Nos. 87-1614, 87-1639, 87-1668

IN THE

Supreme Court of the United States

OCTOBER TERM 1988

JOHN W. MARTIN, *et al.*,
Petitioners,
v.
ROBERT K. WILKS, *et al.*,
Respondents.

RICHARD ARRINGTON, JR., *et al.*,
Petitioners,
v.
ROBERT K. WILKS, *et al.*,
Respondents.

THE PERSONNEL BOARD OF JEFFERSON COUNTY, *et al.*,
Petitioners,
v.
ROBERT K. WILKS, *et al.*,
Respondents.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOINT APPENDIX
Volume III

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CERTIORARI GRANTED JUNE 20, 1988

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From *United States v. Jefferson County* and the cases consolidated therewith.

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* These items are not formally in the record, and are included over the objection of Respondents' Wilks, *et al.* They are included by Petitioners on the basis that the district court on at least three occasions took judicial notice of the record in *United States v. Jefferson County*, the litigation that resulted in the consent decrees. *See* J.A. 54, 111, 186.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ENSLEY BRANCH OF THE N.A.A.C.P., *Plaintiff,* v. GEORGE SEIBELS, *et al.*, *Defendants.*	CIVIL ACTION NO. CA 74-Z-12-S
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LUCY WALKER, *et al.*, *Plaintiffs,* v. JEFFERSON COUNTY HOME, *et al.*, *Defendants.*	CIVIL ACTION NO. CA 76-M-2047-S

January 10, 1977

Memorandum of Opinion

POINTER, D.J.: Since 1945 the Personnel Board of Jefferson County has been charged under state law with the duty of periodically administering examinations to "fairly test the

relative capacity and fitness" of applicants for positions with local governmental agencies.[1] 1940 Ala. Code Appx. §§ 645, *et seq.* (Recomp. 1958). Those who pass are ranked on an eligibility list in the order of their exam scores.[2] As vacancies occur, the three persons then at the top of the list are certified to the employing agency for final selection, the appointments being probationary in nature for the first twelve months.[3] An applicant's name may be removed from the eligibility list after having three times been certified and refused employment.

This litigation challenges the employment practices of the governmental agencies as discriminatory on the basis of race, color, and sex, and includes an attack upon the examinations administered by the Personnel Board. Presently at issue, following a trial held December 20-22, 1976, are the tests currently used to screen applicants for positions as police officers, deputy sheriffs,[4] and firefighters.[5]

An attack upon the police and firefighters exams is certainly understandable when one considers that, although the relevant labor pool is over 25% black, yet on June 30, 1976, only 56 (or 6.5%) of the 860 police officers were black and only 9 (or 1.4%) of the 630 firefighters were black. These statistics may, however, be misleading for purposes of this lawsuit because they include the historical results of hiring practices employed long before passage of the Equal Employment Op-

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1 Fourteen separate county and municipal employers are covered by the law. Cities with a population of under 5,000 are excluded.

2 With multiple vacancies, the number of persons certified is two more than the number of vacancies to be filled.

3 Not presently at issue are requirements (such as age or education) which may be imposed as conditions to taking an examination, nor are specifications (such as residence within Jefferson County) which may give preference to certain applicants.

4 Unless otherwise noted, reference to police officers in the balance of this opinion will also refer to deputy sheriffs.

5 Under F.R.Civ.P. Rule 42, the four actions were consolidated with respect to challenges to Personnel Board tests and a separate trial was scheduled respecting the attacks on the Policeman 10-C, Firefighter 20-B, and Office Worker 30-B tests. At the trial the plaintiffs indicated that the attack on the Office Worker 30-B test was dropped for lack of evidence of adverse impact and that any attack on the 10-C and 20-B tests based on sex was likewise dropped for lack of evidence.

portunity Act of 1972 or, indeed, before utilization of the tests under scrutiny at this time.

The principal focus should rather be upon the events of more recent years, with particular attention upon practices subsequent to March 24, 1972, when Title VII of the Civil Rights Act of 1964 was made applicable to the Personnel Board and the governmental agencies which it serves. Likewise, information as to the general labor pool in the area is of only marginal importance when one has, as we do, extensive data as to actual applicants for positions and there is no evidence that minority applications have been depressed by prior employment practices.

Adoption of the Current Tests

In late 1965, following an independent study as to why no blacks were then employed as police officers in the City of Birmingham, the Personnel Board decided to replace its police and firefighter exams with tests developed by the Public Personnel Association, now known as the International Personnel Management Association. IPMA tests were being widely used in other parts of the country and were considered by the Board as superior to other tests then available. The change was part of a multi-faceted program intended to increase black participation in governmental positions. (See Appendix C to X-342). Policeman Test 10-C and Firefighter Test 20-B have been in use since August 18, 1967, and October 23, 1968, respectively, as the screening examinations for these positions under the state-mandated selection procedure,[6] although at times other tests have been administered for experimental purposes or for validation studies. Since April 10, 1974, a modified scoring key (based upon only 80 of the 120 test items) has been employed in grading the 10-C test for purposes of the eligibility list. This modification was made at the recommendation of qualified independent consultants who, after study, concluded that the scoring change would increase validity of the test for black applicants.

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6 The 10-C and 20-B tests were adopted by the Board after initially experimenting, commencing in January 1966, with alternate forms of the IPMA tests.

Intent

It is clear that the Personnel Board, in performing its functions as an employment agency for the various local governments, has not intentionally discriminated against blacks. Indeed, at least since 1965, the Board has not only sought to provide non-discriminatory opportunities for black applicants, but also attempted, within the limits of its statutory duties, to rectify the racial imbalances in local government employment. Some mention of these aims and efforts is appropriate.

It was the Board's hope that adoption of the tests now in issue would benefit black applicants, while nevertheless providing a fair "test of the relative capacity and fitness" of all applicants, as required by state law. Immediately, a study was undertaken to ascertain whether the IPMA policeman test, although a paper and pencil test, would correlate positively and significantly with a widely used non-verbal performance test of general intelligence, the Revised Beta Examination— and it did. As successful applicants were employed by the city of Birmingham, were trained at the police academy, and entered performance of their duties, information was incorporated into the Board's on-going validation studies—which, while lacking sufficient blacks in the sample (only 6 in the 10-C sample) to permit full analysis, were considered by the Board as justifying further usage of the 10-C.[7] These studies are presented by the Board not as satisfying the requirements of the EEOC or Department of Justice guidelines on tests, but rather as indicating its efforts to see that its examinations were fair predictors of job performance even at a time when it was not subject to the provisions of Title VII. As already noted, when, in 1974, it was advised by independent consultants that a modification of the scoring of the 10-C exam would improve the validity for black applicants, it immediately put that change into effect.

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7 The Board's studies resulted in selection of the 10-C form because of its significant and positive correlation with a greater number of the selected criteria measures than did the alternate IPMA form. The study indicated a significant and positive correlation between 10-C scores and training academy average (as well as several course grades in the academy) and between the training academy average and the officers' latest efficiency ratings.

Since 1965 the Board, with the cooperation of local civic groups and some of the employing agencies, has been actively engaged in recruitment efforts to attract black applicants. In 1966 it began assuming the $10.00 medical examination costs for newly hired persons; and in 1967 it was successful in sponsoring legislation to eliminate the $1.50 examination fee previously required and to eliminate the priority previously given applicants who resided within an employing agency's jurisdiction.[8] It has experimented with a lowering of the raw score used to measure a "passing" grade on the exams where it could justify that approach on the basis of "supply" and "demand".

In short, in its selection, administration and use of the 10-C and 20-B tests, there has been no design or intent on the part of the Board to discriminate on the basis of race or color. However, the standard under Title VII of the Civil Rights Act of 1964 is not so limited[9]—rather, if the *operational effect* of test usage is to discriminate against blacks, then it is proscribed unless it is shown to be a "job related" requirement,[10] with a "manifest relation to the employment in question."[11] See U.S.C.A. § 2000e-2(h). In this inquiry the court is to follow the guidelines adopted by the EEOC and, more recently (November 17, 1976), by the Department of Justice (DOJ), absent some "cogent reason."[12] See *Watkins v. Scott Paper Co.*, 530 F.2d 1159 (CA5 1976). Also instructive are the 1974

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8 Not until 1968 was the residency requirement of the City of Birmingham removed by the city ordinance. A Jefferson County preference remains in effect, but this can hardly disadvantage blacks, who constitute a larger portion of the Jefferson County population than of neighboring counties.

9 An intent to discriminate would presumably be required for there to be a violation of 42 U.S.C. § 1983, if not of 42 U.S.C. § 1981. See *Washington v. Davis*,.—U.S.—(June 7, 1976).

10 *Albermarle Paper Co. v. Moody*, [9 EPD ¶ 10,230] 422 U.S. 405, 425 (1975).

11 *Griggs v. Duke Power Co.*, [3 EPD ¶ 8137] 401 U.S. 424, 432 (1971).

12 There are some conflicts between the EEOC and the DOJ Guidelines. However, it is not necessary as to the issues presently before the court that a choice be made between the two.

A.P.A. Standards for Educational & Psychological Tests and the 1975 Principles for the Validation and Use of Personnel Selection Procedures of the A.P.A.'s Division 14.

Adverse Impact

Where the total selection process has an adverse impact upon a substantial racial group in the labor market, the individual components of that process—such as a screening test—are also to be evaluated for adverse impact. DOJ Guidelines § 4b. For purpose of this two-step analysis, data can be extracted from the evidence pertaining to administrations of the 10-C and 20-B tests which have been used for employment decisions after March 24, 1972:[13]

	10-C		20-B	
	Black	White	Black	White
Failing test	395	191	216	267
Passing test	373	1,762	69	1,263
Hired	51	455	9	215

According to the DOJ Guidelines, § 4b, "A selection rate for any racial *** group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded as evidence of adverse impact ***. Greater differences in selection rate would not necessarily be

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13 Information for this table has been taken from X-11 and from data respecting hires supplied by the parties at the court's request following formal close of the evidence. Certain caveats should be noted: The results of the 10-C exam administered on April 29-30, 1971, have been eliminated because it was not used for employment decisions after March 24, 1972. The results of the 10-C exam administered on September 30 and October 1, 1971 and of the 20-B exam administered on May 26-27, 1971, have been included in the tabulation, even though in part the eligibility lists taken therefrom would have been used prior to March 24, 1972. The number of hires includes those hired in 1972 prior to March 24, 1972. As the Board points out, the number of hires is affected by voluntary choices of the candidates (such as declining job offers or waiving consideration), but, lacking reliable data on such matters for both whites and blacks, the court has looked to actual hires as the measure of the overall selection ratios. Finally, it should be noted that, since persons are permitted to take exams more than once, the applicant figures do not completely accurately reflect the number of different individuals involved. These limitations do not, in the court's opinion, prevent meaningful usage of the data for the purposes indicated.

regarded as constituting adverse impact where the differences are based on small numbers and are not statistically significant, or where special recruiting or other programs cause the pool of minority *** candidates to be atypical of the normal pool of applicants from that group."

So far as the total selection process is concerned, one finds from the above data that the hiring rate for blacks (6.6% of the black applicants on 10-C and 3.2% of the black applicants on 20-B) are substantially less than eighty percent of the hiring rates for whites (23.3% and 14.1%, respectively). These greater differences in selection rates cannot be explained on the basis of inadequate numbers and, according to the court's calculations, are statistically significant: the ϕ coefficient for the 10-C test is .193 and for the 20-B is .121, both of which are significant at $\rho < .001$.

Looking at the data pertinent to the test component of the selection process, one finds again that the pass rates for blacks (48.6% for 10-C and 24.2% for 20-B) are substantially less than eighty percent of the pass rates for whites (90.2% and 82.5%, respectively). And again, according to the court's calculations, these greater differences in pass rates, which are based upon samples of adequate size, are statistically significant: the ϕ coefficient for the 10-C test is .46 and for the 20-B is .48, both being significant at $\rho < .001$. Also of importance is the fact that, of the blacks who did pass the tests, 85.4% placed in the lower half of the initial eligibility lists for police officers and 89.9% placed in the lower half of the firefighter lists.[14]

Some concern can justifiably be expressed that the special recruiting efforts undertaken by the Personnel Board and other groups to attract black applicants—while commendable as an affirmative action to overcome racial imbalance in the police and

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14 These figures are derived from X-12 and are subject to the appropriate caveats indicated in fn. 13, *supra*. Moreover, X-12 does not have any information for one eligibility list and does not contain percentile information as to several lists. In a very real sense, "passing" an exam is measured not by obtaining a derived score of at least 70 (and thereby being entered on the eligibility list), but by obtaining a score sufficiently high to be placed on the eligibility list at a position where, during use of that list, the candidate will actually be certified to an employing agency.

firefighter forces—may at the same time have resulted in an atypical pool of blacks taking the test, producing distortion in the test performances of the black applicants. For example, the black applicants may have included many who were not seriously interested or motivated with respect to the jobs in question, thereby affecting their test performances. Absent, however, any hard data to support such an hypothesis or to indicate its magnitude, the court, impressed with the substantial differences in hire rates and pass rates for the two racial groups, must conclude that the overall selection procedures in effect since March 24, 1972, and as a component part thereof the tests used for those purposes, have had an adverse impact on blacks.

Validation Studies

According to EEOC Guidelines § 1607.3, "the use of any test which adversely affects hiring *** of classes protected by Title VII constitutes discrimination unless (a) the test has been validated and evidences a high degree of utility as hereinafter described ***." For the purpose of making such validation studies of its many tests, the Board in 1972 contracted with Drs. William E. Farrar and William A. McLaurin, Professors in the Psychology Department of the University of Alabama at Birmingham. Both had experience with personnel selection procedures in public employment systems. Priority, but not exclusive attention, was to be given to the police and firefighter tests, and their work on these tests began in late 1972. Their studies respecting the two tests continued even to the time of trial, with various reports being made in each of the years 1973, 1974, 1975 and 1976. That their work was not complete before trial does not suggest inattention; rather, it is indicative that their studies were intended to be thorough and were directed to numerous tests.[15]

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15 Until a couple of months prior to trial, the litigation was being prepared with the anticipation that all tests under challenge were to be considered at a single hearing. When the decision was made by the court that the first trial would only concern the 10-C, 20-B, and 30-B tests, counsel and witnesses were freed to shift their attention to "loose-ends" on these three tests.

Psychometric Analyses

The 10-C and 20-B tests are paper-and-pencil instruments, each consisting of 120 multiple choice items.[16] The initial concern of Drs. Farrar and McLaurin was directed to the reliability,[17] item difficulty,[18] and item discrimination[19] of the tests. The following findings were made:

	reliability		items satisfactorily difficult	items satisfactorily discriminating
	r_{sp}	r_{kr}		
10-C total (N=479)	.95	.95	88	116
10-C black (N=176)	.90	.90	77	106
10-C white (N=303)	.95	.93	70	115
20-B total (N=507)	.92	.91	64	115
20-B black (N=108)	.85	.85	61	66
20-B white (N=399)	.86	.86	53	108

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16 Some items on each test elicit knowledge which apparently would be needed for performance of job functions; others do not. Some effort has been made by the test developer to give "face validity", as by expressing an item involving numerical problem solving in the context of information with which job occupants would be dealing. Face validity does not affect validity for usage as a selection procedure so much as it may overcome motivational resistance by those taking the test.

17 "Reliability refers to the consistency of scores obtained by the same persons when reexamined on the same test on different occasions, or with different sets of equivalent items, or under other variable examining conditions." Anastasi, PSYCHOLOGICAL TESTING, p. 103 (4th Ed. 1976). The methods used in this study to estimate reliability were the split-half technique (corrected by the Spearman-Brown prophecy formula) and the Kuder-Richardson formula 20.

18 A test item correctly answered by too high a proportion of the applicants is considered not difficult enough; correctly answered by too low a proportion, it is considered too difficult. In this study items correctly answered by 30% to 70% of the applicants were considered satisfactorily difficult.

19 Item "discrimination" is in essence a comparison between scores made on an individual test item and scores made on the total test, thereby ascertaining whether particular items "discriminate" significantly in predicting success on the test as a whole. In the study, significance was established at $\rho < .05$.

Inquiry into reliability is a proper first step, because, while no test is perfectly reliable, a test which is not reliable is not valid for any purpose. The consultants found the reliability coefficients for both tests to be of sufficient magnitude to indicate satisfactory reliability. They did acknowledge that the methods selected for this purpose were essentially measures of internal consistency (and with the KR-20 formula, of content homogeneity), but apparently believed it either not feasible or not necessary to investigate error variance due to time sampling. The court agrees as to reliability and notes that possible lack of stability over time is, in a sense, mitigated by the fact that applicants may take an exam on more than one administration.

Analyses of item difficulty and discrimination have no direct bearing upon the validation studies before the court. However, they do reflect an investigation into possible modification or supplementation of the tests to improve their utility and reduce the extent of adverse impact, which is a recommended procedure.[20] See DOJ Guidelines, § 3c.

Documentation and Methodology

The EEOC Guidelines, at §§ 1607.5(b)(2,3,5) and 1607.6, require that various items of information (*e.g.* copies of tests, manuals, rating forms and instructions and representations of statistical data) be included in the report of the study or otherwise available for inspection. Following the 1974 A.P.A. Standards, a more extensive list of documentation requirements is specified in the DOJ Guidelines at §§ 4a and 13b, involving some twenty-four "essential" items and

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20 As previously indicated, the 10-C exam was in fact modified through use, effective April 10, 1974, of an 80-item answer key, which had the effect of eliminating for scoring purposes 40 of the items. This particular change was done to improve correlation with an academy average criterion for blacks (rather than to improve item difficulty or discrimination levels), but it indicates the search for increased test utility. The consultants also recommended consideration of possible modification (or supplementation) of 20-B to improve levels of item difficulty and discrimination. Only one administration of the 20-B was given after this recommendation, and that was done when the existing eligibility list had almost been exhausted but mass administration of an additional test (the PAS) had not yet become feasible.

several other desirable items. The Farrar-McLaurin studies satisfy the EEOC requirements, which were the only ones in effect when their studies were conducted and (so far as then feasible) completed and, indeed, when supplemented by evidence presented immediately before and during trial, they also substantially satisfy the DOJ requirements, which became effective on November 23, 1976.[21]

The studies include presentations of the following statistics:

For the 10-C test:

● intercorrelation coefficients, r and r_c, for 109 Birmingham police officers (without separation by race) respecting their 10-C scores, police academy scores (school average and course grades) and latest efficiency ratings.

● means, standard deviations, and *t* tests for difference in means for 10-C scores of 38 black and 101 white Birmingham police officers.

● means, standard deviations, and r coefficients for 59 Birmingham police officers (without separation by race) respecting their 10-C scores, academy scores (average and courses) and latest efficiency ratings.

● means, standard deviations, r coefficients, and *t* tests for the following:

● ● 20 black and 76 white Birmingham police officers respecting their 10-C scores, academy averages, and latest efficiency ratings.

● ● 8 black and 140 white Birmingham police officers respecting their 10-C scores, academy scores (average and courses), latest efficiency ratings (overall and by sub-parts), and experimental ratings weighted average and by components.

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21 Neither the EEOC nor the DOJ Guidelines require reporting of raw data statistics for Σx, Σx^2, Σy, Σy^2, or Σxy. Such information would, however, be helpful, permitting application of statistical measures not chosen by authors of the report without the loss of accuracy which results from derivation of such items from means, standard deviations and correlation coefficients.

● ● 49 black and 140 white police officers respecting their 10-C scores and academy scores (average and courses). (Also included are data for analyzing significance of differences in correlation coefficients through z transformations.)

● ● 83 Jefferson County deputy sheriffs (without separation by race) respecting their 10-C scores and academy averages.

● ● 77 police officers (without separation by race) from other cities served by the Personnel Board respecting their 10-C scores and academy averages.

For the 20-B test: means, standard deviations, and r coefficients for the following:

● 162 Birmingham firefighters (without separation by race) respecting the 20-B scores, training academy average, and latest efficiency ratings (overall and by sub-parts).

● 196 Birmingham firefighters (without separation by race) respecting their 20-B scores, academy averages, latest efficiency ratings, and experimental ratings (overall and by components). Statistics are reported separately for short-tenure and long-tenure firefighters, using three years of experience as the point of division.

Statistics found to be significant at $\rho < .05$ and $\rho < .01$ are so identified in the report.

Some comment should be made about selection and composition of the different samples. Each sample contained all the persons for whom, so far as was known at the time by the consultants, the data needed for that study was available. The different studies were, however, conducted over a period of several years as either the need was recognized or the particular inquiry became technically feasible; and during the time intervals the work force had changed. Some of the studies involved concern with additional factors (*e.g.*, performance on the Raven and PAS tests, which have been under consideration for use as supplemental or alternative screening instruments), for whom the data existed only for a limited number of applicants or employees. The result is that a particular sample may contain some, but not necessarily all, of the persons in another sample and may also contain some persons who were

not in the other sample. This lack of autonomy or consistency complicates somewhat the process of analysis, but, under the circumstances, is acceptable. There is no hint of contrivance in selection of the samples or of lack of representativeness of the sample subjects.[22]

Criteria

The several criterion-measures (academy grades, efficiency ratings, and experimental ratings) have certain common factors: (1) None appears to be "contaminated" (*i.e.*, affected by knowledge by the rater or scorer of prior score on the 10-C or 20-B). (2) None has been subjected to special statistical scrutiny to detect or control possible bias among raters or graders.[23] (3) None has been subjected to special statistical scrutiny for reliability.[24] (4) Each has been analyzed by the consultants for relevancy (*i.e.*, the extent to which it may be considered as a measure of critical or important work behaviors). Each of the measures has, of course, its own special characteristics and limitations, which will be described separately. It must be emphasized that, in a criterion-related validation study, one is attempting to estimate the extent to which a score on a "predictor" (*e.g.*, 10-C test) can predict job per-

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22 The study of the sample of 59 police officers for whom Raven and PAS test scores were available is subject to question for voluntarism. See A.P.A. Standard E6.1.2.

23 The possibility of bias is of particular concern where subjective evaluations are used as criteria and there are significant differences in those measures for different racial groups. See DOJ § 12b(2). In each study where means and standard deviations are presented separately for blacks and whites with respect to one or more of the basic criterion-measures (academy average, efficiency rating, or experimental rating), the means for blacks is less than for whites, and only in the study which involved but 8 blacks were any of these differences not statistically significant at least at $\rho < .05$. It may be argued that the academy grades should be treated as objective (being based in major part upon multiple-choice exams), but a substantial part of those grades is apparently dependent upon instructors' subjective appraisal of students' performance. (This latter comment is not intended to suggest that more paper-and-pencil test should be used in the academies, but rather that even academy grades are at least in part subjective measures.)

24 See fn. 17, *supra*. Inquiry into the reliability of a criterion is not a trivial consideration. See A.P.A. Standards E4.4. That the various techniques for estimating such reliability have their own limitations affects the interpretation to be reached, not the desirability of making the effort.

formance (*i.e.*, as a police officer) through evaluating its ability to predict scores or ratings on a "criterion" (*e.g.*, academy average)—and hence the study is subject to any limitations which those same criteria have in either predicting or assessing job performance.

(1) Academy Grades.—Where, as here, new employees are required to complete special training before performing their duties, successful completion of that training may properly be used as a criterion-measure, if, that is, the training is intended to, and does, provide skills or knowledge needed for performance of the job. Based upon the evidence presented, including testimony of the directors of the Birmingham police and fire academies, the court finds that the two schools do serve that purpose and function.

Relative standing or ranking among students who successfully complete such training is not, however, as such, an appropriate criterion.[25] Rather, to be relevant as a criterion, such measures must be shown, empirically or otherwise, to be themselves appropriate predictors of job performance. This, in essence, means a two-step correlation study; and, in a situation where one has data on test scores, academy grades, and measures of job performance for the same group of persons, the more direct inquiry (correlation between test scores and measures of job performance) would be preferred to the two-step approach. Grades on particular courses in the academy must also be analyzed for compatibility with findings respecting grades on other courses.

So far as the evidence indicates, academy grades—provided they are passing scores—have no impact on job opportunities, benefits, etc. If this be the case, then, while helpful in preventing "contamination" during validity studies, academy grades are likely to be influenced by motivational considerations not present in actual job performance. The emphasis in the academies on paper-and-pencil multiple choice items, while providing objectivity, may also reflect a relationship to the paper-and-pencil screening exam not found in job performance.

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25 Of course, relative standing or grades in the academy may, depending upon the statistical technique employed, be of use in correlating test scores with successful completion of the training.

These concerns should cause one to be cautious in making non-empirical judgments about the usefulness of relative academy grades as a criterion-measure.

(2) Efficiency Ratings.—The efficiency ratings given periodically on all employees by their supervisors are direct and, ostensibly, appropriate measures of job performance. Drs. Farrar and McLaurin have, however, acknowledged that these ratings are not trustworthy assessments of the employees' actual performance. In addition to other problems, the ratings must be discussed between the rating supervisor and the employee and can have important consequences for the employee. These ratings were, it seems, used in the early studies because of their availability, in the anticipation that other measures could be developed and administered in due course.

(3) Experimental Ratings.—By review of existing job descriptions, by interviews to determine "critical incidents" of the jobs, and by technical assistance and consultation with advisory committees consisting of representative incumbents and supervisory personnel, new "experimental" rating forms were developed for use in the Farrar-McLaurin studies. The forms consist of twelve rating categories for each of the two jobs, the categories relating to personality characteristics, job knowledge, and abilities found through the process to be relevant to job performance. Each is rated on a seven-point scale (poor = 1 to outstanding = 7), with 3 being fixed as adequate. For the police form, weights were developed by the advisory committee to indicate relative importance of the categories to overall job performance.

