

NOT FOR PUBLICATION

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF NEW JERSEY and NEW
JERSEY CIVIL SERVICE COMMISSION,

Defendants.

Civil No. 2: 10-0091 (KSH)
(CLW)

Opinion

Katharine S. Hayden, U.S.D.J.

The United States through the Department of Justice (DOJ) has asked this Court to extend a consent decree reached with the State of New Jersey, and specifically the New Jersey Civil Service Commission. The focus of the DOJ's application is the statewide examination, more fully explained below, that is administered from time to time to police officers seeking to be promoted to the rank of sergeant ("police sergeant examination," "examination"). Back in 2010, the Civil Rights Division of the DOJ sued the Commission alleging that the process for promoting police officers to sergeant position had a disparate impact on African-American and Hispanic candidates, in violation of Title VII of the Civil Rights Act of 1964 (section 707), 42 U.S.C. § 2000e-6. The parties finalized a consent decree in 2012 that put down detailed conditions and requirements for future examinations.

The decree also carefully structured the interplay of promoting already-eligible candidates and future-eligible candidates, to achieve maximum fairness.

By its terms, the consent decree expired in September 2016, after the Commission, with the involvement of the DOJ, had administered two police sergeant examinations. Based on what both parties agree are certain unsatisfactory results of the second administration of the exam, which was held in January 2016 and scored in October 2016, the DOJ seeks to extend provisions of the consent decree that authorize it to oversee the composition and administration of a third examination. For the following reasons, the Court denies such relief.

I. SERGEANT PROMOTION PROCESS AND DISPARATE IMPACT

The DOJ commenced this action in 2010 against the State of New Jersey and the New Jersey Civil Service Commission (“the Commission”). After the parties reached a settlement, the Court issued two opinions, first approving the terms of the consent decree (D.E. 71) and later denying an application by the DOJ to change the method of promoting priority candidates (D.E. 96).

New Jersey has enacted a well-defined method for promoting officers to the rank of sergeant that is within the purview of the Commission. In addition to other duties, the Commission oversees “the selection procedures for promotion to the rank of Police Sergeant that are used by hundreds of New Jersey cities and counties that participate in the New Jersey Civil Service system.” (*Id.* at 2.) This authority is derived both by statute, N.J.S.A. 11A:-1 *et seq.*, and by the mandate of the New Jersey Constitution, which states that:

Appointments and promotions in the civil service of the State, and of such political subdivisions as may be provided by law, shall be made according to the merit and fitness to be ascertained, as far as practicable, by examination, which, as far as practicable, shall be competitive.

N.J. Const. art. VII, §1, ¶2.

The Commission formulates, administers, and scores the examination. Candidates receive a pass/fail score. All test takers who receive a passing score are then eligible for promotion and placed on a police sergeant eligibility list, which ranks the candidates according to examination score (80%) and seniority (20%). The three highest-ranking candidates are certified, and then local jurisdictions have discretion to promote any of those three. N.J.S.A. 11A:4-8. As candidates are promoted, the next highest-ranking candidate from the eligibility list is certified and added to the pool, a process known as the “Rule of Three.” N.J.S.A. 11A:4-8.

Before the consent decree, the sergeant’s examination consisted of multiple-choice questions. From 2000 to 2008, 89% of white candidates passed the examination, compared to 73% of African-American candidates and 77% of Hispanic candidates. (Compl., ¶¶ 14, 16.) The DOJ alleged in its lawsuit that African-Americans and Hispanics “were under-represented in the higher score ranges and over-represented in the lower score ranges.” (*Id.* ¶¶ 19, 21.) The underrepresentation led to 20% of African-American and 22% of Hispanic candidates being certified from the eligibility lists as contrasted with 35% of white candidates. (*Id.* ¶ 23.) From those certified, 18% of white candidates were promoted compared with 9% of African-American and 13% of Hispanic candidates. (*Id.*) As asserted in the complaint, the

“pass/fail use of the NJCSC Police Sergeant written examination” both had a disparate impact on African-American and Hispanic candidates and was not “job related for the Police Sergeant position [nor] consistent with business necessity.” (*Id.* ¶¶ 24-26.)

II. POST-CONSENT DECREE EXAMINATIONS

As part of the consent decree, the DOJ and the Commission agreed to work together to develop and administer an examination that would reduce the adverse effects on African-American and Hispanic candidates. (D.E. 49 (“Second Amended Consent Decree”).) Towards that end, the DOJ offered Dr. David Jones, its test-development expert, to assist with formulating the examination. (D.E. 100 Ex. B (“Letter from DOJ to New Jersey”).) The DOJ proposed supplementing the multiple-choice questions with a subjective component, envisioned as either an interview with the candidate or assessing responses to a video scenario. (*Id.*) The parties agreed that the Commission would keep decision-making authority over testing for knowledge, skills, and abilities (“KSAs”) through multiple-choice questions, and that the DOJ would help develop the new, subjective component. (Second Amended Consent Decree ¶ 80(h).) The consent decree gave DOJ significant input into the first two administrations of the revised examination. (*Id.* at ¶¶ 79, 80.) After that, the decree gives the DOJ a limited role for two more administrations of the examination, whereby the Commission provides baseline data as to each. Thereafter, the Commission is not required to involve the DOJ or its expert in the development, contents, or administration of future examinations. (*Id.* at ¶ 82.)

