1973 WL 123
United States District Court, N.D. Ohio, Eastern Division.

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

No. C 72-1088 | January 16, 1973

Opinion

THOMAS, D. J.

***1** John T. Porter and Edward R. Hargett, for themselves and as representatives of a class, move the court for an order permitting them to intervene as parties defendant for the purpose of taking an appeal from said order to the United States Court of Appeals for the Sixth Circuit.

In their supporting memorandum it is stated:

> The intervention applicants are all nonblack, non-hispanic applicants for patrolman positions in the Cleveland Police Department who passed the July 15, 1972 civil service examination and who, but for this Court's Order of December 21, 1972, would receive appointments as patrolmen. However, as a result of the racial preferences ordered by this Court, they will be deprived of said appointments.

Even in the absence of this court's order it cannot be said that anyone who passed the Civil Service examination, even those receiving higher grades than movants Porter and Hargett, would receive appointments as patrolmen. As pointed out in this court's memorandum of December 21, 1972, the Safety Director has discretionary powers in making the appointments. The Charter of the City of Cleveland, Section 131, provides:

> The appointing authority shall appoint to such position one of the three persons whose names are so certified.

Thus, it is evident that the movants do not have any vested right to secure appointments as patrolmen "but for this Court's order of December 21, 1972."

This court's memorandum of December 21, 1972, explains that,

> [B]ecause it has not yet determined that the tests included in the examination are job related, the defendants have failed to overcome the prima facie showing that the tests have a racially discriminatory impact.

Under these circumstances, it seems manifest that the eligibility list derived from these tests does not vest those who passed these tests with any right to "receive appointments as patrolmen." The use of the eligibility list prescribed by this court's order seeks to avoid the possibly racially discriminatory impact of the tests. Yet because no applicant who passed the examination has any certainty of appointment, the use of the list ordered by this court cannot operate to deprive such person of any vested right.

Though the movants arguably have sufficient interest to intervene, provided they are not already adequately represented, Rule 24(a)(2), Federal Rules of Civil Procedure, it is concluded that present intervenors Fraternal Order of Police have adequately represented the movants and will adequately represent the movants should the Fraternal Order of Police prosecute an appeal. The adequacy of this representation of movants is underscored by the fact, revealed at today's hearing, that counsel for the movants also represent the Fraternal Order of Police.

Finally, this court does not believe that any putative rights of the intervenors to the relief sought, even if intervention were granted, would warrant this court in granting the stay of this court's order as movants request.

***2** Bearing in mind the putative nature of the movants' interest it does not appear likely that their interests are sufficient to warrant affirmative relief, in the event of an appeal, should they otherwise prevail upon the merits.

Moreover, the equities against staying the court's order are too great. The harm to the plaintiffs, and the City of Cleveland and its citizens, far outweighs any individual harm to the movants, or the class they claim to represent, that might but not necessarily will result if the court's order of December 21, 1972 remains in effect.

Intervenors' motion to intervene and their separate motion

for a stay of the court's order of December 21, 1972, is denied.

It Is So Ordered.

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