Raters—the employees' supervisors—were given, in person and in writing, standardized instructions for use of the forms. To prevent the "halo" effect, supervisors rated all their subordinates on one category before proceeding to rate them on the next, etc. The raters were told that their evaluations were confidential and would not be used for any purpose other than the evaluation of the tests.

The court is impressed that the experimental rating method so developed represents an appropriate criterion measure for the jobs in question. These jobs are not ones which lend themselves

to some objective measure, such as the sales produced by a sales representative. The principal limitations with the ratings so obtained are the lack of evidence as to reliability and the lack of special steps to detect or control possible bias.

Study Findings

Key findings from the Farrar-McLaurin studies are tabulated below. Correlations are shown only where presented in the body or exhibits of their reports. Statistically significant differences in means between two sub-groups (blacks and whites; short-tenure and long-tenure firefighters) are indicated by so designating the lower of the two means.

	test	academy	ave	efficiency		rating	experimental		rating
	mean	mean	r	mean	r	acad r	mean	r	acad r
Police									
Applicants									
T=479	65.70								
W=303	75.21								
B=176	49.33**								
Officers									
T=109	82.20		.46**		.12				
Officers									
T=139	69.35								
W=101	75.03								
B=38	54.24**								
Officers									
T=59	81.00	88.66	.77**	81.73	.31**				
Officers									
T=96	80.46	87.94	.72**	81.10	.20	.19			
W=76	84.54	89.00	.64**	81.44	.05	.08			
B=20	64.95**	83.90**	.46**	79.81*	.17	-.05			
Officers									
T=148	82.35	87.38	.45**	84.06	.08		433.79	.21*	
W=140	83.11	87.58	.42**	84.11			434.75		
B=8	69.12**	83.90**		83.18			417.00		
(B=49)	66.78**	83.82**	.47**						
Deputies									
T=83	82.58	87.36	.72**						
Officers									
T=77	79.71	87.50	.60**						
Firefighters									
Applicants									
T=507	70.99								
Employees									
T=162	83.90	90.60	.43**	78.27	.12	-.23**			
Employees									
T=196	81.99	91.27	.45**	79.45	.20**	-.06	61.24	.08	-.09
ST=103	81.01	91.98	.37**	77.14**	.24**	.11	58.65**	.25**	.21**
LT=93	83.09	90.47*	.62**	82.02	.05	-.01	64.11	-.20*	-.20

*$p < .05$
**$p < .01$

Fairness and Differential Validity

If members of one racial group generally obtain lower test scores than members of another group and those differences are not reflected in differences in measures of job performance,

there is a need, where technically feasible, to investigate for possible unfairness of the test to the first group. See DOJ Guidelines, § 12b(7) (noting that this need increases the greater the severity of the adverse impact on the lower-scoring group). As the tabulation indicates, the Farrar-McLaurin studies do show that blacks as a group have scored lower on the 10-C than have whites. Indeed, in each of their studies where those scores are reported separately for the two racial groups, the differences are significant at $\rho < .01$.

One possibility is that the predictive validity of the test for one racial group is significantly different than for the other group. The inquiry here, as emphasized in A.P.A. Standard E9, is not whether there are differences in the correlation coefficients or whether one coefficient is statistically significant while the other is not. Rather, the proper statistical procedure is to test for significant differences in the coefficients.

In the one study in which a sufficient[26] number of both blacks and whites are involved, Drs. Farrar and McLaurin have performed such an analysis. Using the report of test scores and academy scores for 140 white and 49 black police officers, they tested the correlation coefficients (where the coefficient for either subgroup was significant at $\rho < .05$), after z transformations, for significance of difference. None was significant at $\rho < .05$, and with respect to only one course (accident investigation) was the coefficient significant even at $\rho < .10$.

Failure, however, to reject the hypothesis that the correlation coefficients are the same for both groups is not by itself sufficient to demonstrate fairness. Where, as in the present case, test scores by two groups are used in the same manner for members of both groups, it is on the assumption that in general an individual's test score will appropriately predict his standing on the criterion whether he is a member of one group or the other. The predictive relationship between the test score and the criterion can be represented by a regression line[27] formula

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26 The DOJ Guidelines, § 12b(7)(v)(1), do not require analysis where less than thirty persons are in either of the subgroups.

27 Scattergrams in the present case do indicate, within the ranges of scores available, that relationships between the predictors and criteria for both racial groups are essentially linear.

for converting a test score into a predicted criterion score. While regression lines can be calculated separately for the two groups and will almost always be somewhat different, it is important to know whether the slopes or intercepts (or both) of the lines are sufficiently different to call for abandonment of a common line for the two groups. Otherwise, the common regression line (which is the effect of using test scores in the same way for both groups) may systematically underpredict for members of one group (while overpredicting for the other) their criterion score from a particular test score. The method for this inquiry, called analysis of variance, involves use of the *F* distribution tables for statistical significance. If desired, one can determine for what test scores the common regression line should, and should not, be abandoned.

Significantly different regression lines may have the same or similar correlation coefficients. In such a situation comparison of the coefficients will not reveal the inappropriateness of using a common regression line. Thus, with the sample containing 76 white and 20[28] black police officers, comparison of the coefficients respecting 10-C scores (and modified 10-C scores) and either academy averages or efficiency ratings does not, as to any comparison, lead to rejection of the hypothesis of the coefficients being the same. Yet, when the same data are reviewed by analysis of covariance, as the court has done,[29] for the hypothesis that a common regression line fits both whites and blacks, the obtained *F* ratios are 18.38 (10-C and academy average), 3.97 (10-C and efficiency rating), 26.91 (modified 10-C and academy average), and 4.18 (modified 10-C and efficiency rating), each of which (with $n_1 = 1$ and $n_2 = 93$) is significant at $\rho < .05$. It is interesting that in the development

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28 One should view with caution differential studies where either group has less than 30 members. However, the principal concern is that true differences will not appear to be significant with smaller sample numbers.

29 The court has analyzed the 96-subject sample rather than the 189-subject sample because the report of the former includes deviation and correlation data not only for the two racial groups but also for the sample as a whole, facilitating analysis. It should be recognized that analysis from such statistics are subject to rounding errors which could have been avoided had raw data summations been provided.

of the modified 80-item scoring key for the 10-C, adopted to increase the validity coefficient for blacks, the evidence becomes stronger that a common regression line should not be used for both groups.

In view of the fact that covariance analysis suggests rejection of a common regression line for both racial groups, one is tempted—since the differences between white and black means appear to be far greater on test scores than on the criterion-measures—to conclude that the performance of blacks is being underpredicted by the 10-C. However, if regression lines are computed separately for blacks and whites using the results of any of the studies where their test scores and criterion scores are reported separately, it will be found that the lines cross and that for test scores below that crossing point the criterion scores thereby predicted for blacks are less than for whites for the same test scores. Above that point there would be underprediction for blacks, but the intersections occur at such high test scores (the lowest point from any of the data is at a raw test score of 87) that few blacks would actually be affected. If one looks to see where any overprediction or underprediction is statistically significant, it is found that the only significant range of scores is for lower scores, where blacks are being overpredicted by the 10-C.[30]

The net result is that use of 10-C test scores in the same manner for both blacks and whites does not appear to be underpredicting the performance of blacks at the academy or on efficiency ratings. This analysis does not, of course, deal with the possibility of bias affecting the scores blacks obtain at the academy or on efficiency ratings, it only serves as a foundation for concluding that the 10-C is not to be criticized on the basis of differential validity inquiries. The 20-B cannot be subjected to these inquires at the present time for lack of sufficient blacks in any study group.

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30 Absent "adverse impact" on whites as a whole, the "underpredicted" whites cannot challenge the test under Title VII.

Operational Unity

It is not, however, sufficient that, as here, a test is shown to have a statistically significant relationship to one or more criteria and not to be differentially unfair to the adversely affected racial group. In addition, in the words of the EEOC Guidelines, § 1607.5(c), the relationship between the test and the criterion must have "practical significance" or, in the words of the DOJ Guidelines, § 12b(5), the usage of the test must be evaluated "to assure that it is appropriate for operational use." With different words, the two Guidelines are raising the same concern.

In concluding that the 10-C and 20-B tests are valid screening instruments, Drs. Farrar and McLaurin have emphasized their significant relationship to grades in the training academies, and this relationship cannot be doubted. However, as already indicated, it is the court's conclusion that *relative* standing in the academies, as distinguished from successful completion of academy training, is not an appropriate criterion unless it also be demonstrated that those academy grades are themselves valid predictors of job performance. The studies reflect, however, that for the most part the correlation between academy grades and measures of job performance are not significant and, in the few instances where significant correlations are found, the findings are mixed—some being positive and others being negative. A negative correlation, of course, indicates that the higher the academy grades, the lower the performance ratings tend to be. Although an employer is permitted to select the best person for the job despite resulting impact on a racial group, it is not permitted to engage in such selection procedures merely to employ the best person for training.

Nor has it here been demonstrated that either test is a valid predictor of successful completion of the required training courses. According to the director of the policy academy, only 11 of the 733 cadets attending the academy since 1962 have failed to complete the training because of inadequate grades—and no data has been presented as to their 10-C test scores. According to the director of the firefighters academy, no student has failed because of poor grades. of course, since historical use of screening tests (whether the present ones or their

predecessors) has imposed a restriction of range, the conclusion does not necessarily follow that every applicant could complete the training no matter how low his 10-C or 20-B score. However, it should be noted that on occasion the raw test scores used to determine hiring eligibility have been substantially reduced, without apparent impact on their successful completion of the academies. And—while recognizing that, as noted by Dr. McLaurin, this is not a recommended practice[31]—use of the regression lines developed from any of the studies would predict passing academy averages even for persons scoring zero on the 10-C and 20-B tests.

As earlier discussed, the regular efficiency ratings are not trustworthy criterion-measures of actual job performance. Even if they were, the studies provide inconclusive findings with respect to the 20-B (a significant correlation with a group of 196 firefighters, though only of a magnitude of .20, and an insignificant correlation of .12 with a group of 162 firefighters), and even more dubious results with respect to the 10-C.[32]

The experimental ratings are, as previously indicated, considered by the court as an appropriate criterion measure. The correlation, however, between the 20-B and these ratings is found to be .08, which is, of course, not significant; and, while a significant positive correlation is found with respect to the 103 firefighters having less than 3 years service, a significant negative correlation is found the for the 93 having at least 3 years of tenure. Presumably, higher scores on the 20-B (which carried over to higher scores during academy training) resulted in better job performance for the first few years. Had

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31 Regression lines should not generally be used for prediction based on predictor scores which are beyond the range of predictor scores found in the sample, for beyond such known scores the relationship may cease to be significant, may cease to be linear, or may have a slope change. Of course the same possibilities exist when one attempts to justify non-selection based upon correlation coefficients developed through the subjects selected or when one attempts to modify coefficients for restriction of range, such as Drs. Farrar and McLaurin have done.

32 The correlations between the 10-C and efficiency ratings were significant only with respect to the volunteer group of 59 officers.

this advantage merely been erased after more time on the job, this would be one matter—but, as stated, the findings actually showed a significant negative correlation for the longer tenured firefighters, suggesting that over time the lower scoring applicants made the better employees. Absent any indication that during the first few years the lower scoring applicants had been inadequate on the job, one is hard pressed to conclude that the higher scoring 20-B applicants are in fact the better persons to hire. Further study might, of course, lead to other interpretations, such as a determination that recent improvements in the training given at the firefighters academy will result in better employees not only initially but also over time—but no such conclusions can be supported on the present evidence.

The correlation between the 10-C and the experimental ratings is, with 148 in the sample, significant at $\rho < .05$, but has a magnitude of only .21. What do these figures mean? To begin with, it should be understood that for a correlation coefficient to be found significant at $\rho < .05$ is equivalent to saying that, if in fact no relationship between the two variables exists for the "population", the obtained results could be expected to occur only once in twenty such samples—and that therefore one can be 95% confident that for the population (of applicants) there is some correlation (or relationship) between the two variables. It does not mean that one can be 95% confident that the population coefficient is .21. Indeed, to state the population coefficient with only a 5% chance of error (*i.e.*, $\pi < .05$) requires use of a confidence *interval*: here, with a sample of 148, that the true coefficient lies somewhere between .0504 and .3592. The coefficient obtained from the sample is but an estimate of that true population coefficient.

A second consideration is to look at the test scores in the particular sample in comparison with the scores of all persons in the population. Where, as here, there is a restriction in the range of test scores of those in the sample because of prior use of the test, a statistical technique, called correction for restriction of range, may be appropriate for determining the magnitude of the correlation. This "corrected" coefficient, as reported by Drs. Farrar and McLaurin, is .36. It may be noted that utilization of the correction involves the assumption that the two variables (test scores and experimental ratings) are for

the total population "normally distributed;" and, insofar as rating scores are concerned, it is just that—an assumption. Hence, it involves the same type of risk as does the use of a regression formula for values beyond the sample on which based—a technique which, during the trial, provoked Dr. McLaurin's criticism.

In general, other factors remaining the same, the greater the magnitude of the coefficient the more likely it is that the test will be appropriate for use. See DOJ Guidelines, § 12b(5). The importance of the size of the correlation coefficient can perhaps best be understood by reference to certain basic statistical concepts. The square of the correlation coefficient, called the "coefficient of determination," gives the proportion of the variance of the criterion scores which is accountable by reference to variance of scores on the predictor test. Thus, with a correlation coefficient of .21, the study indicates that 4.4% of the variance among experimental ratings is explainable by reference to the variance in test scores, while 95.6% is not. Using the "corrected" coefficient of .36, still only 13% of the variance among experimental ratings could be accounted for by test score variance. By another formula, the correlation coefficient can be converted into a "coefficient of alienation", which gives the size of the error in attempting to predict experimental rating scores from test scores *relative* to the error that would result from a mere guess, *i.e.*, by not using the test. This calculation, based on a correlation coefficient of .21, reflects that use of the test predicts experimental rating scores with a margin of error that is only 2% smaller than it would be without the test, and, if based on the "corrected" coefficient of .36, indicates that the margin of error is only 6.7% less than what would occur by mere guess.

Anastasi comments, and quite properly so, that evaluation of a test in terms of the error of estimate will for many testing purposes be unrealistically stringent. Anastasi, PSYCHOLOGICAL TESTING, p. 166 (4th Ed. 1976).[33] She notes that even

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33 The Anastasi volume was qualified during trial as a recognized treatise under F.R.E. 803(18). Additional standard texts used by the court for the purpose of taking judicial notice of basic statistical formulae are Guilford & Fruchter, Fundamental Statistics in Psychology and Education

tests with an unusually high validity of .80 would appear to be inefficient if used to predict inividuals' relative standing on some criterion, but that most tests are merely used to determine which individuals will exceed a given minimum standard of performance or cutoff point in the criterion. The 10-C, of course, is utilized here both to screen applicants (cutoff scores) and to rank those passing applicants.

While the magnitude of the correlation coefficient is obviously of great importance, there is no minimum coefficient applicable to all employment situations. See DOJ Guidelines § 12b(5). "Under certain circumstances, even validities as low as .20 or .30 may justify inclusion of the test in a selection program." Anastasi, *op. cit.*, p. 166.

Another approach towards evaluation of the relationship found is to investigate the meaning of differences in test scores in relation to the differences in criterion scores thereby predicted. This involves use of the regression formula, which can be calculated from the correlation coefficient and the means and standard deviations of the two variables. Thus, Dr. Roland Ramsey, the plaintiffs' expert witness, questioned the practical value of the 10-C by noting, from the Farrar-McLaurin study involving 140 whites and 49 blacks, that an increase in raw test scores of 40 points produced, under the regression lines given, less than 5 points increase in predicted academy averages.

The common regression line computed for the 148 officers with both test scores and experimental ratings is $\tilde{y} = 300 + .162x$, where x represents a given test score and $\tilde{y}$ is the rating predicted thereby. At first glance, this regression line does not appear to be subject to the criticism made by Dr. Ramsey respecting the other study, for it will be seen that, for example, a test score difference of 10 will predict an experimental rating difference of 16. However, it should be understood that the linear regression formula (as well as the criterion mean and criterion standard deviation, although not the correlation coefficient) varies in direct proportion to any factor by which

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(5th Ed. 1973); Walker & Lev, Statistical Inference (1953); Burrington & May, Handbook of Probability and Statistics (2nd Ed. 1970); and Mehrens & Lehmann, Standardized Tests in Education (2nd Ed. 1975).

criterion scores in the sample have been multiplied. The Farrar-McLaurin study reports the overall experimental rating as the summation of weighted components which comprise the rating. For example, a sample subject rated as 5 (very good) on each of the 12 rating components would, because of the method, be reported as having a rating score of 499, while another subject identically rated except for scores of 4 (good) on the appearance and dependability components would receive an overall rating of 483, with 698 representing a "perfect" score of 7's on all components.

To prevent potential misinterpretation, it is well to consider the regression line not only in the form in which expressed in the Farrar-McLaurin studies, but also in a form which does not contain the inflation caused by the weighting procedure. This can be done, while still retaining the concept of the components having differing weights, by expressing the weights in a manner in which the average weight is 1. That is, instead of the "communication" component having a weight of 8.78 (as reported in the study), of "problem solving" a weight of 9.44, of "learning" a weight of 8.22, etc., they can be shown as having weights of 1.056, 1.136, and .989, etc., respectively. Then, a summation of weighted component scores for a "perfect" score of 7 on all 12 components would result in 84, identical with a "perfect" score if not weighted. Not only does this method retain the concept of weighing the different components, but the transformation (whether of means, standard deviations, or regression line) can simply be made by dividing the reported results by a constant, here 8.31333. The obtained regression line if $\bar{y} = 36.087 + .195x$, where x represents the test score and $\bar{y}$ is the predicted rating (using the new method of expressing weights). It will now be seen that, as with the other studies criticized by Dr. Ramsey, a large difference in test scores produces only a small difference in predicted (un-inflated) experimental rating scores, *e.g.*, a 40 point raw score difference on the test gives less than 8 points difference on the rating score.

Another method for evaluation, which is not complicated by the weighting procedure, is to consider the "standard error of estimate", which, for the data analyzed, is computed to be 92.63. Use of this statistic is demonstrated as follows: while a

raw test score of 70 through the regression formula predicts an experimental rating of 413, one can through use of the standard error of estimate determine, at $\rho < .05$, the experimental rating actually to lie within the range of 231 to 595. Similarly, the predicted experimental rating, at $\rho < .05$, from a raw test score of 40 is found to be in the range of 183 to 547. Obviously, there is a potential overlap, where persons with raw scores of 40 and 70 on the test may nevertheless obtain the same experimental rating score. It is, furthermore, possible to determine how much of a difference in test scores is required for one to be able to predict, at $\rho < .05$, that the higher-scoring applicant will receive an experimental rating which also is higher[34]—and this calculation results in a finding that a difference in test scores of over 86 raw points is necessary for such a conclusion to be reached. It should be noted that the total range of raw test scores to this date used to rank successful applicants (*i.e.*, from a low raw score of 48 to the perfect score of 120, which has not been obtained by any) is yet too limited to enable one to say, at the .05 level, that the highest-scoring applicant would be predicted to obtain a higher experimental rating than the lowest-scoring applicant.

Since the 10-C is utilized not only in an attempt to rank the successful candidates, but also to screen the unsuccessful, it is appropriate to analyze the study results with respect to minimum experimental ratings and to predictions for persons scoring at, and below, the test cut-off scores. A test score of 48, the lowest used as a cut-off, yields a predicted experimental rating of 378, or an average unweighted rating on each component of the experimental rating of 3.78 (3 = adequate, 4 = good).[35] Common regression lines can, of course, also be

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34 A note should be made of this technique since not directly given in most texts [sic]. Using the normal curve, the possibility of scores exceeding $\tilde{y}/\sigma = +.76$ is .2236 and likewise the possibility of scores being less than $\tilde{y}/\sigma = -.76$ is .2236. The possibility of both events occurring is $.2236^2$, or .05. Accordingly, there must be a separation of 2(.76) x standard error of estimate for two predicted scores to be different at $\rho < .05$. One can then determine the difference in predictor scores necessary to produce this separation in predicted scores.

35 By comparison, a raw-test score of 106 (the highest reported in the study for any subject) yields a predicted experimental rating of 472, or an average unweighted rating on each component of 4.73 (5 = very good).

computed separately for each of the twelve components of the rating. When this is done, one finds that a test score of 48 will as to each component predict an unweighted rating of 3 or above, *i.e.*, at least "adequate." While recognizing the risk in extrapolation beyond the range of sample scores,[36] but having little else available for comparable analysis, one can look to estimates of experimental ratings predicted by the regression lines for test scores below 48. If this is done, it appears that even with a test score of 0 the predicted rating is "adequate" or above for the rating as a whole and for seven of the twelve components. Even as to the five components for which the estimated unweighted experimental rating from a 0 test score would be less than 3, the predicted rating cannot be said to be less than "adequate" at $\rho < .05$.

A technique for evaluating tests which employ cut-off scores for screening purposes is to consider "false positives" (persons scoring below the cutoff but nevertheless scoring above the acceptable level of performance on the criterion) in relation to "false acceptances" (persons scoring above the cutoff but below the acceptable level of performance), thereby leading to a comparison between the relative percentage of successful employees above and below the cut-off scores. However, neither this method nor the Taylor-Russell tables (used to estimate net gain in selection accuracy through test usage) can be directly used in the present case because all employees for whom "success" data are available have been screened by the test. It is possible to project the "base rate" (through use of the regression line, standard error of estimate, and normal distribution curves) and then to conduct such inquiries; and, if this be done, one finds any incremental validity to be negligible.

Still another approach is to estimate the effect of the test not on the percentage of persons exceeding minimum performance, but on overall performance of the selected persons. A table given by Anastasi, *op cit.* at p. 173, gives the expected rise in criterion scores through test usage in relation to its validity coefficient and the selection ratio. In the present case,

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36 See fn. 31, *supra*, and the discussion on page 21 of this opinion respecting assumption of normal distribution when a correlation coefficient is corrected for restriction of range.

with a .21 coefficient and a selection rate of .19 (506 officers hired from 2721 applicants), and with a standard deviation of known criterion scores of 94.74, one finds from the table that use of the test (had the applicants actually been hired in the order of the test scores) would probably have produced an average gain of 27 points in the total weighted experimental rating (over the rating expected had the test not been used). This gain is equivalent to being rated one point higher on three of the 12 rating components. The average unweighted rating on each of the components would, without the test, have been 4.07 (4 = good), which compares to 4.35, using the test.

The assessment of utility of a test which, like the 10-C, has a statistically significant validity, albeit of very low magnitude, must include certain value judgments. One of these involves consideration of the nature of the job in question and the consequences of a faulty hiring decision. There can be little dispute that police officers perform a vital, and sensitive, function in our society. The desirability of "upgrading" of law enforcement has been emphasized in two reports received in evidence, the 1967 Task Force Report on the Police, issued by the President's Commission on Law Enforcement and the Administration of Justice, and the 1973 Report on Police, issued by the National Advisory Commission on Criminal Justice Standards and Goals. Economic costs are also involved, particularly in view of the cost of academy training of officers and the restraints placed upon discharge of marginal officers under the civil service laws.

Without demeaning the importance of law enforcement officials, however, it can hardly be said that the possibility of occasional selection of an inept officer presents the same type of daily economic and human risk factors as is involved, for example, in the employment of airline pilots or bus-drivers. *Cf. Spurlock v. United Airlines, Inc.* [5 EPD ¶ 7996] 475 F.2d 216, 219 (CA7 1972); *Usery v. Tamiami Trail Tours, Inc.* [11 EPD ¶ 10,916] 531 F.2d 224 (CA5 1976) (Age Discrimination in Employment Act case, with somewhat related question). A twelve months' probationary period is provided, during which time the occasional incompetent may be detected and dismissed and during part of which time the employee is undergoing training rather than being "on the street". The principal public con-

cern, it would appear, is not so much that the most able officers be employed (though that, certainly, would be desirable) as that the emotionally unfit not be employed. In this context, it is perhaps noteworthy that the 1967 Presidential Commission's report contained a recommendation for use of psychological tests to detect applicants with personality defects (but no such recommendation respecting aptitude tests); and the 1973 National Advisory Commission's report, while acknowledging the desirability of valid aptitude tests, was skeptical as to the results of research to that date. So far as the court has been informed, the 10-C was not designed, and has not been validated, for use in detecting emotional disorders or defects.

The DOJ Guidelines § 12b(b), provide that, in determining operational appropriateness, one should consider "the degree of adverse impact of the procedure, the availability of other selection procedures of greater or substantially equal validity, and the need of an employer, required by law or regulation to follow merit principles, to have an objective system of selection." Obviously this latter factor (requirement under civil service law to give some objective test) cannot by itself suffice as justification for a test which has, as here, substantial adverse impact on a racial group. While it can be said that no other available[37] selection with greater validity than the 10-C has been found, yet it must also be said—considering the minimal benefits resulting from the 10-C in the context of this employment situation—that no-test-at-all has "substantially" the same practical validity as the 10-C.

In summary, the 20-B Firefighter test has not been shown to be a valid predictor of a job-relevant critrion measure and the 10-B Policeman test, while having a statistically significant relationship of a very low magnitude with a job-relevant

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37 Studies of the PAS, developed by Drs. Farrar and McLaurin, show extremely high correlations with experimental ratings, as well as with academy training and efficiency ratings. Ironically, the results are so promising as to cause some concern as to a spurious relationship which may not be replicated. In any event, technical difficulties, unresolved to date, have prevented its administration on a wide-scale basis such as for all applicants, so that for practical purposes it is not "available".

criterion measure, has not been shown to be appropriate for operational use in screening or ranking applicants.[38]

Violation and Remedy

Having concluded that use of the 10-C and 20-B has had an adverse impact upon black applicants and that the studies presented fail to demonstrate job-relatedness, the court must nevertheless determine when the requirements of law were violated and what relief is appropriate therefor. This inquiry should involve no less care than consideration of the tests themselves.

