

1977 WL 15366 (E.D.N.Y.)
United States District Court, E.D. New York.

WHITE, ET AL.
v.
NASSAU COUNTY POLICE DEPARTMENT, ET
AL.

No. 76 C 1869. | Jan. 11, 1977.

Attorneys and Law Firms

Jemera Rone (Blank, Goodman, Rone & Stanley), New York, N.Y., and William D. Wells, New York, N.Y., for plaintiffs.

William Gitelman, County Attorney for Nassau County, by John F. Picciano, for defendants.

Opinion

GEORGE C. PRATT, District Judge: -

*1 In this sex discrimination action, plaintiffs have moved for a preliminary injunction seeking to prevent the Nassau County Police Department during the pendency of this action from hiring any additional police officers. Particularly, plaintiffs seek to prevent the department from carrying out its plan of hiring approximately 100 new police officers from the eligibility list certified by defendant Nassau County Civil Service Commission based upon a 1974 written examination, and from processing those officers through the Police Academy.

[PARTIES]

Three plaintiffs brought this action on behalf of themselves and also as a class action. Plaintiffs' motion for certification of the class is returnable January 27, 1977. All three plaintiffs are women. Plaintiff White is presently a detective on the Nassau County police force on which she has served since 1968. Plaintiff Wilson served on the Nassau County police force from July 1968 to July 1976 when she resigned and moved to Colorado, prior to the commencement of this action. Plaintiff Calamia took a 1972 Civil Service examination for the position of policewoman, but has never been appointed to the police force. She presently lives in Maryland.

Joined as defendants in the action are the Nassau County Police Department, its Commissioner, Daniel Guido, the County Executive, the Board of Supervisors and its

members, the Nassau County Civil Service Commission and its members, the Nassau County Patrolmen's Benevolent Association, and the Municipal Police Training Council (MPTC) and its members. The MPTC is a state body which promulgates minimum hiring criteria for police departments throughout the state. Only the county defendants have taken a position on the motion.

Plaintiffs' preliminary injunction motion is dated December 23, 1976 and was filed on December 27, 1976. After the motion was filed, defendants agreed to postpone any hiring from the current certified list based on the 1974 examination until January 28, 1977. An evidentiary hearing was held on December 31, 1976 at which time the depositions of Police Commissioner Guido and of Adele Leonard on behalf of the Nassau County Civil Service Commission were placed in evidence along with 29 plaintiffs' exhibits and ten deposition exhibits. In addition, testimony was taken from Commissioner Guido, Mrs. Leonard, and from plaintiffs' expert witness, Dr. Georgette Bennett-Sandler.

After hearing the evidence and the arguments of the parties, the court consulted the counsel in an effort to determine whether the issues of the motion could not be resolved by agreement in light of the proof which had been presented. When the parties agreed to explore possibilities for resolution of the preliminary injunction motion, the matter was adjourned to 4:30 P.M. on January 5th.

[EXHIBITS]

On the adjourned date, counsel appeared and reported that while they had agreed on nearly all points, they had been unable to reach agreement with respect to the proper weight of a dummy to be used on the "dummy-carry" test. Absent such agreement the court indicated that a decision would be made on the motion as submitted. At that point, additional exhibits were offered by both parties. In order to complete the record the court directed that the hearing be reopened for the purpose of receiving in evidence the following exhibits, all of which were, for convenience and at the court's direction, marked as court's exhibits:

*2 Court's Exhibit E New York State Police Physical Performance Test

Court's Exhibit F Job Analysis of the position of New York State Trooper

Court's Exhibit G New York City Physical Fitness Standards for patrolman and policewoman

Court's Exhibit H MPTC Physical Fitness Screening Test,

together with suggested agility tests as supplements to the MPTC standards

Court's Exhibit I 32 photographs illustrating three of the suggested agility tests described in Court's Exhibit H

There was no court reporter at the January 5th hearing; by this decision, the foregoing exhibits are officially made a part of the record.

Based on the testimony and exhibits presented, the court finds and concludes as hereinafter set forth.

Prior to 1966 no women were hired by the Nassau County Police Department. Between 1966 and 1974 approximately 40 women were hired by the Department. In 1972 the beginning classification of officers was "patrolman" for men and "policewoman" for women, but the two job classifications differed both in hiring standards and in work assignments.

In 1972, two written exams were given for patrolman and one for policewoman. The policewoman examination was not followed up with medical and physical tests, and subsequently the list established thereby was discontinued with no women being hired on the basis of the examination. The two exams for patrolman were processed through the medical and physical tests, and a total of approximately 470 patrolmen were hired from the two lists. For both of the 1972 patrolman exams there was a height requirement of 5'8" and a weight requirement of 140 lbs. The announced height-weight requirement for the 1972 policewoman exam was 5'2" and 102 lbs.

