In The

UNITED STATES COURT OF APPEALS

For the Eighth Circuit

No. 71-1181

GERALD CARTER, et al.,
Plaintiffs-Appellees,

and

MINNEAPOLIS COMMISSION ON HUMAN RELATIONS,
Plaintiff-Intervenor-Appellee,

vs.

HUGH GALLAGHER, et al.,
Defendants-Appellants.

Appeal from the United States District Court,
District of Minnesota, Fourth Division

BRIEF OF APPELLEE MINNEAPOLIS COMMISSION ON HUMAN RELATIONS

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I N D E X

TABLE OF AUTHORITIES

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

The Minneapolis Commission on Human Relations (hereinafter referred to as "the Commission") adopts the Statement of Issues set forth in the Brief of the plaintiffs.

STATEMENT OF THE CASE

The Commission also adopts the Statement of the Case set forth in plaintiffs' Brief, with the following additional

observations.

Without even an attempt at a finding-by-finding analysis, defendants make the bare assertion that the evidence does not justify 28 of the 146 findings of fact by the Court below (Appellants' Brief, page 10). Plaintiffs' Brief demonstrates, we believe, that the Court had ample ground for each of its findings. However, even taking defendants' assertion at face value, we emphasize that defendants do not dispute the following findings of fact.

> 19. There are at present no Blacks, Indian-Americans, or Mexican-Americans employed with the Minneapolis Fire Department. . . . (A. page 349)
>
> 21. One Black man was employed with the fire department up until 1962, when he retired as a district chief. This man was relatively light complected. Chief Hall said of him: "I personally -- he's a good friend of mine. I call him a Negro. I don't know whether he would admit to it, but I can personally say he is a Negro." . . . (A. page 349).
>
> 31. The four past fire fighter examinations (Exhibits 32-35), given in the years 1957 through 1968, are all representative of the type of written examination which can have a discriminatory effect against minority persons. These examinations utilize a formal English vocabulary

and assumed a background in fire fighting practices and procedures. It is highly probable that they were in fact culturally biased against minority applicants, and thus served not only to eliminate minority applicants but also to deter minority applicants from applying. (A. page 351)

32. No effort was ever made prior to the current examination period to analyze the fire fighter examinations to determine whether they were culturally biased or whether they were valid predictive instruments for use in selecting fire fighters. . . . (A. page 351)

60. During the three years oral examinations were used, a total of 326 persons took the examination. Three Black men took the oral examinations; one in 1950 and two in 1952. The only person to fail on an oral examination was Matt Little, a Black man who took the oral examination in 1950. He was the only applicant out of 115 to fail that examination in 1950. . . . (A. page 359)

61. Mr. Little received grades of 65%, 70% and 70% from the three examiners. He was assigned an average grade of 68.33% by the Civil Service Commission. His

grade of 68.33% was significantly lower than any other oral examination grade given in 1950, or in the years 1952 and 1955. . . . (A. page 359)

63. In the course of an investigation of a charge of racial discrimination with respect to Mr. Little's grade by the former Minneapolis Fair Employment Practice Commission, the examiner who scored Mr. Little 65% made comments to the effect that he didn't think it would be good for only one Black man to join the department, that he thought Mr. Little's service in the medical corps during the war meant that he was carrying slop buckets, and that he was surprised that Mr. Little was not a flashy dresser. Despite his denials of any attempt to discriminate against Mr. Little, the evidence points directly to the fact that Mr. Little failed the oral examination because of his race. . . . (A. pages 359 and 360)

71. There is no indication that the high school education requirement was an essential and necessary qualification for the position of fire fighter. . . . (A. page 362)

In addition to the undisputed findings of fact set forth above, we wish to emphasize the following testimony, all of it given by defendants.