The requirements of Title VII first became applicable to the Personnel Board in March 1972. At that time, and for many years earlier, the Board was required by state law to administer appropriate tests to screen and rank applicants—a requirement which continues to the present time, subject to any over-riding proscriptions of Title VII. It had several years earlier selected the 10-C and 20-B tests as the best tests then available, with the hope that black applicants would fare better than under previous tests. By March 1972 a preliminary, in-house validity study had been conducted, which reflected some improvement in hiring of blacks and the indication of appropriate validity based upon relationship with existing criterion measures. An in-depth independent validation study was immediately undertaken, including investigation of alternative or supplemental selection procedures to improve the predictive validity or decrease adverse impact upon blacks. At least since 1965 the Board has not intentionally discriminated against blacks applicants but, to the contrary, has attempted to increase black employment within the options available under state law, including modification of the scoring key for the 10-C when

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38 Correlation studies respecting efficiency ratings and "experimental" ratings were conducted only for officers employed by the City of Birmingham. However, the evidence is persuasive that job requirements for deputy sheriffs and for police officers employed by other municipalities are essentially the same as for Birmingham officers. The higher correlations found with respect to academy training are not of themselves sufficient to justify a conclusion as to operational validity for these officers different from that reached respecting Birmingham.

recommended by the consultants as a method for increasing validity of the test for black applicants.

The preliminary reports from the consultants, made while more trustworthy measures of job performance were being developed, contained signs of potential validity and recommended continued usage of the test pending the additional studies. Not until April 25, 1975, with respect to the 10-C, and July 8, 1976, with respect to the 20-B, were the studies using these new criterion measures completed and reported to the Board. It was on these respective dates that, in the court's opinion, it should have been concluded that provisional use of the tests was no longer permissible. Prior thereto, the Board was, in the court's opinion, justified in continuing to use the tests (and the eligibility lists generated therefrom) in anticipation of favorable results from those studies. Use of the tests (or of the eligibility lists therefrom) was thereafter, however, contrary to the requirements of Title VII, which override state law inconsistent therewith.

The remedy should be appropriate to the violation found. In this case, from X-11, it is found that, for the two administrations of the 10-C from which eligibility lists used after April 25, 1975, were formed, 658 (or 88%) of the 747 white applicants were placed on the eligibility lists. Had a like percentage of black applicants been so placed, a total of 252 would have been on the lists—128 more than actually placed on the list. Accordingly, to the extent they are still interested, an additional 128 blacks from the prior administrations of the test should be added to the present eligibility lists. This remedy only relates to prohibited use of the 10-C as a screening instrument. An additional measure is needed to correct for the improper use of the test as ranking procedure. Had the eligibility lists been representative of the applicant group and had certifications from the list likewise been representative of the racial composition of the list, approximately 28% of the persons certified would have been black. It is clear that there has been "under-certification" of blacks by this standard, although the precise degree cannot be determined from evidence before the court, which gives such information only by calendar years. The Board is directed to ascertain the extent of such under-certification and in future certifications to include at least 1 black candidate from every 3 cer-

tified until such time that, considering the certifications after April 25, 1975, total number of blacks certified becomes 28% of the total number of persons certified. Thereafter (and until some new selection procedures are adopted which are sufficiently job-related or which have no adverse impact upon blacks) at least 2 of every 7 persons certified by the Board from the revised present list shall be black, provided there be a sufficient number of black applicants interested.

A similar investigation of X-11 with respect to the 20-B, where only one eligibility list has been in effect since July 8, 1976 (the date of the report involving the experimental ratings), results in a conclusion that 91 black applicants should be added to the present eligibility list for firefighters, that at least 1 of every 3 persons hereafter certified shall be black until such time that (considering certifications after July 8, 1976) the total number of blacks certified becomes 14%[39] of the total number of persons certified, and that thereafter (pending adoption of some other valid or non-discriminatory selection instrument) at least 1 of every 7 certified by the Board from the revised current list shall be black.

This order does not preclude use of the 10-C or 20-B as a device for ranking one white as against another white, or one black as against another black. Such a use may be made by the Board, if it so desires, without any discriminatory impact on a racial group. The order does not prevent the Board from new administrations of the 10-C or 20-B (or other tests) or from forming new eligibility lists from time to time; provided, however, that, unless and until a selection instrument is found which either has no adverse impact racially or is sufficiently valid, the test results shall be used in a manner consistent with this opinion, *i.e.*, the eligibility list and certifications to be representative racially of the applicant group regardless of test scores.

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39 Blacks constituted only 14% of the applicants on the only administration of the 20-B involved.

Order

Pursuant to the findings and conclusions contained in the Memorandum of Opinion filed herewith, unavoidably protracted because of the need to detail the findings of fact and the reasons therefor, it is ordered as follows:

1. Use by the Personnel Board of Jefferson County of the 30-B Office Workers test has not violated Title VII or other applicable law.

2. Use by the Personnel Board of Jefferson County of the 10-C Policeman Test and the 20-B Firefighter Test has violated Title VII since April 25, 1975, and July 8, 1976, respectively.

3. To the current eligibility list for police officers and deputy sheriffs the Personnel Board shall add the names of 128 black applicants from prior administrations of the 10-C to the extent such number are still interested. In future certifications, at least 1 black on the revised eligibility list shall be certified for each 3 persons certified until such time that the total number of blacks certified after April 25, 1975, shall be 28% of the total number so certified. Thereafter during use of the current eligibility list as so revised, at least two persons of every seven certified shall be black. Pending adoption of some selection procedure which either has no adverse effect upon black applicants or is sufficiently job-related, the number of blacks on any new eligibility list (and certified therefrom) shall be representative of the number of the black applicants.

4. To the current eligibility list for firefighters, the Personnel Board shall add the names of 91 black applicants from prior administrations of the 20-B to the extent such number are still interested. In future certifications, at least 1 black on the revised eligibility list shall be certified for each 3 persons certified until such time that the total number of blacks certified after July 8, 1976, shall be 14% of the total number so certified. Thereafter, during use of the current eligibility list as so revised, at least one person of every seven certified shall be black. Pending adoption of some selection procedure which either has no adverse impact upon black applicants or is sufficiently job-related, the number of blacks on any new eligibility

list (and certified therefrom) shall be representative of the number of black applicants.

5. In accordance with F.R.Civ.P. Rule 55(b), the court expressly determines that there is no just reason for delay and expressly directs entry of judgment as to the issues here involved, namely, whether use by the Personnel Board of the 10-C, 20-B, and 30-B tests are proscribed by law and, if so, the appropriate remedy therefor.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ENSLEY BRANCH OF THE N.A.A.C.P., *Plaintiff,* v. GEORGE SEIBELS, *et al.*, *Defendants.*	CIVIL ACTION NO. CA 74-Z-12-S
JOHN W. MARTIN, *et al.*, *Plaintiffs,* v. CITY OF BIRMINGHAM, *et al.*, *Defendants.*	CIVIL ACTION NO. CA 74-Z-17-S
UNITED STATES OF AMERICA, *Plaintiffs,* v. JEFFERSON COUNTY, *et al.*, *Defendants.*	CIVIL ACTION NO. CA 75-P-0666-S
LUCY WALKER, *et al.*, *Plaintiffs,* v. JEFFERSON COUNTY HOME, *et al.*, *Defendants.*	CIVIL ACTION NO. CA 76-M-0247-S

ORDER

Pursuant to the findings and conclusions contained in the Memorandum of Opinion filed herewith, unavoidably protracted because of the need to detail the findings of fact and the reasons therefor, it is ordered as follows:

1. Use by the Personnel Board of Jefferson County of the 30-B Office Workers test has not violated Title VII or other applicable law.

[1985 Trial DX 1422]

2. Use by the Personnel Board of Jefferson County of the 10-C Policeman Test and the 20-B Firefighter Test has violated Title VII since April 25, 1975, and July 8, 1976, respectively.

3. To the current eligibility list for police officers and deputy sheriffs the Personnel Board shall add the names of 128 black applicants from prior administrations of the 10-C to the extent such number are still interested. In future certifications, at least 1 black on the revised eligibility list shall be certified for each 3 persons certified until such time that the total number of blacks certified after April 25, 1975, shall be 28% of the total number so certified. Thereafter, during use of the current eligibility list as so revised, at least two persons of every seven certified shall be black. Pending adoption of some selection procedure which either has no adverse effect upon black applicants or is sufficiently job-related, the number of blacks on any new eligibility list (and certified therefrom) shall be representative of the number of the black applicants.

4. To the current eligibility list for firefighters, the Personnel Board shall add the names of 91 black applicants from prior administrations of the 20-B to the extent such number are still interested. In future certifications, at least 1 black on the revised eligibility list shall be certified for each 3 persons certified until such time that the total number of blacks certified after July 8, 1976, shall be 14% of the total number so certified. Thereafter, during use of the current eligibility list as so revised, at least one person of every seven certified shall be black. Pending adoption of some selection procedure which either has no adverse impact upon black applicants or is sufficiently job-related, the number of blacks on any new eligibility list (and certified therefrom) shall be representative of the number of black applicants.

5. In accordance with F.R.Civ.P. Rule 55(b), the court expressly determines that there is no just reason for delay and expressly directs entry of judgment as to the issues here involved, namely, whether use by the Personnel Board of the 10-C, 20-B, and 30-B tests are prosecribed [sic] by law and, if so, the appropriate remedy therefor.

This the 10th day of January, 1977.

/s/ Sam C. Pointer, Jr.
United States District Judge

TABLE ONE

Adverse Impact Counts by Race

Results of Review for Impact Calculations	Number of Announcements	Blacks Affected	Whites Affected
No Data on 28B Scores	22		
No Eligible Blacks	36		
No Eligible Whites	4		
Impact on Blacks	4	15	
Impact on Blacks, but only by a Single Ratee	17	39	
No Impact by 28B Scores	20		
Impact on Whites	3		11
Impact on Whites, but only by a Single Ratee	7	—	169
	113	54	180

54 ÷ 827 total Black ratings on 28B* = 6.53%

180 ÷ 2254 total White ratings on 28B* = 7.99%

* Includes only employees rated who could have attempted a promotional exam.

[1979 Trial DX 360 and 1985 Trial DX 1980]

THE PERSONNEL BOARD OF JEFFERSON COUNTY, '
Room 520 Courthouse, Birmingham
Announces an Open Examination For

FIREFIGHTER,
Cities of
Bessemer, Birmingham, Fairfield, Homewood, Mountain Brook and Ta

TIME: 9:00 A. M., Friday, April 26, 1957.

PLACE: Room 518 Courthouse, Birmingham, Alabama.

SALARY RATES: Beginning and maximum rates:

Birmingham) $314 -$370; less 6% deduction for ratirament
) pension.

Bessemer) $299 - $352; lass 2 1/4% daduction for Faderal
Fairfield) Social Security.
Mountain Brook)

Homewood) $285 - $335; less daduction for Fadaral Socisl
Tarrant City) Security and/or retirement pension.

APPLICATIONS AND FINAL FILING DATE: Applications may be obtainad at the office of the Parsonnel Board, Room 520 Courthousa, Birmingham, until 4:00 P. M., Wadnasday, April 24, 1957, upon payment of $1.50 application fea.

Ap-licants applying after April 24, 1957 will be notifiad when to .ir for tha examination.

PURPOSE OF EXAMINATION: . astablish eligible registars from which to fill positions in the Fire Department of the Citias of Bessamar, Birmingham, Fairfield, Homewood, Mountain Brook and Tarrant City.

ENTRANCE REQUIREMENTS: Tha residance of applicants is not restricted, but applicants placad on tha eligibla registers who live in tha jurisdiction to be served will ba cartifiad first.

Applicants must be white, mala, and meet tha qualificstions prescribed balow:

BESSEMER: Age: 19 and must not have passad 36th birthday;
Height: 5' 8" to 6' 2"; Weight: 140 to 220 pounds.

BIRMINGHAM: Age: 21 and must not have passed 27th birthday;
Height: 5' 9" to 6' 4"; Weight: 150 to 240 pounds.

FAIRFIELD: Age: 21 and must not have passed 35th birthdsy;
Height: 5' 8" to 6' 4"; Weight 145 to 225 pounds.

HOMEWOOD: Age: 19 and must not hava passed 35th birthday;
Haight: 5' 8" to 6' 2"; Weight: 150 to 220 pounds.

MOUNTAIN BROOK: Age: 19 and must not have passed 35th birthday;
Height: 5' 7" to 6' 2"; Weight: 135 to 220 pounds.

TARRANT CITY: Aga: 21 and must not have passed 35th birthday;
Haight: 5' 8" to 6' 4"; Weight: 140 to 240 pounds.

REQUIRED KNOWLEDGES, ABILITIES AND TRAINING: Gradustion from an accredited high school, or equivalent; ability to understand and follow oral and written directions; general knowledge of firefighting practices; mechanical aptitude; mental alartness; ability to solve arithmetic problems of reasonable difficulty; excellant physical condition and good moral characar.

DUTIES: Under supervision, during an assignad shift, to assist in the control and extinguishment of fire, protection of life and property and the maintanance of Fira Department quarters and equipment.

(OVER)

[1979 Trial PX 7 and 1985 Trial DX 1980]

PROMOTIONAL POTENTIAL RATINGS

OF BLACKS AND WHITES

BY DEPARTMENT

(August , 1977 - January, 1978)

Department	Black Pass #	Black Rated #	White Pass #	White Rated #	Blk. Pass Rate %	Wh. Pass Rate %	B:W Pass Rate %	Chi-Sq * Value	Chi-Sq. Value (Yates Corrected)	Exact ** Probability
1. Jefferson County										
Bd. of County Comm.	1	1	2	2	100.0	100.0	100.0	0	0	1.00000
Budget & Mgt. Off.	-	-	7	10	-	70.0	-	-	-	-
Community Develop.	3	3	10	17	100.0	58.82	>100.0	1.90	52	25088
County Attorney	-	-	1	1	-	100.0	-	-	-	-
Personnel Board	2	2	16	17	100.0	94.12	>100.0	.12	.12	.89474
Accounting	1	1	13	14	100.0	92.86	>100.0	.08	3.23	.93331
Sewer Billing	-	-	6	6	-	100.0	-	-	-	-
Revenue	16	16	55	61	100.0	90.16	>100.0	1.71	.61	23419

* The critical values for chi-square are as follows:

X^2 =	.10	.05	.01	.005	.001
	2.71	3.84	6.63	7.88	10.83

** [illegible]s in this probability column represent the likelihood of observing a deviation from the expected numbers of blacks an[illegible]tes passing that is i[illegible] the same direction and at least as large as the observed deviation. The values were computed by summing exact probabilities derived by means of the hypergeometric distribution.

PROMOTIONAL POTENTIAL RATINGS

(Continued)

	Black Pass #	Black Rated #	White Pass #	White Rated #	Blk.Pass Rate %	Wh.Pass Rate %	B:W Pass Rate %	Chi-Sq. Value	Chi-Sq. Value (Yates Corrected)	Exact Probability
Birmingham										
Recorders Court	2	8	16	18	25.0	88.89	28.12	10.61	7.83	.00281
Police Uniform	38	56	503	598	67.86	84.11	80.68	9.47	8.36	.00331
UNDO	-	-	8	8	-	100.0	-	-	-	-
Fire	2	11	399	523	18.18	76.29	23.83	19.45	18.47	.00010
Fire Administration	0	1	35	51	0	68.63	0	2.1	.14	.32692
Traffic Engineering	5	12	29	41	41.67	70.73	58.91	3.41	2.26	.06797
Engineering	5	7	56	63	71.43	88.89	80.36	1.71	.51	.21920
Streets & Sanitation	25	63	166	223	39.68	74.44	53.31	26.75	25.21	.00000
Municipal Garage	2	3	21	24	66.67	87.50	76.19	.92	.01	.39453
Building Maintenance	7	7	12	15	100.0	80.0	>100.0	1.62	.37	.29545
Inspection Services	4	5	58	75	80.00	73.33	> 100.0	.02	.02	.68686
Municipal Airport	-	-	16	17	-	94.12	-	-	-	-
[illegible]rks & Recreation	11	32	65	107	34.38	60.75	56.59	6.91	5.89	.00757
[illegible]al Stadium	-	-	1	1	-	100.0	-	-	-	

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

UNITED STATES OF AMERICA, *Plaintiff,* v. JEFFERSON COUNTY, *et al.*, *Defendants.*	CIVIL ACTION NO. CV 75-P-0666-S

PLAINTIFF UNITED STATES' POST TRIAL BRIEF AND REVIEW OF EVIDENCE

The United States respectfully submits this Post Trial Brief and Review Evidence on the issues tried during the proceedings held on August 6-10, 1979 and October 15-19, 1979.

Introduction

At the conclusion of this segment of the trial of the Plaintiffs' claims the Court invited the parties to submit a review of the evidence on the issues presented at trial. The Court also indicated that the Plaintiffs' [sic] could respond to the Brief filed by the Personnel Board on October 17, 1979.

The Government has decided to combine its review of the evidence with its response to the Personnel Board's Brief. We have where possible included in our review of the evidence citations to the record. However, since the parties have yet to receive the transcript of the proceedings held on October 15-19, which involved the major part of the Board's defense on testing and other issues and our rebuttal evidence, we have in these areas relied principally on the trial exhibits and the notes and memory of trial counsel.

I. WRITTEN TESTS

A. Introduction

In this section, the Government will review the general evidence concerning the validity of the challenged examinations and will, pursuant to the Court's request at the Post-Trial Conference, specifically address the evidence concerning the

[1985 Trial DX 1428 and DX 1429]

validity of the examinations used in the following job classes: account clerk, accountant/auditor, automotive mechanic, bailiff, engineering aide, housing inspector, intermediate clerk, police sergeant/sheriff sergeant, secretary, senior clerk, senior recreation leader, stenographer/intermediate stenographer and utility meter reader.

The following review of the evidence is intended as a supplement to the discussion of adverse impact and the standards for assessing evidence of content validity contained in Plaintiff United States' Pre-Trial Brief, pp. 3-16.

As an aide to the Court, we have attached as Appendix A to this Brief a key to the exhibits concerning adverse impact and the validity of the challenged examinations.

B. Personnel Board Test Construction Methods and Documentation

Miriam Hall, the Chief Examiner of the Personnel Board, testified that the personnel analysts relied upon Position Classification Questionnaires (PCQs) completed as part of the five-year Classification and Pay Study[1], the Job Specification,[2] a synopsis of the PCQs which appears in the Board's Classification and Pay Manual, and the Dictionary of Occupational Titles (DOT) in constructing examinations. These documents do not provide information about whether an individual needs to be able to perform job tasks at entry into the position or whether the individual is trained on the job. Nor is such information provided concerning the knowledges, skills and abilities needed to perform the job tasks. Further, the documents provide little data on the relative importance of the job tasks other than an employee's indication of the amount of time he or she spends performing a task. No information is provided about the criticality of a task or about whether how an individual performs a task differentiates between the quality of the individual workers. As a general rule, Personnel Board technicians did not meet with job incumbents or systematically observe their work as part of the test construction process. An unstructured meeting with depart-

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1 A blank Position Classification Questionnaire is included in Chapter I of the Analyst's Manual, D-X-366.

2 The Job Specifications appear as Exhibit No. 2 in the Content Validity Verification Reports, D-X-394 to D-X-411.

ment heads or supervisors served, as a general matter, as the only supplementation of the classification and pay data.

Ms. Hall testified that neither the PCQs, the Job Specification, nor the DOT constitute an acceptable job analysis; yet, there was no effort to supplement this data in a systematic way. Indeed, personnel analysts, as noted in the review of specific jobs, *infra*, appear to have relied almost exclusively on the Job Specification in preparing their preconstruction analyses.

Dr. Menne's[3] Job Analysis Guidelines, D-X-365, note that position questionnaires "should usually be accompanied by another data collection method. The open-ended questionnaire requires writing skill on the part of the person completing it; there may be an exaggeration of the work done; and responses may be difficult to read and interpret." D-X-365, pp. 6-7.

Dr. Erich Prien[4] criticized the Personnel Board's almost exclusive reliance on classification and pay data in constructing examinations. He noted, as did Dr. Menne, that employees have an incentive (increased pay) and, therefore, a tendency to exaggerate the amount and kind of work they perform when they complete forms used for classification and pay purposes. In addition, Dr. Prien testified that a job analysis conducted for test construction purposes needs to be more detailed than does an analysis conducted for classification and pay purposes. The knowledges, skills and abilities identified in the Job Specifications tend to be general, vague and not operationally defined. The statements are sometimes qualified by indicating that "considerable" knowledge is required. This practice has been criticized by Dr. Prien, and by Dr. Menne as well. D-X-365, pp. 23-25.

There is evidence that the participation of department heads in the test construction process served as an occasion for the private theory of the department head to contaminate the process. For example, this is especially true of the zoo director's involvement in constructing the animal keeper examination. See D-X-378, Attachment No. 1. Ms. Hall testified

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3 Dr. John Menne was the Personnel Board's expert witness on the testing issues.

4 Dr. Erich Prien was the Government's expert witness on the testing issues and the question of the validity of the high school and G.E.D. reqirement [sic].

that although the zoo director noted that employees learn about animal habits on the job, he believed that questions on high school biology would assess an applicant's interest in animals. At the zoo director's direction a reading comprehension section and a section attempting to assess an applicant's attitudes were included in the test, as well.

Department heads were also used to find out what books should be included on the reading lists for the examinations. For example, Ruth Corwin, a personnel analyst, testified at deposition that when she met with police chiefs prior to preparing a sergeant examination, the discussion of the sergeant's job was informal and general and that much of the discussion focused on what books should be in the reading list. P-X-163, April 7, 1977, pp. 9-17.

Documentation of the test construction process, to the extent it exists for tests constructed before 1977, is limited to what is called a "Preconstruction Analysis." Miriam Hall, the Chief Examiner of the Personnel Board, testified that the Board first began using the preconstruction analyis [sic] form in 1974. The preconstruction analyses that have been introduced by the Personnel Board appear in Examiner's Manuals as Attachment No. 1. The following chart identifies the preconstruction analyses that are in the record.

Job Title	Exhibit	Date(s) of Analysis
(1) Account Clerk	D-X-375	11/15/74 2/20/76
(2) Accountant/Auditor	D-X-376	3/3/75
(3) Animal Control Officer	D-X-377	5/20/76
(4) Animal Keeper/Zookeeper	D-X-378	5/24/74
(5) Inter. Clerk	D-X-384	1/27/75
(6) Police/Sheriff Sgt.	D-X-385	3/20/75
(7) Secretary	D-X-387 P-X-123, p. 15	12/19/74 6/17/77
(8) Senior Clerk	D-X-388	9/2&3/75

There have been no preconstruction analyses introduced for tests in the following job classes: (1) automotive mechanic; (2) bailiff; (3) engineering aide; (4) heavy equipment operator; (5) housing inspector; (6) revenue examiner; (7) senior recreation leader; (8) sewage plant operator; (9) stenographer/intermediate stenographer; and (10) utility meter reader.

The preconstruction analysis documents contain three forms. On Form I, the personnel analyst identifies the job tasks, and the knowledges, skills, abilities and personal characteristics (KASPCs) required for the job. Ms. Hall testified that the analysts did not attempt to identify the perceived linkages between KASPCs and the job tasks identified on Form I. Form II is identified as a "Weighting Form;" the personnel analyst notes the test budget on this form. Form III contains a more detailed breakdown of the test budget. None of the forms adequately explain the rationale for the weighting of the various KASPCs in the test budget.

As a general rule, items on the challenged examinations are derived from textbooks. The Personnel Board developed a reading list for the respective examinations; to the extent they are in the record, they appear as Attachment No. 2 in the Examiner's Manuals. Miriam Hall testified that her office maintains an item bank keyed to individual textbooks that have been used to develop items in the past.

Both Dr. Menne and Dr. Prien testified that it is poor practice to derive items from textbooks for exams developed by a content strategy. The danger is that the items would reflect the content of the textbook more than they reflect the content of the job. Dr. Prien noted the potential for constructing tests to fit chapters in textbooks, rather than the identified job elements. Dr. Menne noted that the practice of supplying reading lists to applicants and then developing exams based on the reading lists may lead to test results that do not provide data on which applicants possess more knowledge of the information needed to perform the job. Such a test, he testified, may actually measure which applicants actually studied the textbooks — and the textbooks may or may not relate to the job.

Miriam Hall testified that, subject to approval by the Personnel Board Director, the chief examiner has authority to determine what kinds of selection procedures to use. The chief examiner, therefore, determines whether to use a paper-and-pencil test, a performance test, an oral interview, an assessment center, a training and experience rating or a combination of the above. In all of the job classes, except stenographer/intermediate stenographer,[5] ranking on the eligibility lists was deter-

5 Rank order on stenographer and intermediate stenographer eligibility lists was determined by a combination of scores on the written test and the dictation test. D-X-393, Tab 17.

mined solely by an applicant's score on a written test in entry-level positions. In promotional jobs, rank on the eligibility lists was determined by an applicant's test score combined with points awarded to the applicant for each year of classified service.

The Personnel Board certifies applicants to appointing authorities based solely on their rank on the eligibility list, with the highest ranked applicant being certified first. The Board does not provide guidance to appointing authorities on how to assess applicants during any oral interview they might conduct. The Personnel Board does not use a selection procedure to assess during the probationary period KASPCs that were not tapped by the various written tests, according to Ms. Hall's testimony.