[1974 EXAMINATION]

Beginning in January, 1974, by state law, the positions of patrolman and policewoman were abolished, and a single position of "police officer" was established which could be filled by both men and women. A new written exam was given in February, 1974, with the medical and physical tests given in 1975 for those who passed the 1974 written exam. A height-weight standard applicable equally to men and women was established at 5'8" and 140 lbs. Thus far, no new police officers have been hired from the 1974 exam. In July of 1976 the Civil Service Commission promulgated a list of eligible candidates for police officer based on the 1974 exam and the subsequent medical-physical tests. That list was certified by the Civil Service Commission in December, 1976.

The approximately 100 police officers which the county wishes to appoint at the present time would be appointed from the December, 1976 certified list, but the list

includes no women. It was made up, following Civil Service procedures, by ascertaining the approximate number of police officers needed and then fixing an examination grade level, including on the list all candidates who scored at the level or above. In this case, the level chosen was an examination score of 88. Although there were approximately 30 women who scored 88 or above on the examination, none of them was able to meet all of the medical-physical standards.

The three standards which effectively eliminated women from the certified list were the minimum height of 5'8", the minimum weight of 140 lbs., and the "dummy-carry" test which required that a 150 lb. dummy be carried up and down a flight of stairs, presumably to simulate the removal of an injured person from a home or commercial establishment.

[CONTENTION]

Plaintiffs seek to enjoin any appointments made on the basis of the certified list because, they claim, its height, weight, and physical tests constitute a form of sex discrimination. They argue that the challenged tests are not related to the job of police officer and since their practical effect is to exclude virtually all women from eligibility for the position, their use should be enjoined. Plaintiffs claim that unless use of the current certified list is enjoined, irreparable harm will be inflicted because approximately 100 vacancies will have been filled from a discriminatory list, thereby depriving women of the opportunity to be hired as part of the new class of police officers. Plaintiffs also urge that any use of the 1974 exam should be enjoined because its announced requirements of 5'8" and 140 pounds had a "chilling effect" on many potential women candidates.

Defendants admit that the standards used by the county do "have a disproportionate impact on women," but, the defendants contend, "these standards are necessary to the safe and efficient operation of the Police Department." Defendants further state that "these minimum height, weight and physical agility standards are necessary prerequisites to successful performance as a police officer." Defendants' memorandum of law p. 16.

Ordinarily, a preliminary injunction is designed to preserve the status quo while a lawsuit is pending so as to give all parties and the court sufficient time to thoroughly explore the legal and factual questions raised by the litigation. Whether or not a preliminary injunction should issue frequently involves a delicate balancing of the merits of the action insofar as they can be ascertained on a preliminary basis, against the impact such an injunction would have upon the parties, and in some cases upon the

public as a whole.

If the preliminary injunction requested by plaintiffs were to be granted, then as a practical matter the county could not hire any additional police officers until this action is concluded. Under the Civil Service Law, the hiring process involves, as previously indicated, the taking of a written exam plus the administration of medical and physical tests. This hiring process has become so complex in recent years that the county has abandoned giving its own exams and uses instead civil service examinations prepared by the State Civil Service Commission.

The county has already been notified by the state commission that the earliest possible date for the next police officer examination would be October, 1977. Assuming that date, the earliest that a new list could be certified, based upon that examination and different medical-physical standards, would be approximately one year from now.

[REDUCTION IN FORCE]

Commissioner Guido testified, however, and the court finds his testimony credible, that due to budgetary restrictions no new police officers have been hired since early 1974. During that period the department lost approximately 250 officers through retirement, death and similar reasons. The effective use of approximately 200 additional officers has been lost through contract provisions which have cut down on the availability of existing officers. Moreover, the police department will lose 150 more officers in 1977.

In connection with the 1977 budget, Commissioner Guido realized he should have approximately 900 new officers, but he asked for an increase of only 400 over the existing complement of 3,711 officers. The Board of Supervisors, in its wisdom, authorized only that the present level of 3,711 be maintained, and approved the hiring of sufficient new officers to meet losses below that level. In anticipation of 1977's retirements and other losses, Commissioner Guido has directed that approximately 100 new officers be hired in January, to commence their Police Academy training in early February, so that they would be ready to begin active duty in June of 1977. Commissioner Guido testified that the effect of his failure to hire the new officers at this time would be "catastrophic" and would create a reduction in services which would be detrimental to overall police effectiveness in the county.

The focal points of this dispute are the county's current height, weight, and physical standards, particularly the 150 lb. dummy-carry test. Very little testimony was given

at the hearing with respect to the dummy-carry test, although that was the point which seemed to prevent settlement of the motion. The New York State Police do not require that a 150 lb. dummy be carried, but, only that it be dragged from behind the wheel of an automobile. In New York City, the dummy-carry test calls for a 70 lb. dummy to be carried *down* two flights of stairs. Clearly the Nassau County version of the dummy test is substantially more demanding than that of New York State of New York City.

[CONCLUSION]

With respect to the height and weight standards, the evidence before me on this preliminary injunction motion fails to establish that a minimum height of 5'8" and a minimum weight of 140 lbs. are sufficiently related to the job of police officer in Nassau County to permit their continued use.