The defendant Hugh M. Gallagher, the president of the Civil Service Commission, testified:

> Q. Do you believe there is any affirmative action that this Commission needs to take now to overcome the effects of past discrimination in connection with employment in the Fire Department?
>
> A. I wouldn't say just the Fire Department, sir. I would say all departments within the City of Minneapolis. . . .
>
> Q. You agree that some action needs to be taken, is that correct?
>
> A. That's correct. . . .
>
> Q. I gather you haven't determined what affirmative action needs to be taken in the Fire Department? You just know that something has to be done?
>
> A. That's correct. We haven't come to a determination on it yet. (A. pages 338-39)

The defendant Elizabeth A. M. White, Supervisor of Personal Selection for the Civil Service Commission, admitted

that "the practices of the past have most probably discriminated against minorities," (A. page 296), although she stated she knew of no incident of anyone intentionally discriminating. Mrs. White also testified that the Fire Department has a negative image in the Black and Indian communities of Minneapolis and agreed that "it's going to take some relatively dramatic action to overcome that image" (A. page 303).

Three of the defendants have expressed the opinion that a fourth defendant, Kenneth W. Hall, Chief of the Minneapolis Fire Department, has had a negative influence on efforts to implement fair employment practices in the Fire Department. Referring to Chief Hall's Memorandum of May 15, 1970, in which he characterized efforts to hire more Black employees in the Fire Department as "a drive . . . to lower all entrance standards and requirements for fire fighter . . .," the defendant Gleason Glover testified:

> Q. Did you ever see a copy of that Memorandum?
>
> . . .
>
> A. Well, I don't recall the first time I saw it, but I had a heck of a lot to say about it . . . I felt that this was a planned attempt on the part of Chief Hall to discredit what was going on in a positive way, in terms of trying to bring minorities into the Fire Department.

Q. Did you in fact suggest that it evidenced a racist attitude?

A. Yes, I did, if you want to put it that way. (A. page 111-13)

Again referring to the Memorandum of May 15, Commissioner Glover directed that he be placed on record as "individually reprimanding Chief Hall for issuing such a communication to his personnel which through misstatement of fact, distortion, and innuendo sets the climate for discouraging qualified minority persons from applying for the forthcoming Fire Fighter Examination" (A. page 113). The defendants John Proctor and Mrs. White agreed that "a major obstacle" to their efforts to recruit minority fire fighters has been Chief Hall's actions "which whether by design or not, has diminished our efforts." Both complained of what they characterized as an "unwillingness" on Chief Hall's part "to make the personnel of the Fire Department representative of the population." (Exhibit No. 71; A. page 289)

Defendants neither dispute nor address themselves to the facts set forth above in their Brief before this Court. In our opinion, those facts, together with 110 additional undisputed findings of fact, are sufficient to demonstrate the validity of the Order from which defendants have appealed. Nevertheless, it is perhaps appropriate to respond directly to four points defendants do make in their statement of the case.

Defendants assert that plaintiffs' expert witness in the field of testing had examined the 1961 Fire Fighter Examination and "said he just didn't know if it was culturally biased or not" (Appellants' Brief, page 7). In making that statement, defendants ignore Dr. Wood's testimony concerning the 1963 examination.

> Q. Would you be able to say -- would it be your assumption on the basis of a test that asks for the meaning of such words as incipient, infallible, inaccessible, vigilant, contentious, meticulous, volition, anticipatory, per diem, and brevity, that such an examination would more likely than not have a racial cultural bias built into it against particularly Chicanos, Blacks, and American Indians?
>
> A. Yes, without any question. (A. page 94)

Dr. Wood also testified that "someone who had, for whatever reasons, friendship, relationship, or just because they were a neighbor, or something, exposure to information about fire fighting would have a very considerable advantage, in my judgment, on this examination." (Id.)

Defendants assert that "witness Glover felt that they should have a high school or G.E.D. before becoming a permanent

fire fighter" (Appellants' Brief, pages 7-8). In fact, the defendant Glover testified exactly to the contrary, stating, "I didn't feel that it was necessary for a person to really have a high school education or G.E.D. at the time that he took the exam . . ." (A. page 117).