The documentation of how passing points were determined, to the extent it exists, appears in the Examiner's Manuals as Attachment No. 8, following the 11-page discussion entitled "The Flexible Passing Point". The documentation reveals that, as a general matter, the decision on a passing point was based largely on the number of vacancies in the job class. See *e.g.*, Examiner's Manual for Police/Sheriff Sergeant Classification, D-X-385, Attachment No. 8, dated 4/29/75.

C. The Content Validity Verification Reports

The Menne method of marshalling evidence concerning content validity is described in D-X-365 and D-X-366. Both Dr. Menne and Dr. Prien agree that the method described in those documents is essentially a content-oriented test construction method. Nevertheless, the method was used by the Personnel Board to "verify" the content validity of previously administered tests — tests which were constructed using the methodology described in the preceding section of this Brief. Dr. Prien described such use of content-oriented test construction method as a departure from professional convention. See *infra*, Section I.E.

The Menne method calls for a personnel analyst to identify the job domains and the knowledges, abilities, skills, and personal characteristics (KASPCs) needed to perform those job domains. The work of the personnel analyst is subjected to review by subject matter experts (SMEs) — incumbents and supervisors who are experts about the job being analyzed. SMEs perform their review by completing a Job Analysis Questionnaire (JAQ). The JAQ calls for SMEs to rate and rank the

domains and KASPCs, to rate the test items, and to identify the linkages between KASPCs and domains and between test items and KASPCs. In addition, the JAQ asks SMEs to assess the difficulty of the exam as compared to the difficulty of the job.

Personnel Board employees Jerry Burchfield, Dwight Holsomback and Peter Tyler were primarily responsible for writing the domain and KASPC statements, conducting the SME sessions, reviewing the data generated by the SMEs and writing the reports of findings contained in the content validity verification reports.

The analysts relied on the Position Classification Questionnaires (PCQs), the Job Specification, the Dictionary of Occupational Titles (DOT), and other data available in the classification and pay files in writing the domain and KASPC statements. These are essentially the same documents the Personnel Board had been using to construct the challenged examinations. See Section I.B., *supra*.

Dr. Prien criticized the practice of compiling separate task statements into a composite domain statement. He testified that when separate task statements are lumped together, the SMEs' ratings became less helpful because it is more difficult to isolate what it is that the SMEs are rating. For example, one of the domains in the Secretary Report, D-X-406, Exhibit 4, D-1, uses three different action verbs: "composes, types and distributes a wide variety of material. . ." The SMEs were, therefore, never asked to rate each of these discrete tasks separately and their basis for rating the composite domain is unclear.

Dr. Prien testified that as a general matter it is preferable to have task statements reviewed and rated by SMEs before KASPC (or job element) statements are derived. The identification of KASPCs is based upon inferences about underlying worker characteristics that are needed to perform the job tasks. In order to shorten the "inferential leap" involved, a job analyst should obtain as much information about the job as possible. If the analyst meets with SMEs and discusses or has SMEs rate the job tasks, then the analyst will have a more complete understanding of the job before writing KASPC statements. As a result, the analyst will be less likely to develop KASPCs for tasks that are not performed or that are not required to be performed at entry into the job.

Dr. Prien criticized the way in which KASPC statements were written. He testified that many of the KASPC statements

are not "specific" as required by Division 14 of the American Psychological Association in its "Principles for the Validation and Use of Personnel Selection Procedures," p. 10, or "operationally defined" as required by the Uniform Guidelines on Employee Selection Procedures, P-X-25, Section 14(c)(4). The purpose of the operational definition requirement also is to reduce the "inferential leap" between tasks and KASPCs. In addition, a more specific KASPC statement gives the item-writer more information about what should be assessed and at what level of difficulty; it, therefore, limits the item-writer's discretion and provides more control and integrity to the test construction process. An added concern in this case is that vague, poorly-worded, composite, and duplicative KASPC statements make the item to KASPC linkages made by the SMEs less reliable than they otherwise could have been. As Dr. Menne testified, it is easier to link an item to a vague, ill-defined KASPC statement than to a specific one. Trial Transcript, p. 914, lines 13-16.

Account Clerk, D-X-394, Exhibit 5, is an example of a report that contains poorly-worded KASPC statements. For example, K-2 is defined as "knowledge of accounting principles and practices." A similar statement appears in the Accountant/Auditor Report, D-X-395, Exhibit 5, K-1; yet, the degree and kind of knowledge needed to perform the two jobs are probably not the same. An account clerk SME and an accountant SME may both respond positively to such statements but understand the statements differently. Another problem with the account clerk KASPC statements is that many of them were taken directly from the job specification, D-X-394, Exhibit 2, indicating that the analyst did not arrive at the statements through an independent analysis.

The domain and KASPC statements were reviewed by SME panels of varying sizes. Both Dr. Menne and Dr. Prien agree that a panel of eight to twelve SMEs will generally provide meaningful statistics concerning rater agreement and a sufficient number of views about the job. Dr. Menne testified that in heterogeneous jobs it is wise to try to get more SMEs involved. Dr. Prien testified that a panel of fewer than six SMEs should not be used unless there are no other SMEs available.

Page eight of the Content Validity Verification Reports identifies the number of SMEs participating in the study and the

number and location of incumbents in the position being studied.[6] Six or fewer SMEs were used in the following studies:

Job	Exhibit No.	No. of Incum-bents	No. of SMEs Reviwing Job Data	No. of SMEs Reviwing Test(s)
Animal Keeper	D-X-397	18	5	5
Bailiff	D-X-399	27	4	4
Police/Sheriff Sgt.	D-X-404	231	28	5 or 6
Rev. Exam	D-X-405	13	6	6
Secretary	D-X-406	50	8	3 or 5
Senior Clerk	D-X-407	77	17	5 or 6
Senior Rec. Ldr.	D-X-408	10	5	5

The JAQ Booklet contains rating scales for domains, KASPCs and test items. SMEs are asked to rate domains on a five-point scale (0-4) on five factors: factor A concerns frequency, factor B concerns time spent, factor C concerns criticality, factor D concerns the extent to which performance of the domain is necessary upon entry to the job, and factor E concerns the relationship performance of an individual domain has to successful performance of the job. KASPCs and items are rated on a four-point scale (1-4).

Dr. Menne testified that there are some problems with some of the rating scales. Factor C, Criticality/ Consequence of Error, does not provide SMEs with an option to rate a domain that is performed as not critical. The scale moves from "(0) not applicable; not performed" to "(1) slightly critical." SMEs may also rate a domain as moderately critical, critical or very critical. Leaving aside the question of whether there are degrees of criticality, the scale's utility is limited because SMEs must indicate that a domain that is performed is critical to some extent.

The KASPC scale poses a different problem. As Dr. Menne testified, the KASPC rating scale is not really a scale. Rather it is a set of categorical responses. In addition, the KASPC rating scale and factor D of the domain rating scale both seem to seek SMEs [sic] judgments about the extent to which a particular KASPC or performance of a domain is required upon entry into a position, yet, the "scaled" responses differ.

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6 The studies do not provide data on the number of supervisors of incumbents in the job being reviewed.

The analysis of the judgments of the SMEs is contained in the Report of Findings section of the Content Validity Verification Reports. All of the reports were written by either Mr. Burchfield, Mr. Holsomback or Mr. Tyler, with the exception of the revenue examiner report which was written by Dr. Menne.

The Personnel Board analysts testified that they reviewed the computer printouts of the SME responses to look for negative responses. A negative response was defined as a response indicating that a domain was not performed (a "0" rating on the five factors), a KASPC was "unnecessary" (a "1" rating on the KASPC rating scale), or a test item was "unrelated" (a "1" rating on the Item Rating Scale).

Mr. Burchfield testified that of the five domain factors, he focused his attention on factors A (frequency), B (time spent), and C (criticality). Trial Transcript, p. 1032, lines 8-12. Mr. Holsomback testified that when he reviewed domain ratings, he did not differentiate between a "2", "3" or a "4" rating on the scales. As a result, as long as some of the SMEs indicated that a domain was part of the job the analysts were reviewing, they treated the domain as an appropriate subject for assessment on the challenged examinations.

Mr. Holsomback testified that his review of the responses on the KASPC rating scale focused on whether a majority of the SMEs gave the KASPC a "1" rating ("unnecessary"). If he found that [a] majority of the SMEs rated a particular KASPC as unnecessary, then he would conclude the KASPC was inappropriate for assessment. As with the domain ratings, the analysts did not consider mean ratings of the KASPCs, nor did they treat a "2" rating (desirable: not required) differently than a "4" rating (necessary at entry).

SMEs were asked to link each KASPC to the domain statement(s) for which application of that KASPC is required. The analysts considered that a linkage between a KASPC and a domain was established if one SME linked a particular KASPC to a particular domain.

SMEs were also asked to rank the domains and the KASPCs separately based upon importance. The analysts relied upon these rankings in their reports, frequently noting that they considered that ranking provides the clearest picture of importance. Dr. Prien testified that the ranking operation eliminates any relationship to an absolute scale. As a result, low-rated

domains or KASPCs could be considered important because they were ranked highly. See *e.g.*, Engineering Aide, D-X-400 and Sewage Plant Operator, D-X-409, instances where domains were rated low.

On the item rating scale, the analysts focused their attention on whether a majority of the SMEs gave an item a "1" rating (unrelated). If a majority of the SMEs gave an item a "1" rating, the item was considered unrelated. If only half of the SMEs gave an item a "1" rating, the item was not considered unrelated unless the analyst's review of the item led him to the same conclusion.

The SMEs were also asked to link each item that did not receive a "1" rating to the KASPC to which the item was related. The analysts considered an item to assess a KASPC as long as one rater linked a specific item to a specific KASPC. The analysts used this data to identify KASPCs that were not assessed by the examination. A KASPC was considered to be not assessed by the examination if it was not linked by at least one rater to one item. The reports conclude generally that KASPCs not assessed by the written exam could be assessed during the probationary period. But Ms. Hall testified that the Personnel Board made no effort to see that this was done. Indeed, it would have been impossible to do so since the unassessed KASPCs were not identified until some time after the exams were administered.

The Reports of Findings indicate that the analysts made no effort to determine the extent to which the various KASPCs were assessed by the exam. This is so, despite the fact that Dr. Menne and the analysts agreed that it is important for the high-ranked KASPCs to be given more weight on the exam than the low-ranked KASPCs.

D. Dr. John Menne's Grades and Notes

Dr. Menne testified during the October segment of this trial that he and his wife, who is also a psychologist, reviewed the data concerning the validity of the challenged examinations and attempted to link items on the challenged examinations to KASPCs that he determined to be in the "certification domain". The "certification domain" was comprised of KASPCs that Dr. Menne believed could be assessed by a paper-and-pencil test. Their efforts to link items to KASPCs are reported in P-X-124.

Dr. Menne assigned a letter grade, based upon a conventional college grading scale ("A" through "F"), to the evidence

of validity of the examinations in each job class. The grades are listed in P-X-122.

E. Dr. Erich Prien's Analysis of the Content Validity Verification Reports

Dr. Prien testified that the Personnel Board's test construction methods, discussed in Section I.B., *infra*, do not comport with professional standards and federal guidelines. The basic defect of the test construction method was the failure to perform a complete and thorough job analysis and to derive a test budget from such a job analysis.

The Personnel Board, however, has applied the Menne method of content-oriented test construction in an attempt to "verify" the validity of previously administered tests — tests which were constructed using an entirely different methodology. The job analysis conducted pursuant to the Menne method and documented in the content validity verification reports did not serve as the basis for constructing any of the challenged tests which were used prior to 1977. As a result, the claim of content validity rests on evidence that the previously administered tests are consistent with the findings of the job analyses conducted pursuant to the Menne method between 1976 and 1978.

Dr. Prien testified that he made an effort to accommodate and evaluate the attempted *post hoc* "verification" of the content validity of the challenged examinations. In an attempt to assess the fit between the judgments of the SMEs and the challenged examination, Dr. Prien developed a retranslation analysis. A retranslation analysis starts with the test items and moves backward to KASPCs and then to domains. (In test construction, the movement would be from domains to KASPCs to a test budget to test items.) The retranslation analysis assessed whether the test items were linked by a consensus of SMEs to KASPCs which were important and necessary at entry; and whether those KASPCs were linked by a consensus of SMEs to domains that were important and required to be performed at entry.

Dr. Prien utilized a standard for rater consensus on linkages between items and KASPCs and between KASPCs and domains which were based upon a binomial probability model. See P-X-186. The purpose of the probability model was to determine whether the SME linkages exceeded chance expectancy.

C. Terrence Ireland, Ph.D., a professor of statistics who was qualified at trial as an expert in that field, testified about Dr. Prien's binomial probability model for rater consensus. P-X-186 articulates the probability model and sets forth the rater consensus standards justified by that model.

The major features of the model include defining an item as linked to a KASPC whose identity is not specified *a priori*, if the underlying and unknown probability of the KASPC's selection by raters, who are assumed to be similar, exceeds .5. Accordingly, the null hypothesis is that no KASPC has the expectation of being selected by more than half of the raters. Since the purpose of the validation procedure is to prove items good, the acceptable risk of accepting a bad item as good is defined, while the acceptable risk of rejecting a good item is undefined. The probability level for rejection of the null hypothesis is .05.

The model can be applied to KASPC to domain linkages as well as to item to KASPC linkages, except for a qualification which is applicable in this case. That exception is that the model assumes that a rater can link an item or KASPC to only one KASPC or domain, whereas defendants' raters were allowed to link a KASPC to more than one domain. The fact that more than one domain linkage was allowed has the effect of making the numerical standard for rater consensus more lenient than it was designed to be. That is, domain linkages will occur, by chance, more than 5% of the time.

The final assumption of the binomial probability model is as follows: "(8) More than one KASPC with probability of selection near 0.5 is unlikely to occur." Dr. Ireland was asked about this assumption during cross-examination. He testified that applying the model when assumption (8) was violated would be the equivalent of using a one-tail test in a two-tail situation. In other words, the model's approximately .05 probability of the threshold number of raters selecting a KASPC would be doubled to approximately .10, making the test for chance agreement more lenient than it was designed to be.

As noted earlier, the retranslation analysis required more than just a linkage that exceeded chance probability between an item and a KASPC and a KASPC and a domain. The items must be linked to important KASPCs which are necessary at entry into the job, and the KASPCs that meet that standard must be linked to domains that are required to be performed at entry into the

job. The KASPC rating scale and factor D of the domain rating scale asked the SMEs to make judgments about whether specific KASPCs or specific domains were required at entry into the job.

Dr. Prien decided to require that a KASPC or a domain receive a 3.0 mean rating[7] or higher on the appropriate rating scale in order to be considered necessary or required before entry into the job. The definitions of the responses on factor D, Extent Necessary Upon Entry to the Job, indicate that only ratings of "3" or "4" indicate that performance of the domain is necessary, to some extent, upon entry to the job.[8] On the KASPC rating scale, only a "4" response indicates that a KASPC is necessary at entry.[9] A "3" rating indicates that although the KASPC is necessary at full performance, it "can be and/or usually is gained through some form of training after entry." A "2" rating indicates that although the KASPC is desirable, it is not required. In addition, the requirement of at least a 3.0 mean rating on these scales is justified by recent experiments reported in the professional literature. Dr. Prien testified that the studies indicate that individuals respond to a numerically-scaled rating form based upon a general judgment concerning the question posed, regardless of how the scaled responses are defined. The standards for domain and KASPC ratings set by Dr. Prien are, therefore, reasonable in light of the way the scales have been defined and experimental studies of how individuals respond to numerical rating scales.

Dr. Prien noted that to the extent that there were poorly-worded KASPC statements, data on SME judgments of item to KASPC linkages may have been contaminated. It may be easier for an SME to link an item to a vaguely worded KASPC; and

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7 Mean ratings were used because the computer printouts contained mean ratings. Dr. Prien testified that median ratings could have been used, as well. P-X-168 through P-X-185 reflect the computation of median ratings and the performance of various retranslation operations using median ratings.

8 A "2" rating is defined as: "Desirable; it will shorten an otherwise lengthy training period." The scale does not indicate what constitutes a "lengthy training period" or whether incumbents receive training on the job regardless of the length of the training period. Cf. the definition of "Desirable" on the KASPC rating scale.

9 It is for this reason that Columns 3A-3G on Government Exhibit 168-185 analyze SME linkages considering only KASPCs with 3.5 or higher median ratings.

KASPCs worded similarly may cause SMEs confusion in performing the linkage operation. As a result, the retranslation analysis was hampered somewhat by deficiencies in the job analysis data.

Both testing experts discussed the ability of SME to link items to KASPCs. Dr. Prien testified that SMEs can be trained to perform that operation adequately. Dr. Menne testified that SMEs were not capable of making linkages between items and KASPCs even though the JAQ asked SMEs to perform that operation and Dr. Menne's article, D-X-366, after Appendix III, does not speak of any such limitation on SMEs' capabilities. Indeed, both Dr. Menne's article and the other article in D-X-366, written by Ottemann and Chapman, suggest that rater consensus on item to KASPC linkage should be assessed. See Menne, Menne and McCarthy, pp. 392 and 394; and Ottemann and Chapman, pp.21-22. In any event, the linkage operation performed by SMEs constitutes the only data relating the test items to the job analysis contained in the verification report.[10]

Dr. Menne testified that the face validity of an item — the degree to which an item bears a seeming relation to the job — affected SMEs' judgments on the item rating scales. Nevertheless, he testified that SMEs were capable of judging an item to be unrelated to the job, a "1" rating on the scale. SMEs' judgments that an item was unrelated were heeded only if a majority or, in some circumstances, half of the SMEs gave the item a "1" rating.

The defendants' reliance on this standard to support the claim of content validity produced anomalous results. For example, on the animal control officer exam, a majority of the SMEs rejected only four of the 105 items, D-X-396, pp.17-18; yet, Dr. Menne found that 80 of the 105 items were not job related and could not link an additional 16 items to KASPCs in the verification report, P-X-124. Dr. Menne gave the evidence of validity a grade of D, P-X-122, but reliance solely on the item ratings would have lead [sic] to a different and erroneous conclusion. It cannot be assumed that an item that was not rejected by a majority of SMEs is appropriate and job related.

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10 The Government was not aware of Dr. Menne's efforts to link items to KASPCs until he testified about that effort during the October segment of the trial.

Dr. Prien testified that in assessing item to KASPC linkages he often employed, on an exploratory basis, a consensus standard more lenient than that justified by the binomial probability model. P-X-131 is a summary exhibit that identifies the consensus standards which Dr. Prien applied to item to KASPC linkages and the number of items that survived application of each standard. In every instance, a significant number of items did not meet the retranslation standard. Dr. Prien testified that because so many items failed to meet the item to KASPC linkage standard, he did not assess KASPC to domain linkages, nor did he compare the distribution of the surviving items with a test budget justified by the domain and KASPC rating and ranking data.

A complete retranslation analysis, applying various consensus standards and various controls on linkages and KASPC and domain ratings, has been performed by the Government. The analysis is described in P-X-165 through P-X-167; the results of the analysis performed for each job appear in P-X-168 through P-X-185. Attached as Appendix B to this Brief is a chart that summarizes the results obtained by the various retranslation standards utilized in P-X-168 through P-X-185.

F. Test Equivalence

Dr. Menne testified that based upon his experience in the field of educational measurement, he believed that scores on an exam with a number of non-relevant items would correlate highly with scores on a revised exam. In Chapter 10 of the Analyst's Manual, D-X-366, he wrote:

> In most situations it can be shown that 5 percent or even 10 percent of items that are 'unrelated' does not meaningfully effect [sic] the validity of the test score. Obviously though, such items should no longer be employed in a selection procedure mainly because it is desirable to have tests as good as possible and not waste applicants' time on inappropriate items.

D-X-366, Chapter 10, p. 15.

In addition, Dr. Menne testified that the grades he assigned to the evidence of validity of the various exams reflected his belief about the degree to which selection decisions might have been different if the non-job related items had not been included in the test score. His testimony is not clear on the issue of how many bad items can be found in an exam and still not affect selec-

tion decisions enough to make the exam inappropriate for use. Some light is shed by his responses to the evidence concerning the animal control officer exam. He found 80 of the 105 items (76.2%) on the test were not job-related (P-X-124), yet, he refused to testify that the exam was not content valid.

The only evidence presented by the Personnel Board to support Dr. Menne's assertion about the number of bad items on an exam that can be tolerated is contained in D-X-413. That exhibit contains some incomplete data on the effect of rescoring a few of the challenged examinations[11] after eliminating some items.

Leaving aside the question of whether the standards used for item retention were appropriate, the exhibit is seriously flawed. Dr. Prien testified that the hypothesis to be tested concerns whether selection decisions would have been different if the "bad" items were not considered in arriving at test scores. To assess this hypothesis, it would be necessary to recompute the scores of *all* test takers in order to determine whether the rank order would be different *and* whether individuals who passed the original version of the test would have failed the revised version of the test and vice versa. The computation of the correlation coefficients in D-X-413 appears to be based solely on the assessment of the differences in test scores of those individuals who passed the original test. Moreover, the correlation coefficients, by themselves, do not reveal whether there would have been differences in the selection of individuals.

In only two instances, stenographer and senior clerk, does the exhibit present an individual by individual comparison of rank based upon the original test score and the revised test score. Joseph Kerr, a Personnel Board witness, testified that the comparison on the senior clerk exam was limited to those individuals who were on the original eligibility list.

The data on the senior clerk exam demonstrates that the elimination of 30 items (20% of the original test) significantly affected the ranking of the 22 individuals on the eligibility list. For example, the exhibit shows that one applicant, Joy Elaine Cooper, ranked 4th on the original list but ranked 14th on the rescored list. Another applicant, Deborah Jackson, ranked 19th

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11 D-X-413 contains data on one stenographer exam, one senior clerk exam, one (or two) accountant/auditor exams, one secretary exam, and two housing inspector exams.

on the original list but ranked 8th on the rescored list. Since the Personnel Board certifies applicants based on their rank on the eligibility list, changes of the kind identified on the senior clerk exam would presumably have affected selection decisions.

In addition, as Dr. Prien testified, the comparisons between scores on the original exam and the exam minus some inappropriate items does not provide complete information. It cannot provide information about how applicants would have fared on a form of the examination in which the inappropriate items were replaced by an equal number of appropriate items.

Dr. Prien also testified that he had been involved in an experiment to assess whether two different tests administered to the same group of applicants would produce similar results. Dr. Prien has worked as a monitor of the selection procedures used by the United State Department of State to select foreign service officers. At one point, the Department was considering whether to use the Professional and Administrative Career Examination (PACE), an exam used by the federal government to select individuals for some professional positions. The PACE exam and the foreign service officer exam were administered to the same group of about 6000 applicants. The results were that about 85% of those applicants who passed the PACE exam would not have passed the foreign service officer exam and about 85% of those applicants who passed the foreign service officer exam would not have passed the PACE exam.

In conclusion, the Personnel Board has failed to demonstrate that inappropriate items could have been eliminated from the challenged exams without affecting the selection decisions based upon those exams.

G. Review of Evidence Concerning Specific Examinations

1. Account Clerk

The Personnel Board has used five slightly different paper-and-pencil tests to select account clerks since 1972. Four of these tests were reviewed by incumbents and supervisors as part of the content validity verification process. D-X-394. The fifth test, the one developed in 1977, is discussed in the Examination Chronologies. D-X-393, Tab 1.

The Examiner's Manual, D-X-375, contains two preconstruction analyses, one was completed in 1974 by Miriam Hall and the other one was completed in 1976 by Ruth Corwin. Aside from the "revision" for the 1977 test, D-X-393, Tab 1,

these are the only documents presented by the Personnel Board that purport to document how any of the examinations at issue were constructed.

Miriam Hall, the Chief Examiner of the Personnel Board, testified that the personnel analysts relied upon Position Classification Questionnaires (PCQs) completed as part of the five-year Classification and Pay Study, the Job Specification, a synopsis of the PCQs which appears in the Board's Classification and Pay Manual, and the Dictionary of Occupational Titles in constructing examinations. These documents do not provide information about whether an individual needs to be able to perform job tasks at entry into the position or whether the individual is trained on the job. Nor is such information provided concerning the knowledges, skills and abilities needed to perform the job tasks. Further, the documents provide little data on the relative importance of the job tasks other than an employee's indication of the amount of time he or she spends performing a task. No information is provided about the criticality of a task or about whether how an individual performs a task differentiates between the quality of the individual workers. As a general rule, Personnel Board technicians did not meet with job incumbents or systematically observe their work as part of the test construction process. An unstructured meeting with department heads or supervisors served, as a general matter, as the only supplementation of the Classification and Pay data.

A review of Form I of both the 1974 and 1976 preconstruction analyses, D-X-375, shows that the statement of job tasks and knowledges, skills and abilities was derived, if not copied directly (see 1976 analysis), from the job specification contained in the Classification and Pay Manual. Form II, which is entitled "Weighting Form," contains no explanation or justification for the weights assigned to the various knowledges, skills or abilities that the technician attempted to assess by means of the test. In 1974, bookkeeping and accounting questions comprised 25% of the test. In 1976, that topic accounted for 15% of the test.

The data contained in the Content Validity Verification Report, D-X-394, led Personnel Board analyst Dwight Holsomback to conclude that the account clerk position is "heterogeneous", D-X-394, p. 15. Indeed, of the eight subject matter experts, only four indicated that account clerks perform domains 3 and 4, five indicated that account clerks perform

domains 1 and 5, and seven indicated that account clerks perform domain 2. D-X-394, Exhibit 1-Domain Ratings. After receiving the computer printout, Mr. Holsomback made no systematic effort to review the degree of specialization by account clerks or the degree to which a classification problem might exist.

