdictions; and the jurisdictions themselves. Additionally, all identifiable individuals who took the challenged examinations and who were subjected to the challenged appointment practices were notified, regardless of whether they are entitled to relief.

***24** Furthermore, the State posted, in several newspapers, Department of Personnel locations and job announcement locations, a notice summarizing the decree, explaining where complete copies of the decree could be viewed and setting forth the objection procedures. In addition to complete copies of the decree, sufficient copies of the text of the decree were also available at four New Jersey State Department of Personnel locations.

These notice procedures clearly meet the requirements of Section 108. More importantly, the first-class mailing of notices to 51,000 identifiable individuals, together with publication, and reasonable access to a complete copy of the consent decree for review satisfied procedural due process requirements. *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 176 (1974), *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 318 (1950), *Zimmer Paper Products, Inc. v. Berger & Montague,* 758 F.2d 86, 91 (3d Cir.1985).

Finally, the fairness hearing procedures, described in Section II .B.3., *supra,* provided a reasonable and adequate opportunity for individuals to register their objections with the Court, as required by Section 108 of the Civil Right Act of 1991.

Under these circumstances, the Court finds that objection filed on behalf of Mr. Crawford, asserting that his procedural due process rights were violated because he did not receive enough information is without merit.

3. *Black and Hispanic Objectors Claiming Entitlement to Relief Under the Decree as a Result of the State's Written Examinations*

Six hundred fifty-three blacks have filed objections, claiming entitlement to relief under the decree as a result of the written exams. According to the United States, two hundred fifty-five objectors in this group are already listed in Appendices B and N and, therefore, are eligible to establish their entitlement to relief under the decree by returning Appendix D and by taking and passing the

LECR written examination. Accordingly, three hundred ninety-eight black objectors are not included in Appendices B and N and, as a result, are not eligible for relief under the decree.

Eighteen black objectors complain about having to take another written exam to establish their eligibility for relief under the decree. Given that the written exam is the first step in the selection process, the parties reasonably concluded that retesting was necessary as a means for establishing that a given black candidate is minimally qualified to be a law enforcement officer before he or she receives an award of relief. The Court finds that this exam requirement is reasonable given that potential black candidates for relief will not be required to pass the remaining steps in the selection process in order to obtain relief.

Regarding the three hundred ninety-eight black objectors who are not included in Appendices B and N, these persons correctly object that they have not been identified as being entitled to relief under the decree.

***25** As stated in Section II.C.1., *supra,* the United States identified potential victims of the written exams by reviewing all available data and conducting statistical analyses comparing by race and ethnicity the number and percentage of test takers with the number and percentage of those who were appointed for each symbol number. The United States computed the "shortfalls" of blacks and Hispanics separately for each written exam symbol number and then added up the results for all symbol numbers combined. For those symbol numbers where shortfalls were found, there was an aggregate shortfall for blacks of 287, which was statistically significant, and an aggregate shortfall for Hispanics of 4, which was not. Statistically significant differences are differences that do not occur by chance, but are presumptively the result of discrimination.

The Court has already concluded that this method of identifying victims of the State's allegedly discriminatory hiring practices was reasonable. The three hundred ninety-eight black objectors who are not included in Appendices B and N were not identified as victims by this approved method. As a result, the Court will not refuse to enter the consent decree because it does not provide relief to these objectors.

Similarly, thirty-three Hispanic objectors insist that they are entitled to relief under the decree as a result of the written exams and object because Hispanics are not covered by the decree. The United States' approved method of analyzing the allegedly discriminatory impact of the States' hiring practices revealed that Hispanic candidates were appointed overall in about the numbers that one would expect given the percentage of Hispanics who sat for the written exams. As a result, the decree does not include any remedial relief specifically for Hispanics.

Since Hispanics were not identified as victims of discrimination, the Court finds that the objection of thirty-three Hispanics, arguing that the decree should not be approved because it does not award them any remedial relief, is without merit. Although Hispanics are not compensated under the decree, the general injunctive relief provisions of the decree ensure that they are protected from future discriminatory exams and other employment practices.

4. ***Female Objectors Claiming Entitlement to Relief as a Result of the State's Gender–Based Appointment Practices***

Two hundred seventeen women object that the decree is not fair because they are not included in Appendix I to the decree and thus are not entitled to receive monetary and/or job relief as a result of the State's gender-based appointment practices. In fact, twenty-five of these female objectors are listed in Appendix I to the decree.