A. 2013 Examination (First Administration)

The DOJ initially proposed an oral interview for the subjective component. (D.E. 100 Ex. B (“Letter dated July 31, 2012, from DOJ to New Jersey”).) However, because the examination had not been administered since 2010 when this lawsuit was filed, the anticipated large number of test-takers made an oral interview administratively impossible, and eventually the parties settled on a video-based component instead. Under this formulation, candidates were asked to respond to a video scenario through a series of free response, checklist, and forced-choice questions. (D.E. 100 Ex. D (“Declaration of Dr. David P. Jones”) at ¶ 5.) Although the DOJ initially wanted to create original videos, time constraints forced the parties to use stock videos that had been prepared for training purposes. (D.E. 100 (“DOJ Brief in Support of Motion”) at 7.) The examination still contained multiple-choice questions, which made up 55 % of the examination. (*Id.*)

The first examination was administered on June 1, 2013, and scored by the Commission in 2014. Both the DOJ and the Commission agree that the first administration of the examination was a success and that the results minimized the adverse impact on African-American and Hispanic candidates.¹

B. 2016 Examination (Second Administration)

The parties collaborated on a second examination, which was ultimately approved by the DOJ. The video component consisted of wholly original content.

¹ These representations were made to the Court at oral argument and are implicit in the parties’ papers.

According to Dr. Jones, “the video scenarios covered police sergeant KSAs more comprehensively than they were covered in the video-based component of the First Administration. The length and content of these scenarios also were tailored to the police sergeant job.” (Declaration of Dr. David P. Jones at ¶ 6.)

When the Commission and the DOJ examined the results of the second examination, abnormalities became apparent. (DOJ Brief in Support of Motion at 8; Declaration of Dr. David P. Jones at ¶ 7.) Of concern, “a disproportionate number of African-American and Hispanic candidates, as compared to white candidates, did not provide a response to the last ten test items of the multiple-choice component.” (*Id.*) Although it was not intended to be a timed test, some candidates were unable to complete the exam within the allotted time. (*Id.* at ¶ 8.) According to Dr. Jones, “research findings show[] that ‘timed exams,’ where candidate scores are influenced in noteworthy ways by their being able to complete the exam versus being able to answer all exam questions under little time pressure, typically result in more substantial differences based on race and national origin in the scores obtained by candidates.” (*Id.*) Since the Commission scores an incomplete response as incorrect, a failure to finish these last questions negatively affected scores and created a disparate impact on African-American and Hispanic candidates. (*Id.* at 9.) As a result, the Commission had two options: (1) retain the scores and tolerate the disparate impact; or (2) drop that portion of the exam, which would adversely affect the Commission’s ability to assess the candidates’ skills that those questions were designed to measure.

In response to this unexpected and undesirable outcome, the DOJ filed the within motion, seeking to have the same oversight and input into a third administration of the examination as it had over the last two. The Commission opposes, arguing that the objectionable result of the second administration of the examination was a “minor and readily rectified timing issue.” (D.E. 103 (“New Jersey Opposition Brief”) at 1.) The Court held oral argument on June 15, 2017.

III. STANDARD

The DOJ’s application speaks in terms of “extending” the consent decree, which raises the question of whether the Court would be extending or actually modifying the terms of the decree. Under the law, different standards apply. Pursuant to this decree, either party may request an extension upon a showing of “good cause.” (Second Amended Consent Decree at ¶ 90.) By contrast, a court may modify a consent decree “only upon making a finding that conditions have changed so that the basic purpose of the original consent decree has been thwarted.” *Holland v. N.J. Dep’t of Corr.*, 246 F. 3d 267, 282 (3d Cir. 2001) (citing *Chrysler Corp. v. United States*, 316 U.S. 556, 562 (1942) (quotations omitted)).

A court has broad equitable powers to enforce a consent decree and fashion modification remedies. *See Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 381 n. 6 (1992) (stating that a court’s modification power is “is long-established, broad, and flexible”); *Holland*, 246 F. 3d at 282 (recognizing that “remedial power contained within the modification and compliance enforcement powers can be used to extend a consent decree”). In *Holland*, the Third Circuit provided guidance for district courts

in exercising their authority to modify or extend terms. 246 F. 3d 267. In that case, the DOJ argued that the New Jersey Department of Corrections had not complied with a consent decree and asked for a longer period during which the agency's obligations under the decree would continue. The district court added ten months before the decree would expire, reasoning that the terms of the decree and the court's inherent power conferred authority for its ruling. *Id.* at 270. The Third Circuit reversed, finding that the district court did not make specific findings to support its ruling, and, as well, that pushing out the expiration date modified the decree, and required a showing there was a change of circumstances. *Id.* at 271. The court acknowledged that the district judge had limited power to extend certain provisions, but found that a "court should interpret a consent decree as written and should not impose terms when the parties did not agree to those terms." *Id.* at 281.