A review of the KASPC Statement in the Validity Study, D-X-394, Exhibit 5, led Dr. Erich Prien to conclude that the statements were not "operationally defined" as required by the federal guidelines. The cross-examination of Mr. Holsomback revealed that many of the KASPC Statements were taken from the Job Specification, D-X-394, Exhibit No. 2.

The following chart shows how the SMEs rated the domains on factor D, Extent Necessary at Entry:

	Based Upon Ratings of All 8 SMEs		Based Upon Ratings of SMEs Who Indicated That Domain Performed By Account Clerks		
Domain	Avg. Rating	Median Rating*	# SMEs	Avg. Rating	Median Rating**
1	1.4	.5	5	2.2	2.0
2	1.4	1.5	7	1.6	2.0
3	1.4	.5	4	2.8	2/4
4	1.4	.5	4	2.8	3.0
5	1.0	.5	5	1.6	2.0

* From P-X-168.
** From Dr. Menne's Notes, P-X-124.

Of the eight knowledges and five ability statements, six received less than 3.0 median ratings (K-1, K-2, K-3, K-4, K-7, A-5), P-X-168, and seven received less than 3.0 mean ratings (K-1, K-2, K-3, K-4, K-7, A-1, A-5). D-X-394, Exhibit 1-KASPC Ratings. Notably, all four statements concerning bookkeeping and accounting (K-1, K-2, K-3, A-1) received less than 3.0 mean ratings; three of those four statements (K-1, K-2, K-3) received less than 3.0 median ratings.

Dr. Prien applied the retranslation standard of six out of eight SMEs linking an item to the same KASPC and found that linkage was established on 26 out of 102 items on test No. 1, 26 out of 105 items on test No. 2, 21 out of 101 items on test No. 3, and 14 out of 96 items on test No. 4. P-X-131. Requiring that the items be linked to a KASPC with a 3.0 mean rating reduced the survival rate. See P-X-131.

The Government's analysis of the Content Validity computer tape, P-X-168, shows that no domain had a median rating of 3.0 or higher on factor D, factor E, or factors C, D, and E combined. As a result, no items on any of the four tests survived the standards imposed by 2B through 2G and 3B through 3G. (See P-X-165 for the definition of the various standards.) Imposing a requirement that five of the eight SMEs link an item to the same KASPC, P-X-168, column 2A, produced the following results: test No. 1, 38 out of 102 items survived; test No. 2, 38 out of 107 items survived; test No. 3, 35 out of 101 items survived; test No. 4, 24 out of 96 items survived.

Dr. Menne gave the evidence of validity a grade of B. P-X-122. Dr. Menne's notes reveal he attempted to link test items on two of the exams to KASPCs in what he defined as the "certification domain." P-X-124. The following chart, taken from P-X-124, shows the linkages made:

	Test 12/74	Test 8/76
A2		
K6	47	30
K1	23	29
K5	3	
K8		
K3		
K4	3	18
A1		
K2	10	1
K7		1
Subtotal	86	79
no linkage	11	5
marginal	1	
poor		1
not job related	1	10
Total	99	95

If we eliminate the KASPCs that received median ratings below 3.0, K-1, K-2, K-3, K-4, K-7, A-5, then on the December 1974 test Dr. Menne was able to link only 50 of the 99 items to appropriate KASPCs and on the August 1976 test he was able to link only 30 of 95 items to appropriate KASPCs.

The SMEs were asked to assess the difficulty of the examinations in regard to the difficulty of the job. Job Analysis

Questionnaire (JAQ) Booklet, p. 46, question 3. Six of the eight SMEs rated the exam to some extent harder than the job.

Miriam Hall testified that in 1977 she reviewed the Content Validity Verification Report before preparing an examination. She testified that she did not review the weighting of the exam in light of the SME responses. The only changes she made to the 1976 examination were to delete nine items and to revise 5 other items. There was no testimony that she analyzed the heterogeneity of the account clerk position.

Dr. Prien testified that the evidence presented did not support a conclusion that the examinations in question were content valid in light of professional standards and federal guidelines.

2. Accountant/Auditor

Between 1972 and 1978, the Personnel Board used two versions of a paper-and-pencil test to select accountants and auditors. The test used from 1972 through 1974 contained 50 items and a "problem segment." The test used from 1975 through 1978 contained 53 items and a "problem segment." D-X-393, D-X-376, D-X-395.

The Examiner's Manual, D-X-376, does not contain a preconstruction analysis for the examination used from 1972 through 1974 nor any other documentation of how that examination was constructed. There is a preconstruction analysis dated March 3, 1975, completed by Ruth Corwin, concerning the exam used from 1975 to 1978.

Miriam Hall, the Chief Examiner of the Personnel Board, testified that the personnel analysts relied upon Position Classification Questionnaires (PCQs) completed as part of the five year Classification and Pay Study, the Job Specification, a synopsis of the PCQs which appears in the Board's Classification and Pay Manual, and the Dictionary of Occupational Titles in constructing examinations. These documents do not provide information about whether an individual needs to be able to perform job tasks at entry into the position or whether the individual is trained on the job. Nor is such information provided concerning the knowledges, skills, and abilities needed to perform the job tasks. Further, the documents provide little data on the relative importance of the job tasks other than an employee's indication of the amount of time he or she spends performing a task. No information is provided about the criticality of a task or about whether how an individual performs a task differentiates be-

tween the quality of the individual workers. As a general rule, Personnel Board technicians did not meet with job incumbents or systematically observe their work as part of the test construction process. An unstructured meeting with department heads or supervisors served, as as general matter, as the only supplementation of the classification and pay data. In this case, the Examination Chronology, D-X-393, Tab 2, p. 2, states that the Personnel Board technician relied, in part, on the judgment of her husband, an accountant who did not work for any of the jurisdictions served by the Personnel Board.

Form I of the preconstruction analysis sets out the job tasks and knowledges, skills, abilities and personal characteristics required for the job of accountant. The data listed under the column entitled "Job Tasks" appear to have been copied directly from the Job Specification listing of "Examples of Work". The knowledges and abilities listed on the preconstruction analysis also appears to have been copied directly from the Job Specification.

Miriam Hall testified that the problem segments on the exams came from textbooks and were not actual job samples.

The Content Validity Verification Report identifies 10 domain statements. D-X-395, Exhibit 4. Nine incumbents and supervisors participated in the study. The following chart notes the number of SMEs who indicated that a particular domain was part of the job:

Domain	Total SMEs	SMEs Who Consider Domain Part of Job*
D-1	9	3
D-2	9	3
D-3	9	9
D-4	9	6
D-5	9	9
D-6	9	5
D-7	9	3
D-8	9	7
D-9	9	0
D-10	9	6

* Based upon D-X-395, Exhibit 1-Domain Ratings.

The data suggest a classification problem. Indeed, Dr. Menne's notes, P-X-124, Accountant/Auditor, p. 7, state that there is a "*Classification Problem*!" (emphasis in original).

The Report of Findings of the Validity Study asserts that "personnel are expected to be interchangeable within the class and persons laterally transferred would be expected to perform all types of accounting tasks." D-X-395, p. 17. The Personnel Board introduced no evidence that accountants and auditors are, in fact, laterally transferred from positions with one set of duties to positions with another set of duties.

The Validity Study identifies 16 knowledge statements, 3 ability statements and four skill statements. D-X-395, Exhibit 5. The statements are general, not operationally defined and duplicative. The duplication indicates that the Personnel Board analyst was confused about the distinction between a knowledge statement, an ability statement and a skill statement. See Uniform Guidelines, Section 16(A), (M) and (T). For example, K-1, A-1, and S-1 are general statements concerning accounting principles that appear to be similar. Not surprisingly, the SMEs rated and ranked the general KASPCs concerning accounting principles highly. Their ratings did vary somewhat; K-1 received a 4.0 median rating, whereas A-1 and S-1 received 3.0 median ratings. P-X-169.

Another example of duplication is K-5 and S-2, both of which concern math and are defined in nearly identical language.

As a result of these deficiencies, the job analysis contained in the Validity Study is not very informative. It tells the reader that "knowledge of all the types of accounting principles and procedures" (K-1) is necessary for an individual to perform the job of accountant and auditor. Dr. Prien testified that a statement of that kind does not provide sufficient guidance to the item writer. In addition, the linkage of items to such an element is relatively easy and automatic but provides little information about the appropriateness of the test item.

Dr. Menne's linkage of items to KASPCs demonstrates this phenomenon. On one test, he linked 45 of 50 items to K-1; on the other test all 50 items were linked to K-1. P-X-1. Nevertheless, Dr. Menne gave the evidence of validity a grade of B-. P-X-122.

An analysis of the mean item ratings show [sic] that a substantial number of items received mean item ratings of 2.4 or lower. On test No. 1, 29 of the 50 items (58%) received mean ratings of 2.4 or lower. On test No. 2, 20 of the 53 items (37.7%) received mean ratings of 2.4 or lower.

Dr. Prien testified that the evidence presented does not support a conclusion that the tests used between 1972 and 1978 were content valid in light of professional standards and federal guidelines. He did note parenthetically that the rationale for the 1979 test, D-X-393, Tab 2, p. 4, indicates that the Personnel Board followed an improved test construction process but that there was insufficient evidence for him to draw a conclusion about the content validity of that exam. In any event, the 1979 examination is not in issue in this litigation.

3. Automotive Mechanic

The Personnel Board has used four versions of a 150 item paper and pencil test to select automotive mechanics between 1972 and 1978. D-X-398, p. 19; D-X-393, Tab 5.

The Examiner's Manual, D-X-379, does not contain a preconstruction analysis or any other documentation of how the basic 150 item test was constructed. The Examination Chronology, D-X-393, Tab 5, p. 3, contains a very brief description of how the basic test was modified in 1978.

The Content Validity Verification Report, D-X-398, Exhibit 4, identifies 14 domain statements. Five of those statements received median ratings below 3.0 on Factor D, Extent Necessary At Entry (D-10, D-11, D-12, D-13, D-14). Seven statements received mean ratings below 3.0 on Factor D (D-4, D-8, D-10, D-11, D-12, D-13, D-14).

D-X-398, Exhibit 5, identifies 30 knowledge statements, three ability statements and one skill statement. The KASPC statements are fairly discrete. Of those 34 KASPC statements, 11 received mean ratings below 3.0 (K-7, K-10, K-15, K-17, K-19, K-23, K-24, K-25, K-26, K-27, K-28). D-X-398, Exhibit 1 - KASPC Ratings. Six statements received median ratings below 3.0 (K-10, K-15, K-24, K-26, K-27, K-28) P-X-172. In addition, K-23 and K-25 were not linked by a majority of the raters to the class of domains which received a 3.0 or higher median rating on factor D, Extent Necessary at Entry. P-X-172.

Dr. Prien criticized the way the KASPC statements were written. He testified that many of the elements that were written as knowledge statements should have been written as ability statements because they concerned the ability to perform an observable task. For example, statements which concern knowledge of how to do something (e.g. K-16, K-18) are more appropriately considered abilities. Dr. Prien testified that the

consequence of mislabeling job elements as knowledges is that a paper-and-pencil test would appear to be appropriate when, in fact, another kind of selection procedure should be considered.

The Uniform Guidelines, P-X-25, and the Questions and Answers, P-X-26, address the question of the propriety of using paper-and-pencil tests for jobs such as automotive mechanic. Section 14(c)(4) of the Uniform Guidelines states in part:

> The closer the content and the context of the selection procedure are to work samples or work behaviors, the stronger is the basis for showing content validity. As the content of the selection procedure less resembles a work behavior, or the setting and manner of the administration of the selection procedure less resemble the work situation, or the result less resembles a work product, the less likely the selection procedure is to be content valid, and the greater the need for other evidence of validity.

The Answer to Question 78 of the Questions and Answers states in part:

> Paper-and-pencil tests which are intended to replicate a work behavior are most likely to be appropriate where work behaviors are performed in paper-and-pencil form (e.g., editing and bookkeeping). Paper-and-pencil tests of effectiveness in interpersonal relations (e.g., sales or supervision), or of physical activities (e.g., automobile repair) or ability to function properly under danger (e.g., firefighters) generally are not close enough approximations of work behaviors to show content validity.

Dr. Prien testified that it would be possible and appropriate to use a small job sample test to select automotive mechanics.

Dr. Prien's summary exhibit, P-X-131, shows that six of the nine SMEs were able to agree on an item-KASPC linkage on 103 items on the 150 item test (68.7%), 88 items on the 127 item test (69.3%), and 87 items on the 125 item test (69.6%). If the standard is lowered to require agreement by only five of the nine SMEs, then 112 items on the 150 item test (74.7%) survive. P-X-172, Column 1 (Lax).

Dr. Menne gave the evidence of validity a grade of C+. His notes, P-X-1, indicate that he did not complete his attempt

to link items to KASPCs. He testified that he was concerned about the KR-21 values, because given the length of the test, the KR-21 values should have been .9 or higher.

Dr. Prien testified that the evidence of validity does not support a conclusion that the exams were content valid in light of professional standards and federal guidelines.

4. Bailiff

Until 1974, the Personnel Board used a 75 item paper-and-pencil test to select bailiffs. Starting in 1974, the Personnel Board selected bailiffs from among those individuals who took Policeman Test 100 D-X-393 [sic] Personnel Board Analyst Jerry Burchfield testified that at least six persons who took the police officer test were certified for bailiff positions. Plaintiffs' Exhibit 60, III. 1976-1978, shows that all six persons hired as bailiff between 1976 and 1978 were white.

The Examiner's Manual, D-X-380, does not contain a pre-construction analysis or any other documentation of how the 75 item test was constructed.

Only four SMEs were used to perform a content validity study; page 8 of D-X-399 shows that there were 27 baliffs employed at the time. Dr. Prien testified that it was only acceptable to have an SME panel of four persons if there were no other SMEs available; the data obtained from a small SME panel may not be reliable.

The Content Validity Study identifies 14 knowledge statements, 14 ability statements, and four skill statements. D-X-399, Exhibit 5. Seven knowledge statements, three ability statements and two skill statements received median ratings below 3.0 (K-1, K-5, K-6, K-8, K-9, K-10, K-14, A-7, A-11, A-14, S-1, S-3). P-X-173. Eleven knowledge statements, three ability statements and three skill statements received mean ratings below 3.0 (K-1, K-2, K-4, K-5, K-6, K-7, K-8, K-9, K-10, K-13, K-14, A-7, A-11, A-14, S-1, S-3, S-4). D-X-399, Exhibit 1-KASPC Ratings.

The Report of Findings of the Validity Study, D-X-399, p. 17, states that 17 items were judged not related to their job by two of the SMES and 3 items were judged not related to their job by three SMEs. A majority, three out of four SMEs, indicated that only 55 items (73.3%) on the 75 item test were related to the job of bailiff.

Dr. Prien reviewed the item to KASPC linkage data in the computer printout and found that the four SMEs agreed on a linkage between five items and a particular KASPC. P-X-131. He also testified that if the standard were reduced to require only three of the four SMEs to agree on item to KASPC linkage, then only 15 items survived. When the standard is reduced to agreement between two of four SMEs, then 49 items survive. Dr. Prien testified that even using the 50% consensus standard, the number of items surviving was too small to support a claim of content validity.

Dr. Menne's notes, P-X-124, establish that he was only able to link 29 items to KASPCs in the "certification domain" and that he judged 30 items on the test to be "poor/not job related." Dr. Menne gave the evidence of validity a grade of C.

The Personnel Board presented no evidence concerning the validity of the use of Policeman Test 10C to select bailiffs. This Court has previously held that the Personnel Board failed to establish that Policeman Test 10C is related to the job of police officer.

Dr. Prien testified that the evidence presented does not support a conclusion that the examinations were content valid in light of professional standard and federal guidelines.

5. Engineering Aide

The Personnel Board used a 60 item math test to select engineering aides until September 1977. In September 1977, 28 items concerning surveying and 11 items concerning geometry and trigonometry were added to the 60 item math test. D-X-393, Tab 7.

The Examiner's Manual, D-X-381, does not contain a preconstruction analysis or any other documentation of how the test was constructed.

SMEs reviewed two different sets of domain statements. D-X-400, Report of Findings. Both sets of domain statements received low ratings on factor D, Extent Necessary Upon Entry

To the Job. The following chart shows the mean and median ratings of revised set of domains:

Domains	Mean*	Median**
D-1	1.4	1.0
D-2	2.1	2.0
D-3	1.1	1.0
D-4	1.1	1.0
D-5	1.6	2.0
D-6	1.7	2.0
D-7	0.9	0.0
D-8	0.2	0.0

* D-X-400, Exhibit 1-Domain Ratings.
** P-X-174.

Dr. Prien testified that in a case, such as engineering aide, where the SME ratings indicate that all the job duties are learned on the job, a criterion-related validity study is required to support the use of a paper-and-pencil test. A test that taps job tasks that are learned on-the-job cannot be supported by evidence of content validity.

The Content Validity Study identifies 3 knowledge statements, eleven ability statements and 2 skill statements. D-X-400, Exhibit 5. The following statements received median ratings below 3.0: K-2, K-3, A-4, A-8, A-9, A-10, A-11, S-1. P-X-173. The following statements received mean ratings below 3.0: K-1, K-2, K-3, A-4, A-6, A-8, A-9, A-10, A-11. D-X-400, Exhibit 1-KASPC Ratings. Notably, A-10 and A-11, the two statements concerning trigonometry and geometry received mean and median ratings below 3.0. In addition, a majority of the SMEs (five out of nine) were unable to link A-11 to any of the domains.

Dr. Prien's analysis of item to KASPC linkage shows that six or more of the nine SMEs agreed on the linkage of 47 items. P-X-131.

Dr. Menne gave the evidence of validity a grade of C. P-X-122. He testified about his concerns about the domains receiving low ratings on factor D and the test only tapping a limited number of KASPCs. His notes indicate that he was able to link each item on the test to a KASPC in the "certification domain". Six of the items, however, were linked to A-10 and A-11, ability statements which dealt with trigonometry and geometry and which received mean and median ratings below 3.0.

As noted earlier, the Examination Chronology for engineering aide states that 28 surveying items and 11 geometry and trigonometry items were added to the 60 item test in September 1977. D-X-393, Tab 7. Miriam Hall testified, however, that engineering aide was an entry-level position and that no prior surveying experience was required of applicants.

Dr. Prien testified that the evidence presented does not support a conclusion that the examinations were content valid in light of professional standards and federal guidelines.

6. Housing Inspector

The Personnel Board has used three different tests to select housing inspectors. During 1972, housing inspectors were selected based upon scores on the American Council on Education Psychological Examination (1953 edition), a "scholastic aptitude" test. Both Dr. Menne and Dr. Prien agree that use of this test to select housing inspectors cannot be supported by evidence of content validity.

In November 1972 and January 1973 two versions of a paper-and-pencil "job knowledge" test were used to select housing inspectors. The Examiners Manual, D-X-383, does not contain a pre-construction analysis nor any other documentation explaining how the two tests were constructed.

The Content Validity Verification Report is D-X-402. The Personnel Board analyst identified five domain statements. All five statements received low ratings on factor D, Extent Necessary At Entry. The mean and median ratings are as follows:

Domain	Mean Rating*	Median Rating**
D-1	2.4	2.0
D-2	2.1	2.0
D-3	2.3	2.0
D-4	1.5	1.5
D-5	1.8	1.5

* D-X-402, Exhibit 1-Domain Ratings.
** P-X-176.

A comparison of the KASPC Statements, D-X-383, Exhibit 5, with the Job Specification, D-X-383, Exhibit 2, shows that a number of the KASPC Statements were taken directly from the Job Specification. (See K-3, K-4, K-5, A-1, A-2, A-3)

Of the 13 knowledge statements and 5 ability statements, 6 knowledge statements received mean ratings below 3.0 (K-1, K-2, K-9, K-10, K-11, K-12). D-X-402, Exhibit 1-KASPC

Ratings. All the knowledge and ability statements received median ratings of 3.0 or higher. P-X-176.

Four or more of the eight subject matter experts rejected seven items on the 100-item test (Test No. 2 - November 1972) as being unrelated to the job. Four or more of the eight SMEs rejected 28 items on the 105-item test (Test No. 3 -January 1973) as being unrelated to the job. D-X-402, Exhibit 1-Items-Ratings. Thirty six items on the 105-item test received average item ratings below 2.0. D-X-402, Exhibit 1-Items-Distribution of Ratings.

Dr. Prien's summary exhibit, P-X-131, shows that six or more SMEs were able to agree on item to KASPC linkage for 30 items on the 100-item test and 32 items on the 105-item test.

The Government's analysis of the computer tape, P-X-176, shows that no items survive a standard which calls for items to be linked by a majority of SMEs to KASPCs with at least a 3.0 median rating which in turn are linked by a majority of SMEs to the class of domains with at least a 3.0 median rating on factor D. P-X-176, Columns 2B, 2C, 3B and 3C.

Dr. Menne's notes, P-X-124, show that he was able only to link 86 items on the 100-item tests and 71 items on the 105-item test to KASPCs in what he determined to be the "certification domain." Dr. Menne gave the evidence of the validity of the 100-item and 105-item tests a grade of C. P-X-122.

7. Intermediate Clerk

The Content Validity Verification Report, D-X-403, identifies a 70 item paper-and-pencil test used in 1971 and revised to a 100 item test used in three versions between 1972 and 1974, and two versions (done in 1975 and 1976) of a 99 item test used between 1975 and 1978, for selection of intermediate clerks. D-X-393, Tab 10. The 70 item test, administered in 1971, has not been challenged by the Government and for that reason will not be discussed further.

There are three "Printouts" in the validity report, numbered 1, 2 and 3. Each contains a separate Report of Findings pertaining to two of the six tests or versions of tests. The three separate reports used panels of eight, nine and ten SMEs, respectively, for the rating of domains, KASPCs and items. Of course, the domains and KASPCs did not change, although their ratings by the three panels did vary. Defendants did not aggregate the

domain and KASPC data from the three panels; we have done so in P-X-177.

The Examiner's Manual, D-X-384, contains a preconstruction analysis completed by Marilyn Landers in January 1975. There is no documentation on how any of the exams administered before that date were constructed.

Miriam Hall, the Chief Examiner of the Personnel Board, testified that the personnel analysts relied upon Position Classification Questionnaires (PCQs) completed as part of the five-year Classification and Pay Study, the Job Specification, a synopsis of the PCQs which appears in the Board's Classification and Pay Manual, and the Dictionary of Occupational Titles in constructing examinations. These documents do not provide information about whether an individual needs to be able to perform job tasks at entry into the position or whether the individual is trained on the job. Nor is such information provided concerning the knowledges, skills and abilities needed to perform the job tasks. Further, the documents provide little data on the relative importance of the job tasks other than an employee's indication of the amount of time he or she spends performing a task. No information is provided about the criticality of a task or about whether how an individual performs a task differentiates between the quality of the individual workers. As a general rule, Personnel Board technicians did not meet with job incumbents or systematically observe their work as part of the test construction process. An unstructured meeting with department heads or supervisors served, in general, as the only supplementation of the classification and pay data.

The weighting of the test prepared by Landers in 1975, revised in 1976, and used from 1975 to 1978, is: 20% on vocabulary, 20% on business mathematics, 15% on filing, 20% on business English, of which half is grammar and half mechanics (punctuation, spelling and capitalization), 15% on letter writing, and 10% on clerical procedures. D-X-384, Preconstruction Analysis, Form II.

Eight domain statements are identified in the Content Validity Verification Report, D-X-403. Of the 27 SMEs, 24 indicated that D-8 was not performed by intermediate clerks, 12 indicated that D-4 was not performed, 11 indicated that D-6 was

not performed, and 10 indicated that D-7 was not performed.[12] D-X-403, Exhibit 1-Domain Ratings. D-4 and D-7 have to do with the keeping of fiscal records, D-6 with scheduling, and D-8 with administering tests. Three of these four domains (D-4, D-7 and D-8) were mentioned in one or more of the three Reports of Findings as receiving high ratings from the SMEs who indicated they were performed. The job class was characterized as "very heterogeneous" by the Report of Findings for Printout No. 1, both between jurisdictions and between departments within jurisdictions; and it was stated that "activities that some incumbents do not do may make up the bulk of another incumbent's job." D-X-403, Printout 1, p. 14.

The Personnel Board presented no evidence of a systematic effort to review the degree of specialization by intermediate clerks or the degree to which a classification problem might exist. Dr. Prien testified that when a job class is heterogeneous, evidence of content validity cannot justify the use of the same examination to assess all applicants unless: (1) successful applicants could be placed in any of the specialized or idiosyncratic positions, or (2) the job changed over time (e.g., seasonally) so that over a period of time all of the job duties tapped by the test would be performed by the individual; or (3) incumbents were routinely transferred from a position with one set of duties to a position with another set of duties. The Personnel Board did not present evidence that any of these factors existed in the intermediate clerk classification.

Of the eight domain statements, only D-8 (administering examinations) received a mean rating as high as 3.0 on factor D, Extent Necessary at Entry, and then only if the mean was computed by counting only the three out of 27 raters who said that domain was performed. D-X-403. Exhibit 1-Domain Ratings. Only D-1 (typing) and D-3 (answering telephone inquiries) received median ratings as high as 3.0 on factor D. P-X-177.

There are 46 KASPC statements for the intermediate clerk class. D-X-403, Exhibit 5. The statements are in many instances so vague as to be meaningless, for example: K-20, "knowledge of the interrelationship between job"; A-9, "ability to ascertain the interrelationships between departments"; K-3,

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12 D-X-403, Printout 1, page 14 incorrectly states that one or two of the SMEs for that printout indicated D-7 was not performed. Three so indicated.