In order to be included in Appendix I as a victim of the State's gender-restricted hiring practices who is entitled to relief under the decree, a woman must meet the eligibility criteria set forth in paragraph seventy-six of the decree. In short, any qualified female candidate who scored equal to or higher than the lowest-scoring appointed male candidate for a symbol number listed in Appendix J to the decree is entitled to individual relief. For those symbol numbers listed in Appendix J, women were bypassed for appointment because the State facility had a policy of hiring only male candidates; in other words, the hiring list was "male-only". Symbol numbers are excluded from Appendix J if they relate to a female State correctional facility, for which women were appointed in rank order on the certification list. Symbol numbers are also excluded from Appendix J if women were appointed in numbers equal to or greater than would be expected given the number of female candidates in the applicant pool.

***26** Based on the above eligibility criteria, approximately 450 women were identified and listed in Appendix I. The one hundred ninety-two female objectors who are not included in Appendix I simply do not meet these reasonable eligibility criteria; they are not actual victims of the State's gender-based hiring practices. Therefore, the objection of these two hundred seventeen women that the consent decree should not be approved because it does not award them any relief lacks merit.

Nine women also object to the fairness of the decree, alleging that they were denied a county correction officer position based on gender, which should entitled them to relief. These allegations are beyond the scope of the United States' Complaint and, therefore, are properly not

addressed by the consent decree. Women who believe that they have been discriminated against by county jurisdictions retain the right to pursue their own litigation, provided that their claims are not time-barred.

5. ***Female Objectors Claiming Entitlement to Relief as a Result of the State's PPT***

Seventy-one women object to the fairness of the decree, claiming entitlement to relief as a result of the police officer PPT. Of these seventy-one women, thirty-five are already listed on Appendix E or Appendix E–1 to the decree and have been notified of their entitlement to relief. The remaining thirty-six female objectors include women who represented in their objection that they took the police officer PPT but have failed to provide sufficient documentation to verify that they took and failed it. Many of these women who are not identified among those entitled to relief apparently did not take the police officer PPT, but took either a PPT for correction officer or a physical fitness test for police officer that was administered after the State discontinued using the PPT.

The eligibility criteria for PPT victims provided in paragraph fifty-nine of the decree produced forty-one women (listed in Appendix E to the decree) who are entitled to monetary and other remedial relief, including job offers. Three of these women are also entitled to retroactive seniority because they originally applied for State police officer jobs. Again, women who applied for police officer jobs in county and municipal jurisdictions do not receive retroactive seniority under the decree because local jurisdictions are not parties to this lawsuit.

Although the women listed in Appendix E and Appendix E–1 are similarly situated in that they failed the PPT, the decree awards them different relief. When this Court provisionally entered the decree in February, 1994, it embodied a compromise that provided relief only for PPT victims who had been interviewed as of March 14, 1991. The names of these women are listed in Appendix E. After provisional entry of the consent decree, the United States revisited the issue, and the parties agreed, as a good will gesture, to include more than 200 additional women listed in Appendix E–1 in the settlement for back pay purposes only. Consent Decree No. 19 (filed Oct. 26, 1994), Consent Decree No. 19 (filed Jan. 9, 1995), Consent Decree No. 22 (filed March 8, 1995).

***27** While the differences in the relief awarded to those women listed in Appendix E and Appendix E–1 appear somewhat arbitrary given that these women are similarly situated, this does not preclude this Court's approval of the consent decree. As this Court has already noted, the United States has broad discretion in determining whether to settle a Title VII action, so that:

> practical considerations, such as where limited public resources can be concentrated most effectively, may [legitimately] dictate conduct of a suit inimical to the immediate interests of the discriminatee, who presumably seeks full satisfaction of his individual claim regardless of the effect on other cases.

Bryan, 494 F.2d at 803 (emphasis added).

Twelve women filed objections, claiming that they are entitled to relief under the decree as a result of the sheriff officer PPT. Some argue that the decree does not specifically distinguish between the PPT for police officer and sheriff officer and, in fact, lists the sheriff officer job as one of the law enforcement positions covered by the decree. Since the same PPT was used to screen candidates for both law enforcement jobs, they claim coverage by the decree.

