

For Opinion See [448 F.Supp.2d 397](#), [2005 WL 1949477](#)

United States District Court, E.D. New York.

UNITED STATES OF AMERICA, Plaintiff,

John Brennan, James G. Ahearn, and Kurt Brunkhorst, Plaintiffs/Intervenors,
v.

NEW YORK CITY BOARD OF EDUCATION; City of New York; William J. Diamond, Commissioner, New York City Department of Citywide Administrative Services (in his official capacity); New York City Department of Citywide Administrative Services, Defendants.

Civil Action No. 96-0374 (FB) (RL).
2000.

Complaint in Intervention

Plaintiffs/intervenors John Brennan, James G. Ahearn, and Kurt G. Brunkhorst, by way of Complaint in Intervention, allege as follows:

JURISDICTION

This is an action arising under the Constitution and laws of the United States. Jurisdiction is vested in this Court pursuant to [28 U.S.C. § 1331](#) and [1343\(3\)](#).

ALLEGATIONS OF FACT

1. Each of plaintiffs/intervenors is employed as a Custodian/Custodian Engineer by defendant New York City Board of Education.
2. Each of plaintiffs/intervenors is a Caucasian male.
3. The Complaint filed by plaintiff United States of America ("United States") alleges, among other things, that defendants have engaged in practices relating to the recruitment, hiring, and promotion of Custodians and Custodian Engineers in the New York City school system that have discriminated against blacks, Hispanics, Asians, and women.
4. The Answer filed by plaintiffs/intervenors' employer, defendant New York City Board of Education, among others, denies all allegations of wrongful discrimination.
5. This Court has held no hearings as to the matters alleged in the complaint, and this Court has made no findings as to the truthfulness of the matters alleged in the Complaint.
6. The New York City school system operated by defendants contains many positions for Custodians and Custodian Engineers, with compensation depending upon the size

of the school to which a particular Custodian or Custodian Engineer is assigned. Assignment to more highly paid positions at larger schools is determined primarily by the seniority dates (derived from examination scores) of the applicants for the position.

7. On or about February 11, 1999, the United States and defendants entered into a certain Settlement Agreement, which, subject to Court approval, would resolve all allegations of wrongful discrimination alleged in the Complaint filed by the United States.

8. The Settlement Agreement provides that defendants shall award to a class of persons referred to as "Offerees", and including only black, Hispanic, Asian, and female persons, positions as permanent Custodians or Custodian Engineers, with retroactive seniority dates that are, in many cases, equal to or ahead of the seniority dates presently enjoyed by plaintiffs/intervenors.

9. The seniority dates enjoyed by plaintiffs/intervenors were attained by them as a result of their performance in competitive, job related, nondiscriminatory examinations referred to in the Complaint of the United States as "Challenged Examinations".

10. Persons referred to as "Offerees" in the Settlement Agreement either did not take any of the Challenged Examinations, or received lower scores on such examinations than were received by each of plaintiffs/intervenors, or took the examinations at a later date than plaintiffs/intervenors, in all cases entitling such persons to lower seniority than that enjoyed by plaintiffs/intervenors.

11. At least some of the retroactive seniority dates proposed to be awarded to the "Offerees" are ahead of the dates presently enjoyed by plaintiffs/intervenors. To the extent that occurs, retroactive seniority dates awarded under the Settlement Agreement will damage plaintiffs/intervenors by delaying or preventing their promotion to more senior, and higher paying, positions as Custodians/ Custodian Engineers.

12. The Settlement Agreement does not require defendants to award back pay or money damages to any persons. The sole burden and expense of the Settlement Agreement, if approved by the Court and implemented by the parties, will be borne by plaintiffs/intervenors and persons similarly situated.

13. Defendants have failed to protect the interests of plaintiffs/intervenors in this litigation.

14. In addition to filing this Complaint, Plaintiffs/intervenors have filed written objections to the Settlement Agreement.

15. The proposed retroactive grant of seniority in the Settlement Agreement, to the extent it is based solely on an individual's race or ethnicity, constitutes illegal race discrimination.

16. Defendants have no compelling governmental interest to justify the use of race. Even if they had such an interest, the proposed retroactive grant of seniority in the Settlement Agreement is not narrowly tailored to meet that interest.

17. The proposed Settlement Agreement constitutes illegal employment discrimination against plaintiffs/intervenors on account of their race, in violation of of [42 U.S.C. § 2000e-2](#); deprives plaintiffs/intervenors of equal protection of the laws and the enjoyment of their civil rights as citizens of the United States, in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and [42 U.S.C. §§ 1981](#) and [1983](#); and constitutes a conspiracy to deprive plaintiffs/ intervenors of their civil rights under [42 U.S.C. § 1985\(3\)](#).

WHEREFORE plaintiffs/intervenors demand judgment declaring that the "Settlement Agreement" is illegal, null, and void; temporarily and permanently enjoining plaintiff and defendants from providing a race based retroactive grant of seniority or any other impermissibly discriminatory remedy to the "Offerees"; and awarding plaintiffs/intervenors their attorneys' fees, pursuant to [42 U.S.C. § 1988](#).

UNITED STATES OF AMERICA, Plaintiff, John Brennan, James G. Ahearn, and Kurt Brunkhorst, Plaintiffs/Intervenors, v. NEW YORK CITY BOARD OF EDUCATION; City of New York; William J. Diamond, Commissioner, New York City Department of Citywide Administrative Services (in his official capacity); New York City Department of Citywide Administrative Services, Defendants.

2000 WL 34498101 (E.D.N.Y.)

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