"knowledge of the basic fundamental operation of Government." The interrelationships and fundamental operations relating to those job elements are no where defined, and could be legal, organizational, sociological, or even geographic. Other examples of vague KASPC statements include K-11, "knowledge of the basic rules of public relations," which was ranked 16th, or in the top half of KASPCs, by the aggregated SME panel; A-12; "ability to perform simple routine tasks," which was ranked 13th, or in the top third; and A-13, "ability to learn new procedures," which was ranked 10th. Dr. Menne noted that "(o)n this test . . . the KASPCP [sic] statements are poorly worded." P-X-124.

There were 27 KASPCs which a majority of the 27 SMEs linked to either of the domains having a median rating of 3.0 on factor D: K-1, K-2, K-4, K-5, K-8, K-9, K-10, K-11, K-20, A-1, A-3, A-4, A-5, A-7, A-8, A-9, A-11, A-12, A-13, S-1, S-2, S-3, S-4, P-1, P-2, P-3, P-4. P-X-177. Of these, 22 KASPCs received median ratings of 3.0 or above: K-1, K-2, K-4, K-11, K-20, A-1, A-3, A-4, A-5, A-7, A-8, A-11, A-12, A-13, S-1, S-2, S-3, S-4, P-1, P-2, P-3, P-4. *Id.* Of these, A-1, A-3, A-5, A-7, A-8, A-11, A-12, A-13, S-1. P-1, P-2, P-3 and P-4 were excluded from the "certification domain" by Dr. Menne, leaving the following nine KASPCs in the "certification domain": K-1, K-2, K-4, K-11, K-20, A-4, S-2, S-3, S-4. P-X-124. Those KASPCs are shown below with their importance ranks according to the aggregated panel of SMEs, along with the numbers of items linked to each KASPC by Dr. Menne in P-X-124:

KASPC	Rank	100-Item Test	100-Item (30-B)	100-Item	99-Item
K-1	1	13	17	17	12
K-4	5	1	1	0	2
K-2	7	16	21	21	24
S-2	11	5	2	2	1
K-11	15	0	0	0	0
S-3	17	0	0	0	0
S-4	23	0	0	0	0
K-20	25	0	0	0	0
A-4	29	0	0	0	0
Total		35	41	40	39

Thus, Dr. Menne was able to link only about two-fifths of the intermediate clerk test items to KASPCs which were found to be in the "certification domain," have at least a 3.0 median

rating and be linked by a majority of the SMEs to the two domains that received a 3.0 median rating on factor D.

According to the job specification, which has been identified as underlying the 1975 preconstruction analysis, intermediate clerks were expected to type letters or other written materials "occasionally from own composition." The last phrase is repeated verbatim in Form I of the preconstruction analysis. Despite the admitted "occasional" nature of the writing of letters or other materials, a number of knowledges, skills or abilities are shown on Form I as associated with that task. These include "business English" and "vocabulary," which in the aggregate, according to Forms II and III, account for at least 40% of the 99-item tests. "Letter writing" accounts for another 15% of the items, for a total of 55% of each test.

The writing of letters is not mentioned in the domain statements in the validation study. References to that activity or to the knowledges, skills or abilities said to be associated with it do, however, reappear in certain of the KASPC statements in the same validation study. K-4, for example, is "knowledge of the English language as it pertains to composing letters and proofreading letters." That compound statement lumps the passive, mechanical task of proofreading with the more active and demanding one of writing, so that any importance which writing letters might have had by itself in the views of the SMEs is not ascertainable from the data on that KASPC. S-2, "skill in spelling and writing," and S-4, "skill in word usage and meaning," suffer from the same ambiguity. S-4 additionally lies in the bottom half of the KASPC rankings, 25th of the 46 KASPCs if the rankings of the three sets of raters are aggregated. D-X-403. A-4, "ability to compose business letters," lies in the bottom third of the KASPC rankings, 33rd of the 46 KASPCs. *Id.* K-8, "knowledge of word meaning," received a median rating of only 2.0. P-X-177. Thus, the task of writing letters, to which according to the preconstruction analysis up to 55% of the test items were intended to relate, was a task which the SMEs gave no evidence of performing; and KASPCs which might arguably have been related to that task result in no evidence that the writing task was important in the view of the SMEs because the writing task was commingled with more typically clerical elements, the KASPC did not receive high marks from the SMEs, or both.

Dr. Menne gave the evidence for validity of the intermediate clerk examinations a grade of B/B-. P-X-122.

Dr. Prien testified that the evidence presented does not support a conclusion that any of the tests used between 1972 and 1978 were content valid in light of professional standards and the federal guidelines.

8. Police Sergeant and Sheriff Sergeant

Between 1972 and 1978, the Personnel Board has administered seven versions of a multiple choice paper-and-pencil test to select sergeants. Five of those versions are reviewed in the Content Validity Verification Report, D-X-404, and the other two versions are discussed in the Examination Chronologies, D-X-393, Tab 11.[13]

The Examiner's Manual, D-X-385, contains a preconstruction analysis completed by Ruth Corwin in March 1975. There is no documentation on how any of the exams administered before that date were constructed. The Examination Chronology contains a "rationale" for the development of the 1978 examination. D-X-393, Tab 11.

Miriam Hall, the Chief Examiner of the Personnel Board, testified that the personnel analysts relied upon Position Classification Questionnaires (PCQs) completed as part of the five-year Classification and Pay Study, the Job Specification, a synopsis of the PCQs which appears in the Board's Classification and Pay Manual, and the Dictionary of Occupational Titles in constructing examinations. These documents do not provide information about whether an individual needs to be able to perform job tasks at entry into the position or whether the individual is trained on the job. Nor is such information provided concerning the knowledges, skills and abilities needed to perform the job tasks. Further, the documents provide little data on the relative importance of the job tasks other than an employee's indication of the amount of time he or she spends performing a task. No information is provided about the criticality of a task or about whether how an individual performs a task differentiates between the quality of the individual workers. As a general rule,

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13 In August 1979, at the time the Government reviewed the documents underlying the Examination Chronologies, D-X-393, the Government requested the pass and hire rates, by race, for the sergeant examination administered on November 8, 1978. The Personnel Board failed to supply the requested data. As a result, the Government was unable to introduce evidence concerning the possible adverse impact of the 1978 examination. The issue of the validity of that examination is, therefore, not before the Court at this time.

Personnel Board technicians did not meet with job incumbents or systematically observe their work as part of the test construction process. An unstructured meeting with department heads or supervisors served, as a general matter, as the only supplementation of the classification and pay data.

Ruth Corwin, a Personnel Board analyst, testified at deposition about how she constructed the 1975 sergeant examination. P-X-163, April 7, 1977, pp. 5-75. She testified that she relied on the PCQs, the Job Specification and the DOT in preparing the preconstruction analysis. During the preconstruction process she never discussed the job of sergeant with an incumbent, *Id.*, p. 19 lines 14 to 17, nor did she systematically observe sergeants at work. *Id.*, p. 30, line 7 to p. 31, line 12.

Corwin attended a meeting with the then Chief Examiner, Eugene Williams, and some police chiefs. To the extent that the actual job duties of sergeants were discussed, it was done in an informal and general way. Much of the discussion concerned what textbooks should be on the reading list for the examination. *Id.*, pp. 9-17. She did not meet with any individuals who directly supervised sergeants. *Id.*, p. 19 line 18 to p. 20, line 8.

Corwin testified that Form I of the preconstruction analysis tracked the Job Specifications for police sergeant and sheriff sergeant. In addition, she testified that she did not "really attempt to match a knowledge and a skill and ability with the job task." *Id.*, p. 29 lines 5-6.

The weighting of the components of the examination was based on Corwin's judgment about the relative importance of the various job elements. The information about the importance of a job task or a knowledge, skill or ability was limited to the amount of time the PCQs indicated sergeants spent performing specific tasks. *Id.*, p. 39, line 17 to p. 43, line 3.

Dr. Prien testified that professional research exists which demonstrates that time spent performing a job task is not necessarily the best indicator of the relative importance of tasks and elements.

The items on the series of examinations used to select sergeants, like most of the items on the other examinations challenged by the Government, were derived from textbooks. Both Dr. Menne and Dr. Prien testified that it is poor practice to derive items from textbooks for exams developed by a content strategy. The danger is that the items would reflect the content

of the textbook more than they reflect the content of the job. Dr. Prien noted the potential for constructing tests to fit chapters in textbooks, rather than the identified job elements. Dr. Menne noted that the practice of supplying reading lists to applicants and then developing exams based on the reading lists may lead to test results that do not provide data on which applicants possess more knowledge of the information needed to perform the job. Such a test, he testified, may actually measure which applicants actually studied the textbooks— and the textbooks may or may not relate to the job.

The reading list for the sergeant examinations were rather lengthy. For example, the 1974 list contained 21 textbooks, as well as Titles 14 and 15 of the Code of Alabama. *Id.*, Deposition Exhibit No. 1. (See D-X-385, Attachment No. 2 for the 1977 reading list which contains the same number of books.) Corwin testified that all the test items were derived from the books on the reading list and that there were items for each book on the list. *Id.*, p. 44, line 2 to p. 46 line 6. See P-X-123, pp. 9-11.

Dr. Prien testified that he reviewed the sergeant examinations and found that a substantial number of multiple choice items on the test had a convoluted and overly complex style. Items of that style assess an individual's test-taking ability to a greater extent than they assess an individual's knowledge.

The Content Validity Verification Report, D-X-404, identifies 20 domain statements, 27 knowledge statements, 11 ability statements and 3 skill statements. D-X-404, Exhibits 4 and 5. A total of 28 incumbents and supervisors participated in the study.

(In 1977, the SMEs rated and ranked the domains and the KASPCs, identified linkages between KASPCs and domains, and reviewed 450 items selected from the item bank. The data compiled on these 450 items is not contained in the Validity Study. In 1978, the SMEs reviewed the five tests used by the Personnel Board between 1972 and 1976.)

Of the 20 domain statements, only 9 received median ratings of 3.0 or higher on factor D, Extent Necessary At Entry (D-1, D-3, D-4, D-6, D-7, D-8, D-13, D-14, D-20). P-X-178. Only 5 domain statements received mean ratings of 3.0 or higher on factor D (D-1, D-4, D-7, D-8, D-13) D-X-404, Exhibit 1-Domain Ratings.

Of the 41 knowledge, ability and skill statements, 13 received mean ratings below 3.0 (K-9, K-10, K-11, K-13, K-15, K-16, K-22, K-23, K-24, A-5, A-7, A-8, S-3), D-X-404, Exhibit 1-KASPC Ratings; five statements received median ratings below 3.0 (K-11, K-15, K-16, K-24, S-3). P-X-178.

The highest ranking KASPC statement was A-1, ability to communicate orally. D-X-404, Exhibit 1-KASPC Rankings.

The SMEs were grouped in subpanels of 5 or 6 persons to assess the five tests used between 1972 and 1976, even though there were at least 28 SMEs available to review the tests.

Dr. Prien's summary exhibit, P-X-131, shows that four of six SMEs were able to agree on item to KASPC linkage for 154 of 260 items (59.2%) on test No. 1, 131 of 260 items (50.4%) on test No. 3, and 126 of 250 items (50.4%) on test No. 4. Four of five SMEs were able to agree on item to KASPC linkage for 108 of 250 items (43.2%) on test No. 2 and 80 of 250 items (32%) on test No. 5.

When a standard that requires a simple majority of SMEs (four out of six or three out of five) to agree on linkage of items to KASPCs with a 3.0 or higher median rating which are, in turn, linked by a simple majority of SMEs to the class of domains with a 3.0 or higher median rating on factor D is applied to the data generated by the SMEs the following linkages result: *

Test No.	No. of Items	No. of Items Linked
1	260	127 (48.8%)
2	250	153 (61.2%)
3	260	131 (50.4%)
4	250	111 (44.4%)
5	250	135 (54%)

* Based upon P-X-178, Column 2B (Lax).

Dr. Menne's notes, P-X-124, show that he reviewed two versions of the sergeant examinations, a 260 item test and a 250 item test adminstered on November 8, 1978. The following chart shows the number of items he was able to link to KASPCs in what he determined to be the "certification domain":

	260-item test		Nov. 8, 1978 Test Items 1-129	Items 130-150	Total	
K-1	25		37	1	38	
K-5	9		2	1	3	
K-12	0		0	0	0	
K-3	0		0	0	0	
K-4	0		2	2	4	
K-7	7		21	2	23	
K-6	50		11	3	14	
K-26	12		5	3	8	
A-3	0		0	0	0	
K-8	5		4	4	8	
K-21	51		0	40	40	
K-27	18		1	2	3	
K-19	1		9	0	9	
K-25	1		1	0	1	
K-14	0		0	13	13	
K-18	4		1	1	2	
K-2	0		5	0	5	
K-17	1		0	1	1	
K-23	3		0	4	4	
K-20	0		0	3	3	
K-11	10		0	9	9	
K-10	0		0	0	0	
K-9	0		1	0	1	
K-24	1		1	0	1	
K-22	11		1	3	4	
K-16	0		0	0	0	
K-13	0		4	11	15	
K-15	2		0	0	0	
A-7	5		0	0	0	
No Linkage	44	(16.9%)	20	15	35	(14%)
D-20	0		2	0	2	
D-7	0		1	0	1	
D-2	0		0	2	2	

The chart shows that many of the highly-ranked job elements were not tapped at all or only tapped by a few items. Moreover, on the 260-item test he was unable to link 44 items (16.9%) and on the 250-item he was unable to link 35 items (14%). Nevertheless, Dr. Menne gave the evidence of the validity of the examinations a grade of B-, with the 1978 examination receiving a grade of B/B+. P-X-122.

Dr. Prien testified that it is inappropriate to eliminate from formal assessment important job elements in a selection procedure supported by evidence of content validity. In particular, he noted that A-1, ability to communicate orally, could have been assessed using either a structured oral interview or an assessment center approach. He further testified that the adverse impact a paper-and-pencil test has on blacks can be reduced by using such selection procedures and by reducing the weight in the total selection process that the written test is accorded.

Miriam Hall testified that the rank order eligibility list is based solely upon scores on the written test and points awarded for years of classified service. Hall further testified that the Personnel Board provides no means by which the KASPCs that were not assessed by the written test can be formally assessed during the probationary period. As a result, important job elements, such as oral communications skills, are never formally assessed.

Dr. Prien noted that supervision and leadership are an important part of a sergeant's job. He testified that a paper-and-pencil test of supervision and leadership cannot be supported by evidence of content validity because leadership is a construct. In addition, he noted that a paper-and-pencil test of supervision and leadership does not closely resemble the work setting in which these worker characteristics are exhibited.

Dr. Prien testified that the evidence presented does not support a finding that the examinations were content valid in light of professional standards and federal guidelines.

9. Secretary

The Content Validity Verification Report, D-X-406, identifies four versions of a 160-item paper-and-pencil test used to select secretaries between 1972 and 1976. A fifth version of the test was constructed in 1977 and used on two occasions. D-X-393, Tab 13.

The Examiner's Manual, D-X-387, contains a preconstruction analysis completed by personnel officer Marilyn Landers in December 1974. In addition, a "rationale" and part of a preconstruction analysis dated June 17, 1977, appear in P-X-123, pp. 13 and 15. These documents are the only evidence that purport to document how any of the examinations at issue were constructed.

Miriam Hall, the Chief Examiner of the Personnel Board, testified that the personnel analysts relied upon Position Clas-

sification Questionnaires (PCQs) completed as part of the five year Classification and Pay Study, the Job Specification, a synopsis of the PCQs which appears in the Board's Classification and Pay Manual, and the Dictionary of Occupational Titles in constructing examinations. These documents do not provide information about whether an individual needs to be able to perform job tasks at entry into the position or whether the individual is trained on the job. Nor is such information provided concerning the knowledges, skills and abilities needed to perform the job tasks. Further, the documents provide little data on the relative importance of the job tasks other than an employee's indication of the amount of time he or she spends performing a task. No information is provided about the criticality of a task nor about whether how an individual performs a task differentiates between the quality of individual workers. As a general rule, Personnel Board technicians did not meet with job incumbents or systematically observe their work as part of the test construction process. An unstructured meeting with department heads or supervisors served, as a general matter, as the only supplementation of the Classification and Pay data.

Form I of the 1974 preconstruction analysis indicates that a secretary "composes and types letter [sic] and reports." D-X-387. The Job Specification, which has been identified as a document underlying the preconstruction analysis, indicates that a secretary "composes and types *routine* letters, notices and other material" (emphasis added). Neither document provides greater specificity about how often secretaries are called upon to compose something and what it is they may be called upon to compose. For example, the documents do not provide information about whether secretaries who compose routine letters base their letters on forms.

The weighting of the exam prepared by Landers in 1974 is: 30% on business English, 35% on principles of leadership and supervision, methods of discipline, organization and policy, training and motivation and effective employee relations, 25% on general secretarial procedures, 5% on business arithmetics and 5% on filing. D-X-387. The weighting of the exam prepared in 1977 is basically the same. See P-X-123, p. 15.

The Content Validity Verification Report, D-X-406, Exhibit 4, identifies ten domain statements. Of the 8 SMEs, four indicated that D-3, D-7, and D-9 were not performed by secretaries. Notably, D-7 is the only domain concerning super-

vision. D-X-406, Exhibit 1-Domain Ratings. Of the four SMEs who indicated that supervision was not part of a secretary's job, one (SME No. 6) worked for Birmingham, one (SME No. 1) worked for the Health Department, and two (SMEs No. 6 and No. 5) worked for Jefferson County.

The Personnel Board presented no evidence of a systematic effort to review the degree of specialization by secretaries or the degree to which a classification problem might exist. Dr Prien testified that in case of a heterogeneous job class, the same exam given to all applicants cannot be justified by evidence of content validity unless: (1) successful applicants were subject to placement in any of the specialized or idiosyncratic positions within the job class, or (2) the job changed over time (e.g. seasonally) so that over a period of time all of the job duties tapped by the test would be performed by the individual, or (3) incumbents were routinely transferred from a position with one set of duties to a position with another set of duties. The Personnel Board did not present evidence that any of these factors exist in the secretary classification.

Of the ten domain statements only D-1 and D-2 received mean ratings of 3.0 or higher or factor D, Extent Necessary At Entry, D-X-404, Exhibit 1-Domain Ratings and only D-1, D-2 and D-4 received median ratings of 3.0 or higher on factor D. P-X-180.

The Validity Study combines the separate tasks of composing, typing and distributing "a wide variety of material" together into a single domain statement, D-1. This statement is the only statement that deals with what, if anything, secretaries are called upon to compose. The SMEs, therefore, did not have an opportunity to address separately the issue of whether secretaries compose anything.

Of the 27 knowledge, skill and ability statements, six received mean ratings below 3.0 (K-6, K-9, K-10, K-13, K-14, A-4). D-X-404, Exhibit 1-KASPC Ratings. All KASPCs received median ratings of 3.0 or higher. P-X-180.

Although there were 50 secretaries at the time the validity study was conducted, D-X-387, p. 8, only 5 SMEs reviewed tests 1 and 2 and only 3 SMEs reviewed tests 3 and 4. Dr. Prien testified that the three person subpanel was unacceptable in light of the number of incumbents in the classification. In addition, he testified that the ratings of the three person panel would not produce meaningful results from a statistical standpoint.

Dr. Prien identified two reasons why the supervision segment was professionally suspect. First, what is identified in the preconstruction analyses as a "leadership and supervision" segment of the tests really seeks to test a construct — leadership. As such, a test tapping leadership ability cannot be justified based on evidence of content validity; rather, empirical evidence is required. Second, Dr. Prien's professional opinion is that ability to supervise cannot be assessed by a paper-and-pencil test, in part, because a paper-and-pencil test does not closely resemble the setting in which supervisory functions are performed.

Dr. Prien's summary exhibit, P-X-131, shows that the five SMEs who reviewed tests 1 and 2 agreed on item to KASPC linkage for 16 out of 160 items in test No. 1 and 26 out of 160 items in test No. 2. When the consensus standard is reduced to require agreement between three of the five SMEs to a particular KASPC, then 112 items (70%) survive on test No. 1 and 109 items (68.1%) survive on test No. 2. P-X-180, Column 1 (Lax).

Dr. Menne identified KASPCs that belonged in what he called the "certification domain". P-X-124. The KASPCs in the "certification domain" that are linked by at least five of the eight SMEs to the three domain statements that received median ratings of 3.0 or higher on factor D are as follows:[14]

D-1: K-1, K-3, K-4, K-5, S-3

D-2: K-1, K-2, K-4, K-5, S-3

D-4: K-8, K-10, S-5

Dr. Menne reviewed four tests and attempted to link items to KASPCs in the "certification domain". Column one of the following chart displays the number of items he was able to link to KASPCs in the "certification domain" for each test. Column two displays the number of items he was able to link to KASPCs in the "certification domain" which were in turn linked by a majority of the SMEs to D-1, D-2, D-4, i.e., K-1, K-2, K-3, K-4, K-5, K-8, K-10, S-3, S-5.

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14 Based upon Exhibit 1, KASPC-Task Tie-In Occurrence Table, D-X-406.

Exam Date(s)	No. of Items	Column 1	Column 2
7/21/72; 10/11/73[15]	110	103(93.6%)	85(77.3%)
1/15/75	160	145(90.6%)	81(50.6%)
4/30/76	160	142(88.8%)	83(51.9%)
7/11/77	160	155(96.9%)	89(55.6%)

Dr. Menne gave the evidence of the validity of these examinations a grade of B-/C+. P-X-122.

Dr. Prien testified that the evidence presented does not support a conclusion that any of the tests used between 1972 and 1978 were content valid in light of professional standards and federal guidelines.

10. Senior Clerk

Defendants' Content Validity Verification Report, D-X-407, identifies six versions of a 150-item paper-and-pencil test, used to select senior clerks. Six administrations occurred between 1972 and 1976; a subsequent revision was administered in January 1977. In June 1978, after the results of the validation study were known, the test was administered in a reduced and modified version containing 140 items. D-X-393, Tab 14.

The Examiner's Manual, D-X-388, contains a preconstruction analysis done by personnel officer Ruth Corwin in September 1975 for the sixth test administered during the period 1972 and 1976. In addition, certain material relating to an item analysis done in December 1976 appears in P-X-123, p. 20. The above-mentioned are the only pieces of evidence purporting to document how any of the examinations for senior clerk were constructed.

Miriam Hall, the Chief Examiner of the Personnel Board, testified that the personnel analysts relied upon Position Classification Questionnaires (PCQs) completed as part of the five-year Classification and Pay Study, the Job Specification, a synopsis of the PCQs which appears in the Board's Classification and Pay Manual, and the Dictionary of Occupational Titles,

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15 It is not clear whether this examination was, in fact, used to select secretaries. Neither the Examination Chronologies, D-X-393, Tab 13, nor the Government's Exhibit on the Pass Rates of Whites and Blacks on Challenged Examinations, P-X-59, indicate that an examination for secretaries was administered on either of these dates. In addition, each of the four exams identified in the Validity Study, D-X-406, contained 160 items.

in constructing examinations. These documents do not provide information about whether an individual needs to be able to perform job tasks at entry into the position or whether the individual is trained on the job. Nor is such information provided concerning the knowledges, skills and abilities needed to perform the job tasks. Further, the documents provide little data on the relative importance of the job tasks other than an employee's indication of the amount of time he or she spends performing a task. No information is provided about the criticality of a task or about whether performance of the task differentiates between high and low quality workers on the job as a whole. As a general rule, Personnel Board technicians did not meet with job incumbents or systematically observe their work as part of the test construction process. An unstructured meeting with department heads or supervisors served, as a general matter, as the only supplementation of the classification and pay data.

A review of Form I of the September 1975 preconstruction analysis contained in D-X-388 reveals that many of the statements of job tasks and of knowledges, skills and abilities thought to be related to the jobs were copied verbatim from the job specification contained in the Classification and Pay Manual. See D-X-407, Exhibit 2. Deviations from the manual include the addition of such "personal characteristics" as "dependable," "self-confident," "intelligent" and "diplomatic." Form II, the weighting form, contains no explanation or justification for either the categories to be measured by the test or the relative weights assigned to them by the technician, save the phrase, "review of job spec." Supervision received a weight of 20% on the weighting form, and accordingly Form III shows 31 questions, worth 29 out of a total of 150 points, designed to measure supervision.

Dr. Prien's professional opinion is that ability to supervise cannot be assessed by a paper-and-pencil test. This is in part because such a test does not closely resemble the performance of supervisory functions in an actual work setting. That testimony condemns the 20% of the test on supervision, which purports to measure the "ability to lead or supervise subordinate level personnel" (D-X-388, Form I).

Of the domain statements used in the Content Validity Verification Report, D-X-407, only D-12 involved supervision. The SMEs gave that domain a median rating of only 2.0 on Factor D, Extent Necessary at Entry. P-X-181. There is an addi-

tional problem with the supervision domain, D-12: four of the 17 SMEs indicated that the job did not include performance of it. D-X-407, Exhibit 1-Domain Ratings. The four were not concentrated in any particular jurisdiction: No. 1 listed Fultondale as her employer, No. 3 listed Mountain Brook, No. 4 listed Jefferson County, and No. 13 listed "Inspection Services" without indicating the jurisdiction.

The Rationale which appears in the Examination Chronology, D-X-393, Tab 14, notes that the SMEs eliminated 23 of the 35 items on the 1977 test which concerned supervision. The Rationale concludes that the validation study data reflect either a classification problem or "a lack of recognition by some Senior Clerks that some of the duties performed (by them) are supervisory in nature." D-X-393, Tab 14, Rationale. Despite the evidence that supervision was not uniformly a part of the job and was in any event not rated as an important part of the job, the supervision segment of the examination was retained in the 1978 exam. *Id.*

Ratings of domains other than supervision (D-12) confirm that there was a problem of "diversity," as stated by Personnel Board Analyst Jerry Burchfield in his Report of Findings. Domains D-9, D-10, D-11 and D-14 were identified as not performed by 10 or more raters, while D-4, D-5, D-6 and D-12 (the last having been mentioned above) were so identified by four or five raters. D-X-407, Exhibit 1-Domain Ratings.