Despite the ambiguity raised by the general language of the decree at paragraph fifty-nine, there is no evidence of record that would support an inference that female applicants for sheriff were discriminated against by the PPT. The sheriff officer PPT was administered from 1987 until 1988, approximately one year. Insufficient data exists to conduct an analysis to determine if the sheriff officer PPT had a discriminatory adverse impact on female candidates. In addition, the cut-off passing score was set at 237 seconds, which was much more liberal than that 202 second cut-off score for the police officer PPT. Given the lack of data and the more liberal passing score, the Court concludes that it is entirely reasonable for the decree not to provide individual relief for women who failed the sheriff officer PPT. As a result, the Court will not withhold approval of the decree on this basis.

6. ***Other Reactions to the Proposed Settlement***

When evaluating the fairness of a consent decree, a district court should consider the reaction of affected individuals to a settlement. *Girsh,* 521 F.2d at 157. In addition to the groups of objectors already discussed above, other persons have filed objections to the fairness of the decree and, in doing so, have voiced their reactions to the settlement. Those objections are discussed below.

a. ***A potential conflict with an existing consent decree in an NAACP lawsuit***

Mr. James Derco objects that the decree will conflict with a prior consent decree filed in the case of *N.A.A.C.P. v. City of Clifton, et al.,* which created special eligibility lists for minorities to remedy the alleged effects of past

discrimination. In fact, the consent decree in this matter will not affect any eligibility lists for Clifton. Although Clifton is governed by State civil service laws, the relief accorded by the decree does not include priority job offers in that jurisdiction. *See* Pl. Br. Attachment 1. Consequently, no existing eligibility lists in Clifton are affected by this consent decree.

b. ***This lawsuit has delayed or prevented hiring***

***28** Twenty-four persons object that this lawsuit has caused a hiring freeze that has prevented them from being hired or has delayed their permanent appointment because they were either held on an existing certification list for a prolonged period, the eligibility list was suspended, or they were appointed provisionally without pension benefits or seniority rights. Consequently, these objectors seek permanent jobs, back pay, retroactive seniority and pension contributions.

These objections do not challenge the fairness of the consent decree. Rather, they are directed towards the State's decisions regarding the disposition of existing eligibility and certification lists. In response to the United States' filing of this lawsuit, the State voluntarily decided to either suspend or terminate existing eligibility lists generated from written exams that were challenged as unlawful in order to comply with federal law. Since nobody has the right to be hired from an eligibility list generated from unlawful selection criteria, these objectors do not have legally cognizable interests that are affected by the decree. *O'Neill,* 100 F.R.D. at 360, *see United States v. New Jersey,* 658 F.Supp. 9, 11–12 (D.N.J.1986), *aff'd sub nom., Vulcan Pioneers, Inc. v. New Jersey Department of Civil Service,* 832 F.2d 811 (3d Cir.1987) (promotion eligibility lists for fire fighter which were product of clearly unlawful civil service exams could not be used to make promotions). As a result, the adverse impact of the consent decree upon the interests claimed by these objectors do not preclude final entry of the consent decree.

c. ***Irrelevant objections***

Six hundred sixty-one persons have submitted objections raising issues that are not covered by this lawsuit and that do not challenge the fairness of the consent decree. Some objectors complain about unfair treatment on the job or wrongful discharge that is beyond the scope of this lawsuit. Many others complain about failing a medical exam, psychological exam, LECR written exam, physical fitness test, drug test, or oral interview for a law enforcement job or about being disqualified for other, non-prohibited reasons. The United States did not challenge any of these selection devices or reasons for disqualification in this lawsuit.

Still other objectors complain about being rejected for a non-law enforcement job, for a law enforcement job above an entry-level position, such as sergeant, or for a law enforcement job in a jurisdiction not covered by State civil service laws, which again are beyond the scope of this lawsuit. A small number of objectors complain that they were not hired before their eligibility list expired because a local jurisdiction appointed provisionally and retained officers of their own choosing. That issue also is beyond the scope of this lawsuit.