1. The MPTC has adopted much lower height-weight requirements: minimum height of 4'8" for women and 5'2" for men, with weights graduated according to height.
2. Various studies which have been made around the country have failed to establish that height and weight are necessarily related to the police officer's job.
3. Commissioner Guido, himself, acknowledged that he knew of no objective evidence which would show the job relatedness of the county's present minimum height and weight standards, although he did testify that he had a "feeling" that in some circumstances the height and weight of a police officer might be directly related to how he could perform a particular duty. He candidly acknowledged, however, that this was no more than a feeling, and he could not support it with any empirical data or any studies which had been made of the problem.
4. In 1976, 13 women police officers, who had originally been hired by the county as policewomen subject to the 5'2" height requirement, were appointed by Commissioner Guido as detectives. The Commissioner praised the work of these women and found them to be in all respects competent, effective members of his department.
5. Approximately 85% of the work of the police department is not directly related to law enforcement activities. The members of the police department perform a wide variety of functions, and the opportunities for supervisors within the department to assign personnel based upon their particular abilities are such as to create considerable flexibility in the department's operations.

[NO IRREPARABLE HARM]

On the evidence as a whole, and as a result of the county's own favorable experience with women officers who do not meet the current height, weight, and physical standards, particularly when considered in the light of the administrative flexibility available in assigning duties within the department, the court concludes that no irreparable harm would be done to the Nassau County Police Department if during the pendency of this action some persons were to be hired who did not meet the present height, weight, and physical agility requirements. The department claims it "needs" new people immediately; it also claims it "needs" to retain the height, weight, and physical tests currently in effect. Both "needs", however, are relative, and the evidence presented does not permit the court to make the fine judgments necessary for balancing those "needs" here.

Such a determination can only be made by persons having a detailed knowledge of the present staffing operation of the police department. Only the people who are responsible for the police operations in the county can accurately weigh the many competing considerations, and determine at what point the "need" for new people outweighs the "need" to maintain current height, weight, and physical standards. On the present record we cannot determine how many people would qualify under the lesser standards described below, what special talents they might have, what opportunities there may be for assignment to jobs which are less subject to strenuous physical demands, exactly how pressing is the need for new police officers, and what balance should be struck between the need for new officers and the natural desire to have the most qualified police possible serving on the county police force.

Accordingly, the court is disposing of the preliminary injunction motion so as to leave the final balancing of interests in the hands of the persons responsible for the hiring and operation of the county police department. The motion for a preliminary injunction against the hiring of any new police officers based upon the Civil Service list which was certified in December of 1976 is granted, on condition, however, that defendants may hire new police officers based upon the 1974 written examination, provided that new medical-physical tests be offered and administered to those eligible candidates who request reprocessing, and that the new tests be based upon the height, weight, and physical agility standards and tests of the Municipal Police Training Council supplemented by the following tests:

1. Tire change: remove and replace tire of patrol vehicle, taking replacement tire from trunk. No restriction as to

position or location of feet.

2. Lift injured person into ambulance: lift an ambulance trundle with another police employee into an ambulance and remove the trundle from the ambulance. A 150 lb. dummy will be on the trundle to simulate an injured person.

3. Simulated pursuit run: applicant must participate in a simulated pursuit encompassing a run of approximately 300 yards, scaling a six foot chain link fence, a run of another 300 yards and scaling of a six foot chain link fence.

4. Simulated carry of a 112 ½ lb. injured person: applicant must carry a 112 ½ lb. dummy up and down a flight of stairs to simulate the carrying of an injured person from a home or commercial establishment. The dummy shall simulate a human body to the extent of having arms, torso and legs. In the course of the dummy carry, the dummy's legs may touch the ground, but it may not be dragged.

If the county elects to proceed on the basis of the reduced requirements outlined above, the defendant Civil Service Commission is directed to reprocess the eligible candidates under the 1974 written examination in accordance with this decision and to certify a new list based upon the results of that reprocessing.

Plaintiffs' "chilling effect" argument is rejected. To invalidate the entire 1974 written exam might unreasonably interfere with the department's need for new officers. Plaintiffs have also urged that the new opportunities for being hired on the basis of reduced standards should be made available to women only. The court rejects this argument and directs that the new standards, if they are used by the county in conjunction with the 1974 examination list, shall be applied without discrimination as between men and women candidates.

The court's decision in this matter is made only after balancing a multitude of competing considerations. One of the significant elements in the court's decision is the temporary, limited effect of the injunction granted. A new examination will be given in the fall of 1977. Hopefully, by that time, additional empirical data, studies and other evidence will be available by which the department can develop a set of height, weight, and physical standards which will fairly incorporate current notions of equal employment opportunity.

Another significant element in this decision is the need for a prompt decision on which the police department can base its manpower plans for the coming year.

It is not intended that this decision by the court have any precedential weight whatsoever in terms of resolving the

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ultimate issues of this case when they are presented for determination upon a full record with ample time for careful briefing by the parties and deliberation by the court.

SO ORDERED.

Parallel Citations

15 Fair Empl.Prac.Cas. (BNA) 261