The Personnel Board presented no evidence of a systematic effort to review the degree of specialization by senior clerks or the degree to which a classification problem might exist. Dr. Prien testified that in the event a job class is heterogeneous, the same examination given to all applicants cannot be justified by evidence of content validity unless: (1) successful applicants are subject to placement in any of the specialized or idiosyncratic positions within the job class, or (2) the job changes over time (e.g., seasonally) so that over a period of time all of the job duties tapped by the test are performed by the individual, or (3) incumbents are routinely transferred from a position with one set of duties to a position with another set of duties. The Personnel Board did not present evidence that any of these factors existed in the senior clerk classification.

Of the 14 domain statements, only D-6, D-9 and D-11 received mean ratings of 3.0 or higher on factor D, Extent Necessary at Entry, and then only when the calculation was

restricted to the raters indicating the domain was performed (12, 7 and 1 raters, respectively). D-X-407, Exhibit 1-Domain Ratings.[16] Only D-1, D-2 and D-8 received median ratings of 3 or higher on that factor.

Of the 45 KASPCs, there were 27 which a majority of the 17 SMEs linked to any of the three domains having a median rating of 3.0 on Factor D: K-1, K-2, K-3, K-4, K-5, K-6, K-7, K-8, K-14, K-17, A-1, A-2, A-3, A-4, A-5, A-6, A-9, A-10, A-11, S-1, S-2, S-3, S-4, P-1, P-2, P-3, P-4. P-X-181. Of these, 24 KASPCs received median ratings of 3.0 or above: K-1, K-2, K-4, K-5, K-6, K-7, K-8, K-17, A-1, A-2, A-3, A-4, A-5, A-6, A-9, A-11, S-1, S-2, S-3, S-4, P-1, P-2, P-3, P-4. *Id.* Of these, seven KASPCs (K-2, K-4, K-5, K-17, A-1, S-2) were measured by items according to the linkage operation described in Dr. Menne's notes, P-X-124. Those KASPCs are shown below with their importance ranks as computed by defendants, along with the numbers of items linked to each KASPC for the tests analyzed by Dr. Menne in P-X-124:

KASPC	Rank	Test 1	Test 2
K-5	1	12	22
K-2	2	27	29
K-6	3	10	9
K-4	5	20	20
A-1	10	1	0
K-17	11	0	3
S-2	12	12	7
Total		82	98

Thus, Dr. Menne was unable to link at least one-third of the 150 items on these tests to KASPCs having at least a 3.0 median rating and linked by a majority of the SMEs to any of the three domains which received a median rating of 3.0 on factor D.

Dr. Menne did link a number of items to certain KASPCs not meeting the above standards. These KASPCs were K-21, with 26 items in Test 1 and 31 items in Test 2; K-10, with 17 items in Test 1 and 17 items in Test 2; and K-12, with eight items in Test 1 and five in Test 2. K-21, "knowledge of basic supervision techniques," suffers from the earlier-described infirmities

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16 A defendants' exhibit gives some mean values on two factors. D-X-413, fourth page. Those seem to be mean ratings on factors D and E, not C and D as labeled.

in the testing of ability to supervise. In addition, K-21 received a mean rating of only 2.8 from the SMEs who rated it. D-X-407, Exhibit-1, KASPC Ratings. Fourteen out of 17 SMEs linked that KASPC to D-12, the supervision domain, which received a median rating of only 2.0, P-X-181, and a mean rating of 1.9 (2.5 if the calculation is done only on those saying the task was performed) on factor D. D-X-407, Exhibit 1-Domain Ratings. As noted earlier, the 1978 Rationale stated that 23 of the 35 supervision items on the 1977 test were found non-job-related by the SMEs. D-X-393, Tab 14, Rationale.

A second KASPC to which Dr. Menne linked a number of items but which did not meet the above standards, was K-10, "knowledge of basic math as it pertains to addition, subtraction, multipulication [sic] and division of whole numbers, mixed numbers, fractions and decimals." That KASPC was linked by 13 out of 17 raters to D-4, relating to computing, collecting and posting fines and fees, and making bank deposits. D-X-407, Exhibit 1-KASPC-Task Tie-In Occurrence Table. That domain received a median rating of 2.0, P-X-181, and a mean rating of 1.8 (2.6 counting only the twelve out of 17 raters who said the domain was performed) on factor D. D-X-407, Exhibit 1-Domain Ratings. That KASPC measured an unimportant domain. The third KASPC in the group, K-12, "knowledge of banking such as preparing or making bank deposits," could be linked only to the same weak domain, D-4, because D-4 is the only domain which mentions banking. Only seven of the SMEs linked K-12 to D-4. D-X-407, Exhibit 1-KASPC-Task Tie-In Occurrence Table.

Retranslation to KASPCs with 3.0 median ratings and domains with 3.0 medians on factor D results in the following numbers of items surviving out of 150 items total: Test 1, 56 items; Test 2, 52 items; Test 3, 46 items; Test 4, 57 items; Test 5, 55 items; Test 6, 38 items. P-X-181, column 2B, pp. 14-9, 14-18, 14-27, 14-36, 14-45, 14-54.

After the first segment of this trial, defendants undertook an exercise in test rescoring by which they attempted to show that the dropping of non-job-related items from the senior clerk examination has little effect upon the results of the examination. See D-X-413, fourth through sixth pages. That attempt is flawed in several ways:

(1) The Personnel Board ignored its own evidence on the number of inappropriate items. The October 1975 version of

the test (Test 2) was assumed for purposes of the rescoring exercise to have only 26 non-job-related items, whereas the defendants validity study concluded that 39 items were found not to be job-related by the SMEs rating the exam.

(2) Only the tests of those who passed were rescored and re-ranked. Thus, there was no attempt to assess the impact of rescoring upon the pass/fail determinations made as a result of using the test.

(3) Even with the artificial limitations placed upon the rescoring by defendants, as set forth in (1) and (2) above, the rescoring resulted in dramatic reordering of the 22 applicants on the eligibility list. For example, the applicant ranked fourth on the original list was 14th on the recompleted list.

Dr. Menne gave the evidence of validity of the senior clerk examination a grade of B/C+. P-X-122.

Dr. Prien testified that the evidence of validity does not support a conclusion that the examinations are content valid in light of professional standards and federal guidelines.

11. Senior Recreation Leader

The Personnel Board has used a paper-and-pencil examination developed by the Public Personnel Association (PPA) in the 1960s to select senior recreation leaders. D-X-393, Tab 15. There is no evidence that PPA reviewed or analyzed the position of senior recreation leader as it existed in the jurisdictions served by the Personnel Board during the test construction process. Nor is there any evidence that, prior to the content validity verification session in March 1978, the Personnel Board conducted a job analysis of the senior recreation leader classification to determine whether the content of the job comported with the content of the PPA examination.

The Examination Chronology for senior recreation leader, D-X-393, Tab 15, identifies the following content areas of the PPA examination: "*reading comprehension*, recreation principles, sports, recreation activities, *leadership*, first aid, records and reports, community relations, and arts and crafts" (emphasis added).

Both Dr. Prien and Dr. Menne expressed reservations about the use of a reading comprehension segment on a test supported by evidence of content validity. Their concern was whether a general assessment of reading comprehension was related to the content of the job. Dr. Prien testified that a reading

comprehension segment of a test could be supported by evidence of content validity only if the reading material on the test was similar or identical to reading material that an incumbent would have to work with on the job. There was no such showing in regard to the senior recreation leader examination.

"Leadership" has been recognized by the professional standards and federal guidelines as a construct. For that reason, Dr. Prien testified that an assessment of leadership cannot be supported by evidence of content validity. In addition, Dr. Prien testified that "leadership" or "supervision" cannot adequately be assessed by a paper-and-pencil test because such a test does not closely resemble the setting in which supervisory or leadership functions are performed.

The Content Validity Verification Report, D-X-408, Exhibits 4 and 5, identifies five domain statements, knowledge statements and seven ability statements. A comparison of the knowledge and ability statements with those contained in the Job Specification, D-X-408, Exhibit 2, shows that many of the statements in the Validity Study are taken directly from the specification (See K-1, K-2, K-3, K-4, A-1, A-2, A-3 and K-8).

The Validity Study used only three incumbents and two supervisors as SMEs. The study indicates that there were 10 incumbents in the position at the time the study was conducted. D-X-408, p. 8.

All four domain statements received mean ratings below 3.0 on Factor D, Extent Necessary at Entry, D-X-408, Exhibit 1-Domain Ratings. All received 3.0 median ratings on that factor. P-X-182. Of the knowledge and ability statements K-8 and K-10 received mean ratings below 3.0. D-X-408, Exhibit 1-KASPC Ratings. All KASPCs received median ratings of 3.0 or higher. P-X-182.

Of the 125 items on the exam, 70 items (56%) received mean item ratings of 2.4 or below. D-X-408, Exhibit 1-Items-Distribution of Ratings. Six items were rejected by three or more SMEs as being unrelated to the job. D-X-408, Exhibit 1-Items-Ratings.

The SMEs were asked to assess the difficulty of the examination in relation to the difficulty of the job. Job Analysis Questionnaire (JAQ) Booklet, p. 46, question 3. Four of the five SMEs rated the exam to some extent harder than the job.

Dr. Prien's summary exhibit shows that four of the five SMEs were able to agree on item to element linkage for 34 of the 125 items (27.2%) on the exam. P-X-131. If the consensus standard is lowered to agreement between three of the five SMEs, then 69 items (55.2%) would meet the standard. P-X-182, Column 1 (Lax).

Dr. Menne's initial analysis of the evidence of validity led him to give the evidence a grade of B/B-, P-X-122; however, at trial he testified that the appropriate grade would be in the C range.

Dr. Menne's notes indicate that he was unable to link 22 of the 125 items (17.6%) to any KASPC. P-X-124. An additional 20 items were identified as "marginally related to the job." A total of 42 items, one-third of the test, either were not linked to any KASPC or were only marginally related to the job.

In 1978, Miriam Hall reviewed the validity study and decided to add 26 items dealing with supervision. D-X-393, Tab 15. Four items from the basic test were deleted. Two items (37 and 53) which the Validity Study recommended should be deleted, D-X-408, p. 18, were left in the test and another three items (51, 60, and 120) which received mean ratings below 2.0 were left in the test. D-X-393, Tab 15, p. 3. In addition, the reading comprehension segment remained in the examination.

Dr. Prien testified that the evidence presented does not support a finding that the examinations are content valid in light of professional standards and federal guidelines.

12. Stenographer/Intermediate Stenographer

The Personnel Board has used three similar paper-and-pencil tests in the classifications of stenographer and intermediate stenographer. Prior to August 1974, stenographer and intermediate stenographer were separate classifications. A 55-item test was used for stenographers and a 70-item test was used for intermediate stenographers. In August, 1974, the two classes were merged. The 70-item test was used until it was replaced in March 1977 by a 96-item test. All three forms of the written test were used in conjunction with a 150 item dictation test. Applicants were ranked based on their combined scores on the written and dictation tests. Passing points were determined based upon the combined scores. D-X-393, Tab 17; D-X-410; P-X-139.

The Examiner's Manual, D-X-391, does not contain a preconstruction analysis or any other documentation of how the tests were constructed. Nor does the Examination Chronology, D-X-393, Tab 17, contain a complete description of how the tests were constructed.

Jerry Burchfield, the personnel analyst who prepared the Content Validity Verification Report, D-X-410, testified that the stenographer classification is a heterogeneous one. He testified that:

> In some departments, they [stenographers] will spend most of their time taking dictation and shorthand from maybe three or four people. Maybe in a smaller jurisdiction, they answer the telephone, they serve as, you know, a receptionist, they type, they file, fill in for the city clerk, may run a gamut of I don't know what all.

Trial Transcript, pp. 1079, line 21 to p. 1080, line 2.

At the time the validity study was conducted, there were 98 stenographers, 56 of whom (57.1%) worked for various departments within the City of Birmingham. Of the nine incumbents and supervisors involved in the study only two (22.2%) worked for Birmingham. Both of the SMEs who worked for Birmingham (SME #4 and SME #55) worked in the Police Department's detective division, which employed only six stenographers as of 1976. P-X-1, pp. 110, 112. As a result, the possible range of job duties within the stenographer classification in Birmingham was not assessed completely.

The Personnel Board presented no evidence of a systematic effort to review the degree of specialization by stenographers, even through Mr. Burchfield testified that he recognized the class was a heterogeneous one. Dr. Prien testified that when a job class is heterogeneous, evidence of content validity cannot justify the use of the same examination to assess all applicants unless: (1) successful applicants could be placed in any of the specialized or idiosyncratic positions, or (2) the job changed over time (e.g., seasonally) so that over a period of time all of the job duties tapped by the test would be performed by the individual; or (3) incumbents were routinely transferred from a position with one set of duties to a position with another set of duties. The Personnel Board did not present evidence that any of these factors existed in the stenographer classification.

The validity study identifies six domain statements. D-X-410, Exhibit 4. The two highest-ranking domains concerned taking dictation (D-1) and typing (D-2). Surprisingly, two of the SMEs (SME No. 3 and SME No. 53) indicated that stenographers at Cooper Green Hospital were rarely, if even, called upon to take dictation. D-X-410, Exhibit 1-Domain Ratings, Task 1, Factor A. Six of the nine SMEs indicated that D-5, which concerned "mathematical and fiscal computations," was rarely, if ever, performed by stenographers. D-X-410, Exhibit 1-Domain Ratings, Task 5, Factor A.

Four of the six domain statements received mean ratings lower than 3.0 on Factor D, Extent Necessary At Entry (D-1, D-3, D-5, D-6). D-X-410, Exhibit 1-Domain Ratings. All six domain statements received 3.0 median ratings on Factor D. P-X-184, face sheet.

Of the 40 knowledge, skill and ability statements, 17 received mean ratings below 3.0 (K-3, K-6, K-7, K-9, K-10, K-12, K13 [sic], K-14, K-15, K-16, K-17, K-18, A-7, A-10, A-12, S-7, S-8). D-X-410, Exhibit 1-KASPC Ratings. Seven of the statements received median ratings below 3.0 (K-9, K10 [sic], K-12, K-14, K-16, A-10, S-7). P-X-184.

Of the three written tests, only the 55 item test and the 70 item test were reviewed by the SMEs and by Dr. Menne. Dr Prien's summary exhibit shows that five of the nine SMEs were able to agree on item to KASPC linkages for 38 items on the 55 item test (69.1%) and 41 items on the 70 item test (58.6%). P-X-131.

Dr. Menne's notes show that on the 70 item test, he linked 17 items (24.3%) to K-8, knowledge of the principles and practices of modern office procedure. P-X-124. K-8 was ranked 30th of the 45 KASPCs by the SMEs. D-X-410, Exhibit 1-KASPC Rankings. In addition, K-8 was linked to D-6 by all of the raters and was not linked to any other domain by a majority of raters. D-X-410; Exhibit 1-KASPC-Task Tie-In Occurrence Table. D-6 received a 2.7 mean rating on Factor D, D-X-410, Exhibit 1-Domain Ratings, and was ranked fifth of the six domains by the SMEs. D-X-410, Exhibit 1-Domain Ratings.

According to Dr. Menne, both exams contained items which were linked to K-13 and which concerned basic math (5 items on the 55 item test, 6 items on the 70 item test). P-X-124. K-13 was ranked 35th of the 45 KASPCs by the SMEs. D-X-410, Exhibit 1-KASPC Rankings. In addition, K-13 was linked

to D-5 by all of the raters and was not linked to any other domain by a majority of raters. Exhibit 1-KASPC-Task Tie-In Occurrence Table. As noted earlier, six of the nine SMEs indicated that D-5 was rarely, if ever, performed by stenographers.

Dr. Menne gave the evidence of the validity of the exams a grade of B. P-X-122.

Dr. Prien testified that the evidence of validity does not support a conclusion of content validity in light of professional standards and federal guidelines.

13. Utility Meter Reader

The Personnel Board used a 77-item paper-and-pencil test to select utility meter readers between 1972 and 1976. The test consisted of 50 short-answer questions and 27 questions concerning reading dials on drawings of meters. In 1978, the Board dropped the 50 short-answer questions from the exam.

The Examiner's Manual, D-X-392, does not contain a preconstruction analysis or any other documentation of how the test was constructed.

The Content Validity Verification Report, D-X-411, Exhibit 4, identifies four domain statements. D-1, which concerned reading meters, is the only domain that received a mean or median rating of 3.0 or higher. D-X-411, Exhibit 1-Domain Ratings; P-X-185. D-4, which concerned maintenance tasks, was considered not to be part of the job by four of the seven subject matter experts.

Of the 16 knowledge, skill and ability statements identified in Exhibit 5 of the validity study, only four received mean ratings of 3.0 or higher (K-2, A-1, A-3, S-1). D-X-411, Exhibit 1-KASPC Ratings. Only seven received median ratings of 3.0 or higher (K-1, K-2, K-3, A-1, A-2, A-3, S-1). P-X-185.

A majority (four or more out of seven) of the SMEs rejected 16 of the 77 items (20.8%) as being unrelated to the job. D-X-411, Exhibit 1-Items-Ratings. Eighteen items (23.4%) received mean item ratings below 2.0; 38 items (49.4%) received mean item ratings below 2.5 D-X-411, Exhibit 1-Items-Distribution of Item Ratings.

Dr. Prien's summary exhibit shows that five or more of the SMEs agreed on an item to element linkage for only 11 items. P-X-131. Even if K-2 and S-1, both of which concern math, are

considered identical, only 42 of the 77 items (54.5%) meet this retranslation standard.

Dr. Menne gave the evidence of validity a grade of C. Dr. Menne's notes, P-X-124, show that he found 19 items not relevant, 12 items barely or marginally relevant, and 5 items poor; a total of 36 out of 77 items (46.8%) fit into these categories.

Dr. Prien concluded that the evidence does not support a conclusion that the examination was content valid in light of professional standards and federal guidelines.

II. PROMOTIONAL POTENTIAL RATINGS

A. Review of Evidence

All employees in the classified service receive promotional potential ratings (Form 28B, Pl. Ex. 23) from their supervisors every six months. The only purpose and effect of this evaluative rating is to determine whether an individual employee is eligible to promote to a higher level job (Tr. 640, Testimony of Joseph Kerr). An employee receiving below an 85 rating is barred from applying for a promotion and/or competing on a promotional examination for six months from the effective date of the rating (Tr. 640, Testimony of Joseph Kerr).

The Government has offered evidence which demonstrates that the use of the promotional potential rating form as a screening instrument for promotional opportunities has had an adverse impact upon blacks in the classified service. This evidence was in the form of statistical charts and the expert testimony of a statistician which analyzed the ratings given to blacks and whites from August, 1977 to January, 1978, the first six-month period (Cycle I) in which all non-probational classified employees received ratings on a system-wide basis (Tr. 55-59, Testimony of Lorna Grenadier; Tr. 580-1, Testimony of Joseph Kerr). The base data for the Government's statistical charts were computer printouts supplied by the Personnel Board.[17]

Since the same Form 28B is used throughout the classified service to evaluate employee promotional potential, the Government presented evidence of the overall adverse impact of the

17 In their brief, for the first time, defendants question the source and accuracy of the data reflected in Plaintiff's Exhibits 70 and 71 (Brief of Def., p. 30). This belated objection is hard to understand, since the departmental totals of blacks and whites passing and failing which appear in

rating system on blacks in the classified service (Pl. Ex. 71). The Government also presented evidence analyzing the passing rates for blacks and whites by department (Pl. Exs. 70, 72), since departmental supervisors administer the ratings and employees promote ordinarily within the same department and jurisdiction. Lastly, in response to a rebuttal exhibit submitted by the Personnel Board, the Government offered evidence of adverse impact upon blacks, looking only at those employees in promotional pools for which particular examination announcements were made during the effective life of their Cycle I ratings (Pl. Ex. 144).

Plaintiff Exhibit 71 reflects that for Cycle I the passing rate for blacks as compared to whites system-wide was 53.62%.[18] The computed chi-square value and summed chi-squares of departments demonstrate that te level of statistical significance between the disparities in black and white pass rates is far in excess of the .001 level. In this regard Dr. Ireland, a statistical expert, testified with respect to Pl. Ex. 71 that the large value of chi-square indicated that the differences in the expected pass rates for blacks and whites from the observed rates were statistically significant (Tr. 109-110, Testimony of Clifford T. Ireland). Dr. Ireland also testified as to the appropriateness and theoreticl basis for using the sum of chi-squares to take into account the possibility that there were different expected pass rates in each department. (Tr. 111-113, Testimony of Clifford T. Ireland).

Plaintiff Exhibit 70 presents the statistical data on a departmental basis in order to focus more specifically where the

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Pl. Ex. 71 and from which jurisduction totals in Pl. Ex. 70 were derived, were those supplied by the Personnel Board in response to a Request for Admission. Moreover, these exhibits were received into evidence without objection as to the accuracy of the data itself (Tr. 57, 59). Defendants' own witness, Mr. Kerr, testificd that he had no reason to doubt that the ratings had the impact suggested by the Government. (Tr. 582, Testimony of Joseph Kerr).

18 Although Cycle I reflects the first six-month period in which all classified employees received promotional potential ratings, evidence and testimony presented by the Personnel Board established that after five of the next six months of Cycle II (February 1978-June, 1978), the identical pass/fail rate continued. (Def. Ex. 359; Tr. 639, Testimony of Joseph Kerr). This evidence strongly suggests (and there was nothing offered to the contrary) that the disparate racial pattern of the Cycle I ratings continued in Cycle II ratings.

promotional potential ratings are having an adverse impact on blacks. While many of the departments have a small number of total incumbents or black incumbents, it is significant to note that in 6 out of the 7 departments in which more than 20 blacks and 20 whites were rated, the disparities in the black/white pass rates were statistically significant. These include in Jefferson County: Cooper Green Hospital, Patient Care, General Services, and in Birmingham: Police, Streets and Sanitation, and Parks and Recreation (Pl. Ex. 70).

Plaintiff Exhibits 70 and 71 provide solid evidence that the promotional potential rating system used by the Board is having an adverse impact on blacks. Further, Plaintiff's Exhibit 29 reflects that all but 15 of the several hundred rating and reviewing officials are white. These facts show that Form 28B has operated and will continue to operate in a racially discriminatory manner so as to deny blacks an equal opportunity to aspire for and achieve promotions within the classified service.

In an effort to rebut the Government's impact statistics, the Personnel Board took the approach of analyzing separately each of the promotional announcements which were issued during the period of the effective life of the Cycle I ratings.[19] In Defendant Exhibit 360, for each announced examination, the ratings of employees in lower classifications to which the promotional exam was open were recorded and analyzed to measure adverse impact under the 80% rule and under the statistical test of chi-square. Based on this analysis, Mr. Kerr concluded that on some announcements the ratings had an adverse impact on blacks; on some there was "reverse" impact on whites, and on some there was no adverse impact (Tr. 581-82, Testimony of Joseph Kerr).

In Def. Ex. 360 the Board has attempted to link an employee's rating to a particular examination announcement when, in fact, promotional potential ratings are not administered in this manner. Rather, an employee is rated on a periodic basis every

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19 This approach resulted in the Board's considering the ratings that were given to only 1,382 (24.4%) of the 5,658 employees who received promotional potential ratings during Cycle I. (Pl. Exs. 71, 144), [sic] Moreover, this approach results in the exclusion of all of the ratings that were given to police patrolmen and deputy sheriffs, jobs which now include a sizeable number of blacks, solely because the promotion examination for Sergeant was not announced during the period covered by the Cycle I ratings.

six months, and the effect of a below 85 rating is total exclusion from promotional consideration for that period. The Board's myopic approach here has consequences that tend to distort the conclusions derived by Mr. Kerr from Def. E. 360.

By taking each job announcement as an individual entity to assess adverse impact, in many cases the sample size of candidates is so small as to provide useless data susceptible to misleading conclusions. In addition, several announced examinations during the period were open to the same pool of employees so that a particular employee's rating was counted several times in formulating the findings on impact. This multiple counting of a single rating led to n admitted problem of inflation of figures, such as in the case of five separate announcements for Head Nurse at Cooper Green Hospital where blacks in the lower classification of Staff Nurse had a higher passing rate than whites (Tr. 584, Testimony of Joseph Kerr).

To compensate for these deficiencies the Personnel Board later introduced Def. Ex. 412, which purported to analyze cumulatively the ratings given to employees listed in Def. Ex. 360, counting each rated employee only one time. However,the total figures used to assess adverse impact merely reflected the sum of the 2 X 2 contingency tables for each announcement in Def. Ex. 360, thereby failing to eliminate the problem of double-counting (Compare Def. Ex. 412 p. 1 with Def. Ex. 360, Table One, p. 5).

The Govenment [sic] did use the correct data in calculating the black/white passing rates of employees listed in Def. Ex. 360, counting each rating only once. The black pass rate was 75.6% of the white rate, and the disparity was far in excess of the .001 level of statistical significance (Pl. Ex. 144). Thus, even using the Board's approach of segregating the ratings to conform to particular announced examinations, the result is the same. The promotional opportunities of black employees are disproportionately adversely affected by the rating system.