The United States also received a very small number of objections from people who state that they object to the fairness of the decree but do not state reasons for that objection. Similarly, four hundred sixty-one persons have filed objection cover sheets only which, in and of themselves, do not indicate whether or why the person objects to the decree. The Court is unable to comment on these submissions.

d. ***Objections to the wording of the decree***

***29** Fourteen persons object to the specifics of various provisions of the decree. Ms. Patricia August argues that the decree fails to give details regarding the actual money to be awarded, the number of persons receiving awards and the formula to be used in calculating specific monetary awards. Ms. Dorothy Hill, Ms. Sharlene Steed and Ms. Debra Wertz also object that the decree does not state the formula to determine the monetary amounts to be awarded to each victim. They also complain that the decree does not state the criteria to determine eligibility for relief. To the contrary, paragraphs 37, 59 and 76 of the decree set forth the specific criteria to determine eligibility for relief for each group of victims.

Mr. Tony Page suggests that the decree should be amended to provide a uniform formula for distributing monetary awards to persons eligible for relief.

The decree provides the criteria for determining who shall be entitled to receive individual relief, including back pay and/or a priority job offer and associated job benefits. Until all claim forms from eligible candidates are received and reviewed by the parties, it is impossible to determine who will receive individual relief. The test results for those black candidates who have taken the LECR written exam on the special administration date are not yet available, and the State must administer the exam to one more group of black candidates. Until the number of qualified blacks is determined, it is impossible to give any details regarding the actual money to be awarded to each person under the decree.

Once this information is obtained, the decree obligates the United States to recommend to the Court all remedial

awards, including back pay and job offers. The United States has represented to the Court that it intends to use a formula to distribute the money fairly, but that it is still too early in the decree implementation process to have a final formula in place. When this Court holds a hearing in the summer of 1995 to review the recommended awards of individual relief, the United States will disclose fully its methodology for computing back pay. At that hearing, those individuals who receive offers of relief will also have an opportunity to object to the specific relief offered. In short, the fairness of the specific individual relief awards is not properly before the Court at this time.

Ms. Laura Bryant objects that the decree does not cover women who were bypassed for appointment to a State correction officer recruit job as far back as 1986. She passed the written exam for that position in 1982. Ms. Grace Stribling makes the same objection. She passed the written exam for State correction officer recruit in 1981 or 1982.

As this Court has already indicated, the United States and the State reached a reasonable compromise on the settlement of this matter, including the time periods within which individual relief is awarded, based on all available data. Insufficient information exists for the Court to conclude that the State's gender-based hiring practices discriminated against women dating back to the early 1980s. Accordingly, the decree does not provide relief for women who took State correction officer written exams during that time period and may have been bypassed for appointment based on gender. Those women have always had the right to pursue their own Title VII actions. Thus, the Court cannot conclude that the failure to provide relief to such women under the consent decree is unreasonable.

***30** Ms. Natalie Greene complains that all candidates eligible for monetary relief should be eligible regardless of whether they accept or decline a job offer. The decree does provide that monetary relief shall be awarded independent of the decision to accept a priority job offer. Decree at ¶¶ 45, 63, 81. Ms. Greene further objects that the remedial relief for black victims under the decree does not accrue earlier than March 1, 1988. Decree at ¶ 28.

As previously stated, the settlement reflects a reasoned compromise between the parties, taking into account the risks and costs of litigation, the uncertainty of determining when any one black candidate would have been deemed qualified and hired, and the desirability of resolving this matter sooner as opposed to later. Given that the United States has sought to achieve broad public goals in bringing this Title VII action, its decision to compromise on this retroactive date for benefits is reasonable and lawful under Title VII, despite the potential conflict with the particular interests of a particular individual. *See Bryan,* 494 F.2d at 803.

Ms. Greene also argues that individuals should receive pension contributions upon being hired and not after successfully completing the working test period.[8] The parties agreed to require that persons receiving pension benefits successfully complete the working test or probationary period to ensure that anyone who fails to complete the test period does not receive a windfall in benefits.

8 Ms. Shawn Marie Small complains that it is not fair that persons who are entitled to receive retroactive pension credits should have to wait one year "after all priority appointments are made" before receiving credits. The decree provides that an individual must successfully complete his or her working probationary period before receiving pension contributions. Decree at ¶¶ 50, 67, 86. There is no requirement in the decree that "all priority appointments be made" before benefits are received.