Defendants assert that, despite the statement on brochures they prepared that an applicant for a position with the Fire Department must have a satisfactory arrest record, "the witnesses all testified that the concern was only with convictions of crimes or misdemeanors" (Appellants' Brief, page 8). That assertion is simply inaccurate. Chief Hall stated:

> A year or so ago I remember we had one particular fellow, he had quite a record, and after he had taken the examination, he was on the list and ready to be appointed, he was arrested again for stealing money. . . . So I asked to have this man turned down and he was turned down. (A. page 177)

Chief Hall went on to testify that he believes an applicant's arrest record should be checked. (A. page 178).

Finally, we wish to respond to defendants' references to the position of the Commission on final argument (Appellants' Brief, pages 9-10). Defendants quote extensively from our

discussion of relief to insure the hiring of enough qualified Blacks to overcome the effects of past discrimination. They quote two of the reasons that we gave for preferring alternating relief to an Order requiring 20 Black persons to be hired first. They omitted the third reason:

> The third reason is that we are not really sure that 20 is enough and we would hate to see it end up that there are 20 minority firemen this year and next year there is 21 or 22, and the year after that that there is 23 or 24. For that reason we tend to prefer the alternating type of relief, but either is certain permissible in this Court and appropriate for this Court to grant. (A. pages 340-41)

The Commission supports the Order of the Court below, in all respects. We deem that Order to be entirely appropriate, fashioned carefully to meet the precise needs demonstrated by the evidence before the Court.

As to the issue to which defendants address themselves most vigorously in their Brief, and on which they attempt to show a split between plaintiffs and the Commission, the Commission is in full accord with the position of the Court, the plaintiffs, and the defendant Gleason Glover, as demonstrated in this

excerpt from his testimony:

> Q. Is it your position that in order to bring about more than the most token sort of integration in the Fire Department that it's necessary to suspend at least temporarily the veterans preference and the charter provisions concerning the order in which you have to take people?
>
> A. Right . . . I think that on a temporary basis, until such time as the Fire Department, which is supported by tax dollars, reflects to a degree -- at least a minimum degree, the minority population of this City, that we should, you know, suspend state statutes and charter provisions that prohibit this from happening. (A. page 145)

ARGUMENT

The Commission adopts the arguments set forth by the plaintiffs in their Brief.

We do not believe that it is necessary to respond to defendants' contention that 42 U.S.C. Secs. 1981 and 1983 do not apply to the defendants herein. Defendants' position amounts to

a claim that the federal courts of this country are without power to enforce the Fourteenth Amendment.

Defendants' most vigorous argument is that the Court below erred in ordering a minority preference, claiming that the Order was in clear violation of the Minneapolis City Charter and the Minnesota Veterans Preference Act. We address the remainder of our remarks to that point.

The proper starting point for an analysis of what is an appropriate decree in a racial discrimination case is that,

> the 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. Louisiana vs. United States, 380 U.S. 145, 154 (1965).

Starting from this point of reference, the Court of Appeals for the Eighth Circuit has concluded specifically, "the remedial power of the Federal Courts under the 14th Amendment is not limited by state law. Louisiana vs. U.S., 380 U.S. 145, 154 . . ." Haney vs. County Board of Education of Sevier County, 429 F.2d 364, 368 (1970). The Sevier litigation involved several areas of conflict between the need to overcome the effects of past discrimination and strict enforcement of otherwise Constitutional state law and administrative regulations. The most dramatic conflict,

presented in an earlier appeal of the case at 410 F.2d 920 (1969), was the requirement of Arkansas statutory law that school district annexation or consolidation be approved only by a majority vote of the electorate. Despite this statutory requirement, the Court had no difficulty reversing the District Court for failing to require the annexation or consolidation of racially separate school districts.

In carrying out their duty to fashion relief that is effective in overcoming the results of past discrimination, other Federal Courts have frequently found it necessary to suspend otherwise valid state laws or state administrative regulations. Perhaps the most prominent line of cases requiring suspension of state law is the series of cases requiring "freeze" orders in connection with the administration of literacy tests for voter registration in the South. See United States vs. Duke, 332 F.2d 759 (C.A. 5, 1964) and United States vs. State of Mississippi, 339 F.2d 679 (C.A. 5, 1964). In the latter case, the Court of Appeals reversed a judgment of the United States District Court for the Southern District of Mississippi for failing to suspend state statutes. The Court of Appeals directed a freeze order and stated,

> the freeze order which will have to be entered by the trial court contemplates the temporary suspension of the state's statutes regulating registration unless the state should see fit

to cause reregistration of all the voters of this county . . . 339 F.2d 679, 684.