IV. DISCUSSION

The consent decree remains in effect until the latest of three dates: three years from the entry of the decree; the parties' fulfillment of their respective obligations; or the Commission's administration of the second police sergeant examination in accordance with paragraph 80. (Second Amended Consent Decree ¶ 89.) Factually, all of those events have happened. Granting the DOJ's motion would confer authority in the DOJ over the formulation and administration of three sergeant's examinations when the decree calls for only two.

The DOJ argues that because of the unexpected results of the second administration, it "has not had, in practice, the opportunity to review the State's

police sergeant selection procedure for the requisite period envisioned” and that a third examination, subject to substantial DOJ involvement, is necessary to ensure the relief sought by the consent decree. (DOJ Brief in Support of Motion at 13-14.) But there are no provisions in the decree conferring additional authority in the DOJ based on how the first two administrations turned out. The Court does not agree that the relief DOJ wants involves “extending” the decree, and will not apply the standard of “good cause.” Instead, as taught in *Holland*, in order to prevail the DOJ must show that circumstances have sufficiently changed “so that the basic purpose of the original consent decree has been thwarted.” *Holland*, 246 F. 3d at 282.

The DOJ argues that circumstances did change.

The Decree was intended to provide the United States with the opportunity to see the police sergeant selection procedure in effect for more than one administration to determine if it complies with Title VII and if its results could reliably be replicated in future administrations. However, because of the unanticipated differences between the First Administration and Second Administration that evolved during the course of test development, and the consequences of the multiple-choice component’s unplanned operation as a timed test, the United States has not had, in practice, the opportunity to review the State’s police sergeant selection procedure for the requisite period envisioned by the Parties.

(DOJ Brief in Support of Motion at 13-14.)

The consent decree is designed to achieve three purposes: (1) ensure that the State no longer violates Title VII in promotions to police sergeant; (2) create a new selection procedure; and (3) provide back pay and priority promotions with retroactive seniority to those who were denied a promotion to police sergeant due to the

challenged employment practices. (Second Amended Consent Decree ¶ 12.) Objectives two and three have been accomplished. The DOJ argues that the first objective may not have been achieved even though the parties fully complied with their respective obligations and authority because the DOJ does not have a sufficient sample size – which it apparently defines as two successful administrations of the revised examination – to determine if the Commission’s new selection procedure cures a disparate impact.

The DOJ helped develop, and had no objections to, the second examination, which used original videos developed with the DOJ’s and Dr. Jones’s input. (Declaration of Dr. David P. Jones at ¶ 6.) The final multiple-choice questions that raised this controversy were part of the written component, which was developed under the oversight of the Commission, and did not require the DOJ’s approval. The DOJ is not charging the Commission with foul play; by its own characterization, the results of the second administration were “unexpected.”

As a practical matter, achieving equity takes time, and this consent decree is a limited tool designed to implement changes in specific and measured ways. Significantly, the parties prepared for the long-term challenge of complying with Title VII by agreeing that the DOJ would have a defined, if limited role in the third and fourth examinations and continue to evaluate the base-line data while lessening its involvement. The Court agrees with the Commission’s position that the inadvertent time constraint can be “readily rectified” by giving candidates more time to complete

the examination.² Indeed, New Jersey has expressed that intent in its papers and at oral argument. (New Jersey Opposition Brief at 11.)

Applying the guidance in *Holland*, the Court finds that the parties have fulfilled their defined obligations, and that the consent decree would be substantially modified were it, in effect, revived and the DOJ endowed with an additional measure of authority over the administration of yet another exam. This goes well beyond what the decree envisioned. The Commission has pointed out that granting the DOJ's application would significantly delay the pending administration of the exam this fall, when counsel indicated thousands of candidates are expected to take it, which suggests that the good is in danger of being pushed aside in the search for the perfect. Above all, there is no showing that the basic purpose of the decree was "thwarted." Rather, the second administration exposed a flaw in how much time was needed to complete the written portion of the exam – the very portion that always remained under the direct authority of the Commission.

V. CONCLUSION

For the foregoing reasons, the DOJ's motion is denied. An appropriate order will be entered.

Dated: June 30, 2017

/s/ Katharine S. Hayden
Katharine S. Hayden, U.S.D.J.

² In its sur-reply, the Commission stated: "The State does not need the DOJ's participation in a third administration of the Police Sergeant examination to correct this timing issue. In fact, Dr. Jones states in his declaration at paragraph 13 that increasing the amount of time to complete the exam is an option to correct any adverse impact seen in the second administration." (D.E. 108 at 2.)