Mr. Donnell Joyce, Mr. Todd Richardson and Mr. John Thomas, Jr. object that the decree requires persons to file an actionable complaint with the EEOC in order to be eligible for relief. There is no such requirement in the decree. The decree provides that persons who either meet the eligibility criteria *or* who file actionable complaints challenging the exams or practices are eligible for relief. *See, e.g.,* Decree at ¶ 59. This language in the decree is meant to capture any additional persons with pending EEOC charges who may or may not have satisfied the eligibility criteria under the decree. Ms. Rosemary Huntbey and Ms. Debra Sheyka, for example, were later added to Appendix E to the decree who even though they were not interviewed by the Department of Justice prior to March 14, 1991, because they filed timely EEOC charges challenging the police officer PPT.

Ms. Maryann Lynch suggests amending the language of the decree to address in more detail who is eligible for relief. She offers the following language: the decree should provide relief to any person who was not "offered or was delayed in [being offered or] obtaining one of the entry-level law enforcement positions named in the United States' Amended Complaint" (bracketed language supplied by Ms. Lynch).

The Court is unclear exactly what Ms. Lynch is proposing and how it differs from the present language in the decree in terms of results. To the extent that she is complaining that the decree does not provide relief to persons who were delayed in being offered a job as a result of the exams or practices challenged in this lawsuit, however, the Court has already concluded that the existing language of the decree provides relief to all identifiable victims of the alleged discrimination.

***31** Mr. Johnnie Matthews objects that the decree covers only the appointment of entry-level law enforcement officers and not discrimination related to promotion. The United States did not challenge promotional practices in this lawsuit. Moreover, it would be neither feasible nor reasonable for the decree to provide those victims of discrimination who become newly appointed candidates immediate promotion from an entry-level law enforcement position to a more senior position, without requiring that they first demonstrate the required skills and qualifications needed for the promoted position. *See Albemarle Paper,* 422 U.S. at 419 (quoting *Wicker v. Hoppock,* 6 Wall. 94, 99 (1867) (" '[t]he injured party is to be placed, *as near as may be,* in the situation he would have occupied if the wrong had not been committed" ') (emphasis added)). Therefore, the failure of the consent decree to address the State's promotional practices does not render the decree unfair and unreasonable.

Ms. Alisa Simmons objects that the decree does not provide "a solution for applicants who will take future exams," "a solution for making applicants aware of their placement on lists" during the selection process and "a procedure for future hiring practices." The purpose of the decree is to achieve the objectives of Title VII: to end discrimination and to compensate those injured by the discrimination. It is beyond the purpose of the decree and the responsibility of the United States to administer exams for the State, to require that the State use certain selection devices or to set up procedures for future hiring. The general injunctive provisions of the decree are designed to ensure that the State's selection devices comply with federal law in the future.

III. CONCLUSION

Having reviewed the objections submitted by those persons who are affected or potentially affected by the consent decree, the Court concludes that none of the objections prevent this Court from approving the decree. The record in this action clearly demonstrates that the terms of the consent decree are lawful, constitutional, reasonable, equitable and consistent with the public interest. Furthermore, the decree fulfills the goals of the United States in bringing this Title VII suit in order to protect public rights.

Therefore, the Court finally approves the consent decree and orders the Clerk of the Court to enter it as a final resolution of the claims asserted by the United States. The State and the United States may now begin the identification and distribution of remedial relief to victims of the State's allegedly discriminatory past practices.

JUDGMENT ORDER

The consent decree entered into by the parties, provisionally entered by this Court on February 17, 1994, having come before the Court for approval and final entry; and

The Court having considered the submissions of counsel, as well as oral argument, heard at the fairness hearing, held on November 17 and 18, 1994; and

***32** The Court having reviewed the objections that were timely submitted by potentially affected members of the public, as well as the arguments of those persons who chose to speak at the fairness hearing, held on November 17 and 18; and

For the reasons set forth in the Court's Opinion filed this day; and

For good cause shown;

It is on this 14th day of March, 1995, hereby ORDERED as follows:

1. The Court approves the Consent Decree entered into by the parties and provisionally entered by this Court on February 17, 1994, as a fair, adequate, and reasonable resolution of all claims raised by the United States in its Complaint; and

2. The Clerk of the Court shall enter the Consent Decree as a final judgment in these consolidated cases.

Parallel Citations

75 Fair Empl.Prac.Cas. (BNA) 1602