The other most common type of case involving suspension of state law or administrative regulations concerns the use of "vouchers" as to residency or good moral character. In United States vs. Logue, 334 F.2d 290 (C.A. 5, 1965) the Court considered a requirement that all applicants for registration in Wilcox County, Alabama, supply, as part of their application form, a section entitled "Examination and Supporting Witness".

> This part of the questionnaire form is not to be filled out and signed by the applicant himself, but must be completed by someone who is already a registered voter in the county. The supporting witness must affirm that he is acquainted with the applicant, knows that the applicant is a bona fide resident of the county, and is aware of no reason why the applicant would be disqualified from registering. This requirement is apparently designed to expedite the determination that the applicant has met the residency requirements and that he is of good character. It is undisputed that this voucher requirement, as promulgated, applies to all applicants for registration, both White and Negro. 344 F.2d 290, 291.

Although over 70% of the adults in Wilcox County were Black, no Black was registered to vote at the time of the hearing before the District Court. Blacks who attempted to register could not obtain a registered voter as a voucher. Although the voucher requirement was applied to Whites, as well as Blacks, and although there was no evidence of discriminatory intent in adopting the requirement, the Court of Appeals held that the District Court "erred in refusing to enjoin the use of the supporting witness requirement as part of the registration process in Wilcox County", 344 F.2d 290, 291. The Court held that the United States was entitled to a preliminary injunction against the use of the supporting witness requirement, at least for a time.

A similar case is Meredith vs. Fair, 298 F.2d 696 (C.A. 5, 1962), cert. denied, 371 U.S. 828 (1962). James Meredith, who became the first Black person to attend the University of Mississippi, was rejected for registration at the University in part because he did not have certificates of good moral character from six university alumni. Even though the university's regulations required such certificates for every entering student, the Court directed the suspension of that requirement in order to overcome the effects of past discrimination.

Finally, there is at least one case in which a Federal District Court has expressly ordered a temporary suspension of

Civil Service listing requirements in order to overcome the effects of past discrimination, United States vs. Frazer, 317 F.Supp. 1079 (M.D.Ala. 1970). In that action, the United States sued the officials of the State of Alabama responsible for administrating the merit system for state employment. In Alabama, the merit system involved the use of examinations similar to Minneapolis' Civil Service exams and required that appointments be made from among the top three individuals on the appropriate eligibility list. After finding that the state used this system persistently to discriminate against Black applicants for state employment, the Court directed three major types of relief. It eliminated the state's discretion to reject qualified Black persons who are ahead of White persons on the appropriate eligibility list. It also directed the assignment to the first available jobs of 62 Black persons, regardless of whether they were ahead of or behind White persons on the appropriate eligibility list. Third, it ordered that Black persons who had been classified as laboratory aids be given preference in job assignments over all White persons who had been classified as laboratory technicians, regardless of the relative positions of the applicants on the appropriate eligibility list.

Article 6 of the Federal Constitution provides that the Constitution and all federal statutes are the "Supreme Law of the Land." State constitutional or statutory provisions and municipal charter or ordinance provisions that stand in the way

of full vindication of federal constitutional or statutory rights must, at least temporarily, be laid aside. The evidence before the Court below established the existence of past discrimination and the need to overcome it. The Court had not only the power, but the duty to suspend temporarily the Minneapolis Charter and Minnesota Veterans Preference Act provisions concerning order of appointments.

CONCLUSION

For the reasons stated above and in plaintiffs' Brief, the Order of the District Court should be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Brief upon the other parties and upon amicus curiae by mailing copies thereof, postage prepaid, to their attorneys of record at the following addresses:

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