In Defendant Exhibit 355 and the testimony of Joseph Kerr, the Personnel Board has introduced some evidence that certain jobs in the classified service are "dead-end" jobs[20] while

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20 "Dead-end" refers to jobs with no career ladder associated to it (Tr. 622, Testimony of Joseph Kerr). A complete listing as of May, 1974 appears in the back of Def. Ex. 355 under the title "Classes Not Normally Within Career Ladders." (Tr. 623).

others require additional formal education or training as a condition for advancement (Tr. 560-62; 583, Testimony of Joseph Kerr). Through this evidence the Board has attempted to foster the implication that promotional potential ratings are superfluous in these jobs and should not be counted in determining the adverse impact of the ratings. This approach was taken despite the assertion of the Personnel Director in his deposition that there are no jobs in which promotional potential ratings are given where most or all of the employees rated are not expected to be promoted (Deposition of Joseph Curtin, Vol. I, p. 93, Pl. Exhibit 33).

Moreover, the material contained in Def. Ex. 355 upon which the Board's implication rests is both misleading and irrelevant. Defendant Exhibit 355, dated 1975, states that it is based on the 1974 Career ladders and Lattices and incumbent figures at that time. The promotional potential rating system challenged by the Government was instituted in 1977, and this three year time lapse sheds doubt on the relevance and reliability of Def. Ex. 355's conclusions and implications. For instance, while Def. Ex. 355 lists a total of 111 employees in 1974 as being in the "dead-end" job of Clerical Assistant, Plaintiff Exhibit 1 shows 12 incumbents spread over four departments in that job in 1976 and Defendant Exhibit 349 lists 12 incumbents in 1979. Similarly Ex. 355 shows a total of 29 employees in the "dead-end" job of bailiff when the evidence reflects that in 1979 there are only four bailiffs employed by the County (Def. Ex. 349). The remainder of "dead-end" jobs listed in Def. Ex. 355 shows few incumbents. Thus, the effect of counting those "dead-end" jobs in determining the adverse impact of the ratings in 1977 could not have materially affected the outcome drawn from the data.

Another problem with Def. Ex. 355 is its failure to include jobs that were created subsequent to the 1974 Career Ladders and Lattices. Some of these include Dietary Aide and Housekeeping Aide, jobs which are heavily black and are promotable to Dietary Assistant, Cook's Helper or Housekeeping Assistant (Deposition of James Fields, Vol. I, pps. 49-51, Pl. Ex. 36).

Also in relying solely on the lines drawn by the Ladders and Lattices, defendants mislabeled certain jobs as requiring additional education or formal training. For instance, while the 1974 Ladders and Lattices show a Keypunch Operator re-

quiring additional education or training to promote directly to Data Processing Operator, the actual job announcement for Data Processing Operator states only that it is open to Keypunch Operators without requiring more education or formal training (Def. Ex. 360, p. 83). The same is true for Construction Equipment Operators going to Public Works Supervisor (See job announcement in Pl. Ex. 15).

These deficiencies in Defendant Exhibit 355, coupled with the Board's failure to offer any evidence that counting these allegedly "dead-end" jobs had any discernible effect on the Government's impact statistics, offer little in the way of a challenge to the Government's evidence of adverse impact.

Finally, the Board did not offer any evidence to attempt to validate the use of promotional potential ratings as a screening device for promotions. Given the highly subjective nature of Form 28B (See Depositions of Raters, Pl. Exs. 42-54) and the absence of professional participation in its development (Deposition of Joseph Curtin, Vol. I, p. 42-43; 64-65, Pl. Ex. 33), the failure of the Board to offer any evidence of its validity is a tacit admission of the impossibility of meeting that burden. In light of the Government's unrebutted evidence of the adverse impact of the promotional potential ratings upon black employees, the Board's use of the rating system has been a violation of Title VII.

B. Discussion

In the Government's Pre-Trial Brief we have discussed in detail the subjective and non-job related nature of the promotional potential rating form and the Title VII ramifications of having a predominately white rater group use this type of form to select candidates for promotion from among a pool of employees which includes blacks. The depositions of raters and reviewers (Pl. Exs. 42-54) establish that the ratings are administered in an arbitrary manner. As can be seen from the review of the evidence, the result is that the Board's promotional potential rating system has had an adverse impact on black employees.

The Government has presented evidence that reflects that blacks traditionally have been promoted in the classified service at a disproportionately lower rate than whites. (Pl. Ex. 16).

The Board has offered no evidence to show that despite the existence of a pattern of adverse ratings, blacks have been promoted at a rate equivalent to whites. Instead the Board con-

tends that the Government's evidence falls short of showing an adverse "bottom line" selection rate, thereby insulating from challenge the adverse impact of the rating system itself. (Brief for Defs. pps. 31-32.) The Government submits that in the circumstances of this case such a showing of specific "bottom line" selection rates is not a necessary prerequisite for establishing adverse impact.

The *Uniform Guidelines*, *supra*, Sec. 4C, state that ordinarily when the total selection process does not have adverse impact, the individual components of the selection process should not be evaluated for adverse impact. The *Guidelines* qualify this statement with exceptions:

> However, in the following circumstances the Federal enforcement agencies will expect a user to evaluate the individual components for adverse impact and may, where appropriate, take enforcement action with respect to the individual components: (1) where the selection procedure is a significant factor in the continuation of patterns of assignments of incumbent employees caused by prior discriminatory employment practices, (2) where the weight of court decisions or administrative interpretations hold that a specific procedure (such as height or weight requirements or no-arrest records) is not job related in the same or similar circumstances.

Uniform Guidelines, supra, Section 4C. See also *Questions and Answers #25 Uniform Guidelines*, 44 FR 11996, 12000 (March 2, 1979).

As we point out in our Pre-Trial Brief, it is well-established law in this Circuit that "procedures which depend almost entirely upon the subjective evaluation and favorable recommendation of the immediate foreman are a ready mechanism for discrimination against Blacks." *Parson* v. *Kaiser Aluminum and Chemical Corp.*, 575 F. 2d 1374, 1385 (5th Cir. 1978); *Wade* v. *Mississippi Cooperative Extension Service*, 528 F.2d 508 (5th Cir. 1976); *Pettway* v. *American Cast Iron and Pipe Co.*, 494 F.2d 211 (5th Cir. 1974); *Rowe* v. *General Motors Corp.*, 457 F. 2d 348 (5th Cir. 1972). The clear weight of these and other decisions that have dealt with the administration of subjective evaluations such as the promotional potential rating form have found them to be not job-related and toosubjective. See also *James* v. *Stockham Valves and Fittings Co.*, 559 F. 2d 310 (5th

Cir. 1977); *Rogers* v. *International Paper Co.*, 510 F. 2d 1340, 1346 (8th Cir. 1975).

In light of an established line of cases that have condemned the use of non-job related subjective evaluation forms by white supervisors to evaluate black employees, the Board's continued use of an admittedly non-professionally developed promotional potential rating form, which adversely affects blacks, obviates the need to present evidence of the bottom line selection rates.

This is especially so in the circumstances of this case. The promotional potential rating system has been in existence only since August, 1977. An analysis of the bottom line selection rates in specific job classifications for the year and a half since Form 28B was instituted would not necessarily provide any probative information concerning the adverse impact of the ratings, since promotional activity confined to that period would not be sufficient to make reliable conclusions. Since the Government is challenging the future use of the rating system, it is reasonable to make the logical inference that the continuing racial disparity in promotional eligibility ratings will be reflected over time in the bottom line promotional rate. This inference is particularly compelling in light of the lack of evidence that any other element in the promotional process is having or will have a counter-balancing effect.

III. IN-SERVICE REQUIREMENTS

A. Restrictions on Promotions Between Municipalities

Section 664 of the 1940 Alabama Code (Recomp. 1958) provides, *inter alia*, that "[w]ithin the discretion of the director of personnel vacancies in positions shall be filled in so far as practicable by promotion from among employees holding positions in the classified service."

Rule 5.1 of the Personnel Board's Rules and Regulations provides, *inter alia*, that "vacancies in positions above the lowest rank in any category in the classified service shall be filled as far as practical by the promotion of employees in the service. The Director shall in each case determine whether an open competitive or promotional examination will serve the best interests of the service in attracting well qualified candidates." (Curtin Dep., May 22, 1979, exhibit 113)

The evidence reflects that the Personnel Board has traditionally followed a practice of maintaining separate promotion-

al registers for each of the defendant municipalities and at times has also kept separate registers for various departments within a particular jurisdiction (Curtin Dep. May 23, 1979 Vol. 3, p. 302, Tr. 763-764). This practice was not required by State law and was not part of any collective bargaining agreement (Tr. Trans. 821, Curtin Dep. Vol. III, May 24, 1979, pp. 410-411)[.]

Under this system if, for example, a promotional examination is announced for heavy equipment operator and the examination is open to employees of the cities of Bessemer, Hueytown, Gardendale and Birmingham, incumbents in each of those jurisdictions who pass that promotional exam will be placed on a separate eligibles register (Tr. Trans. 720, 721 Pxs 93, 99, 120). Their rank on the register is based on the unweighted composite of their test score and their credits for years of classified service (up to a maximum of 20 years). See Sec. 664 of the Ala. Code 1940, Appendix Recomp. 1958, and Px 95. Thus a passing incumbent in Bessemer could theoretically receive a composite score of 75 on the promotional exam and rank number one on the eligible list in that jurisdiction, while an incumbent in the City of Birmingham whose composite score was 85 could rank in the middle or lower portion of the register for that jurisdiction.

Continuing the example, in filling a heavy equipment operator vacancy in Bessemer, the eligibles register for that jurisdiction must be exhausted before resort may be made to the eligibles register of another jurisdiction covered by the announcement. (Tr. Trans. 763-65, 822, 823)

It has been the policy of the Personnel Board wherever possible to fill promotional vacancies with incumbents on the eligibles register of the jurisdiction in which the vacancy occurs (see Deposition of Chris Doss, June 18, 1979, p. 35); and that on only infrequent occasions has the Board had to fill a promotional vacancy with an incumbent from another jurisdiction in the jobs covered by the plaintiffs in-service challenge. (Curtin Dep. May 23, 1979 Vol. 3, pp. 301-304; Tr. Trans. 711-727, 765, 830-834). Those jobs are: public works supervisor, construction equipment operator, heavy equipment operator, labor supervisor, refuse truck driver, and secretary (see Gov't. Pretrial Brief, pp. 39-42)[.]

This practice, in conjunction with the Board's practice of limiting promotional candidates to incumbents in the next lower

rated position(s) within the lines of progression established by the Board's career ladders and lattices (see section III B *infra*), has had a pronounced adverse impact on the promotion opportunities of blacks in both the classified and the unclassified service.

From 1972 through 1976 there were a total of 230 promotions to these positions throughout the classified service of which only 7 (3%) went to blacks. Those promotions separated by job and jurisdiction reveal the following:*

	Total	Black	% Black
1. Public Works Supervisor			
Jefferson County	7	0	0
Birmingham	11	0	0
	18	0	0
2. Construction Equipment Operator			
Jefferson County	38	1	2.7
Birmingham	15	0	0
Bessemer	2	0	0
Fairfield	1	0	0
Homewood	1	0	0
	57	1	1.8
3. Heavy Equipment Operator			
Jefferson County	39	1	2.6
Birmingham	28	2	7.1
Bessemer	8	0	0
	75	3	4.0
4. Labor Supervisor			
Jefferson County	27	1	3.7
Birmingham	16	0	0
Bessemer	8	0	0
Gardendale	1	0	0
Homewood	1	0	0
Midfield	1	0	0
	54	1	1.9
5. Refuse Truck Driver			
Birmingham	29	2	6.9
Bessemer	3	0	0
Fairfield	2	0	0
Gardendale	2	0	0
Midfield	2	1	50.0

	Total	Black	% Black
Mountain Brook	1	0	0
Tarrant	1	0	0
	40	3	7.5
6. Secretary			
Jefferson County	15	0	0
Birmingham	11	0	0
Health Dept.	5	0	0
Other Jurisdictions	4	0	0
	35	0	0

* The figures in this chart were taken from the printout that is in evidence as Plaintiffs' exhibit 16. This printout was used to compile Plaintiffs' summary exhibits 73 through 79. We wish to note here that there are a few slight discrepancies between this table and the figures contained on the summary exhibits due to typographical and/or computational errors. This table provides an accurate summary of information contained in Plaintiffs' exhibit 16[.]

Plaintiffs' summary exhibits 73 through 79 analyze in detail both the number and percentage of incumbent blacks in the classified and unclassified service who were precluded from eligibility to take the promotional examinations for these positions, and the number and percentage of incumbent blacks who would have been placed on separate promotional registers under the Board's current practices. Here we shall first illustrate, based on those summary exhibits, how the Board's practice of limiting competition for promotion to incumbents within a particular jurisdiction has adversely impacted on blacks.

The Personnel Board has traditionally filled heavy equipment operator vacancies by the promotion of individuals from the truck driver classification (Px 15, tb 2; Px 79 p. 1).

As seen from the above chart, during the period from 1972 through 1976 the County filled a total of 39 heavy equipment operator vacancies of which only 1 (2.5%) was filled by a black. As of October 1974 the County employed a total of 59 truck drivers of whom only 1 (1.7%) was black (Px 79, p. 6). As of May 1976, the County employed a total of 62 truck drivers of whom only 3 (4.84%) were black.

On the other hand, in the City of Birmingham there were a total of 74 truck drivers employed as of October 1974 of whom 15 (20.3%) were black (Px 79, p. 6). As of May 1976, 34 of 120 or 28.3% of the City's truck drivers were black (Px 79, p. 2)[.]

Moreover, the record reflects that since 1973 truck driver positions have generally been filled by the promotion of incumbents in the unclassified service (Px. 19). In the Jefferson County Public Works Department, which is where most if not all of the County's truck drivers are assigned (see Px 6, p. 1, Px 2, pp. 138-139), the unclassified service has been predominantly white. See Px 73, pp. 2, 5. See also Px. 28, deposition of Everett Armour p. 15 and exhibit 1 of his deposition; deposition of Willard Hogan, p. 22, and Px 20 the Jefferson County allocation list effective October 1, 1973. In contrast, the unclassified service in the City of Birmingham has been predominantly black (Px 73, pp. 3, 6).

Further, County of Public Works officials have admitted that jobs in the unclassified service in that Department have traditionally been filed [sic] by word of mouth referrals and referrals of friends and relatives (Dep. of Everett Ray Armour, June 19, 1979, pp. 8, 18-23, Dep. of Willard Hogan June 19, 1979, pp. 9, 10; Dep. R.D. Irvin June 18, 1979 p. 8).

Therefore, given the relatively small number of blacks who have been able to gain access to the entry level jobs in the county Public Works Department, the Board's in-service requirements will necessarily perpetuate a predominantly white work force in that Department.

B. Limitation of Promotions to Employees In the Next Lower Rated Job Classifications

The Board has traditionally followed a practice of limiting competition for promotions to incumbents in the next lower rated job classifications as prescribed by the Board's career ladder system (Curtin Dep. Vol. II, May 23, 1979, p. 309). This practice has also had an adverse impact on blacks in the lower rated and/or entry level positions on the ladder. See Plaintiffs summary exhibits 73-79. Moreover, the Board has presented no evidence that experience in the next lower rated classification on the career ladder is a necessary prerequisite for successful performance in the next higher rated position. Therefore, it has not demonstrated that this promotion practice is required by business necessity.

Set forth below is an illustration based on plaintiffs' summary exhibits 73-79 of how this policy of the Personnel Board in conjunction with its restrictions on transfers between jurisdictions has adversely affected the promotional opportunities of blacks.

Since at least 1967, construction equipment operator vacancies in Jefferson County have been filled through promotional announcements which for the most part have been limited to incumbents in heavy equipment operator and labor foreman positions. On at least one occasion the Board has extended promotional eligibility for this position to prison labor guards and senior equipment servicemen employed by the County. (See Px 15, Tab 1, p. 6). These nnouncements, however, have not been open to refuse truck drivers.

By way of contrast promotional announcements for construction equipment operator vacancies in the City of Birmingham have extended to incumbents in the jobs of refuse truck driver as well as heavy equipment operator and labor foremen [sic], (Px 15, Tab 1, p. 8). As of October 1974, 16% of the refuse truck drivers in the City of Birmingham were black (Px 73, Chart II, p. 3). As of May 1976 approximately 14% of the City's refuse truck drivers were black.

By further excluding truck drivers, semi-skilled laborers, and unclassified workers from promotional eligibility for the construction equipment operator examination, a substantial percentage of blacks in the City of Birmingham were totally precluded from competition for construction equipment operator positions both in Birmingham and in each of the other defendant jurisdictions.

The record reflects further that as of October 1974, 15 or 20% of the truck drivers of the City of Birmingham were black and 455 or 73% of the unclassified workers were blacks (Px 73, Chart II, p. 3).[21] There were no semi-skilled laborers working for the City as of that date (Px 73 Chart II p. 3)[.] As of May 1976, 34 or 28% of Birmingham's truck drivers were black and 41 or 68% of its semi-skilled laborers were black (Px 73, Chart I, p. 3). Of the City's 603 unclassified workers, 459 or 76% were black (Id.).

The evidence further reflects that individuals employed by the City of Birmingham in truck driving, semi-skilled-laborer, and unclassified laborer positions constitute a readily available pool from which to draw qualified candidates for construction

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21 The Government have [sic] not included in their [sic] summary exhibits unclassified workers employed in health or other unrelated occupations, nor has it included elected or appointed officials in the unclassified service.

equipment operator promotion examinations. See trial testimony of Trennon Nickerson 179-209, Mose Shine Jr. 218-231, Johnny Brown 283-296, James Purvis, 264-267.

As seen from the chart above, from 1972 through 1976 the County promoted 36 of its incumbents to construction equipment operator vacancies, none of whom were black (Px 74). The Director of Personnel has admitted by deposition that blacks employed the City of Birmingham would constitute a readily available labor pool for job vacancies in other jurisdictions. See Curtin Dep. May 23, 1979, Vol. 2, 357-358)[.]

The only reason given by the Director of Personnel for not extending promotional eligibility beyond the jobs listed in its announcements or to employees in other jurisdictions is the presence, in the Director's view, of sufficient numbers of qualified incumbents in the next lower rated job(s) and a desire to give first preference in promotions to incumbents within the same department or jurisdiction (Curtin Dep. Vol. 2, p.309, 315).

This hardly rises to the level of a showing of a business necessity for these practices. Furthermore, the Director of Public Works for Jefferson County, Mr. Chris Doss, testified by deposition that he would not object to allowing employees of the City of Birmingham to promote to positions in his department. Deposition of Chris Doss, June 18, 1979, p. 38. Doss further candidly admitted on his deposition that in his view the practice of filling promotion vacancies from among incumbents in his department has not had satisfactory results. Said Mr. Doss:

> "You see, the policy we have now, and I think the policy must be changed, it does not — it's not based on race or minorities or women. Very frankly, for the most part we are not getting the caliber of person coming in and working up through the ranks that public works has traditionally had. So I think that we are going to have to go to a more open recruiting or hiring basis. In other words, a lot of our advancement is limited to people within the system. I think that is going to have to be changed. Because we are not getting the quality of people on the lower levels that work themselves up . . . There is going to be a lot of rumblings when that is done but I feel it is essential" (Deposition of Chris Doss p. 33)[.]

C. The In-Service Requirements In the Birmingham Streets and Sanitation Department

Because of the historically heavy concentration of blacks in the unclassified jobs of the Streets and Sanitation Department of the City of Birmingham, coupled with the reclassification in 1975 of a sizeable number of these blacks into semi-skilled laborer positions in the classified service, the Board's in-service requirements for promotion have, in this Department, had their most severe adverse effect on blacks. From 1972 to 1976 the number of blacks and whites promoted into the jobs relevant to the in-service challenge in the Streets and Sanitation Department were as follows:

	Total	Wite	Black
Heavy Equipment Operator	25	23	2
Refuse Truck Driver	28	26	2
Labor Supervisor	14	14	0
Construction Equipment Operator	13	13	0
Public Works Supervisor	7	7	0
	87	83	4

(Px. 16)

Heavy Equipment Operator

Plaintiff Exhibit 79 analyzes for heavy equipment operator (HEO) the adverse impact of the in-service requirement, which restricted to truck drivers eligibility to compete for promotion to HEO. As of May, 1976, blacks comprised 29.20% (33/113) of the truck driver classification, the announced promotional pool for the HEO examination given in the Streets and Sanitation Department in March, 1975 (Px 79). However, if semi-skilled laborers were allowed to compete, the pool would be increased to 41.57% black (69/166), and the addition of unclassified laborers would make the pool 71.24% black (441/619) (Px 79).

In response to these statistics the Board offered no evidence to show that experience gained in the truck driver classification is a necessary prerequisite to the ability to compete for an HEO job. The Government, however, did present testimony that serving as a truck driver is not required to perform the job of HEO and that several blacks in semi-skilled and unclassified laborer positions have possessed the skills to at least be tested for HEO. James Purvis, former unclassified laborer, truck driver and HEO in the Streets and Sanitation Department and

current business manager for the union representing employees in that department, testified that his experience as a truck driver did not make him any more ready to take the HEO test than his experience as a laborer (Tr. 265, Testimony of James Purvis). He also testified that he knew of blacks in the unclassified service who were capable of operating heavy equipment (*Id.*). One of the men he named, Johnny Brown, testified that he had worked for 35 years in the Streets and Sanitation Department, all but one of which was as an unclassified laborer. Mr. Brown described how as an unclassified laborer in 1940 he operated the first bulldozer ever obtained by the City. He tesified that he continued to operate heavy equipment such as front end loaders and backhoes for many years until his retirement in 1976 (Tr. 284-290, Testimony of Johnny Brown). He also testified that he even taught men how to operate heavy rollers (Tr. 289), but was never allowed to take a test to promote directly to HEO (Tr. 291, Testimony of Johnny Brown).

Refuse Truck Driver

The job of refuse truck driver has always been restricted to candidates who are presently truck drivers (Px. 15). Thus, the identical statistical analysis of excluded promotional pools previously described for HEO is appropriate and was presented in Plaintiff Exhibit 78. The exclusion of unclassified laborers from eligibility to compete for refuse truck driver has been particularly repressive to the promotional opportunities of laborers who work on the garbage crews, virtually all of whom have been black (Tr. 181, Testimony of Trennon Nickerson; Tr. 259, Testimony of James Purvis). Mr. Purvis testified that there is no difference in driving a refuse truck from a regular truck and that in most garbage crews laborers get the opportunity to operate the refuse truck in a limited capacity (Tr. 266-267, Testimony of James Purvis). To require laborers who are familiar with the operation of a refuse truck to serve as truck drivers before being eligible to compete for refuse truck driver will continue to arbitrarily and adversely deny promotion opportunities to employees in the predominantly black unclassified service and in the heavily black semi-skilled laborer positions in the Birmingham Streets and Sanitation Department.

Labor Supervisor

As of December, 1978 there had never been a black labor supervisor in the Birmingham Streets and Sanitation Department (Pxs 17, 73). In a 1973 announcement, the promotional ex-

amination for this job in the City of Birmingham was open only to truck drivers and provisional labor supervisors (Px 15). The classification of semi-skilled laborer did not come into being in Birmingham until March, 1975. At that time the Personnel Board reclassified 62 unclassified laborers in the Streets and Sanitation Department, 39 of whom were black. Most of these employees were placed into the newly classified job of semi-skilled laborer (Pxs 20, 68), the others being declared truck drivers. Subsequent to this action no promotional announcement for labor supervisor was made until December, 1978 at which time semi-skilled laborers were allowed to compete (Dx 360)[.][22]

The important point here is that blacks in the unclassified service, especially those who were reallocated in 1975 to semi-skilled laborer, were denied the opportunity prior to that time to compete for promotion to labor supervisor. And of course, those employees remaining in unclassified positions continue to be excluded from promotional considerations. An example of the problem is Herman Copes, a black employee with the Streets and Sanitation Department since 1960, who testified that although he was a lead worker helping supervise a crew of laborers for thirteen years until his reclassification to semi-skilled laborer in 1975, he was not permitted to take the labor supervisor test as an unclassified employee (Tr. 299-300, Testimony of Herman Copes). Mr. Purvis further testified that most laborer crews continue to have leadworkers, who are unclassified and most of whom are black, who are qualified to take the labor supervisor test (Tr. 268, Testimony of James Purvis). Thus, the exclusion from the promotional pool of unclassified laborers, who are 82.12% black, continues the non-representation of blacks as labor supervisors (Px 76).

The existence of employees in laborer and semi-skilled positions who are qualified to sit for promotional examinations for refuse truck driver, HEO and labor supervisor has been confirmed by the Superintendent of the Streets and Sanitation

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22 Plaintiff Exhibit 76, which analyzes the adverse impact of the in-service requirement for Labor Supervisor proceeded along the assumption that the excluded pools as of 1976 included semi-skilled laborer, since no examination announcement for the City of Birmingham subsequent to 1973 was produced by defendants during discovery. In light of the 1978 announcement contained in Defendant Exhibit 360, the post-1976 figures on adverse impact with respect to semi-skilled laborers may be in error, but with respect to the unclassified remain undiminished.

Department, Mr. Arnold Moncrief. In his deposition, Mr. Moncrief testified that he notified the Personnel Board that "he did not feel that the promotional opportunities were available to all of the men that should be there" because "it was almost impossible for a laborer or a semi-skilled laborer to go to labor foreman at that time, or heavy equipment operator, or refuse truck driver." (Deposition of Arnold Moncrief, p. 69, Px 37). Later he acknowledged that it is the in-service requirements that prevent semi-skilleds and laborers from being promoted and not a lack of qualified employees in those classes (Deposition of Arnold Moncrief, p. 95, Px 37).

Construction Equipment Operator

The in-service requirement for construction equipment operator (CEO) in the Streets and Sanitation Department is incumbency as a refuse truck driver or HEO (Px 15). As of December, 1978, there had never been a black CEO in Birmingham (Px 17, 73), and Plaintiffs' Exhibit 74 analyzes the adverse impact upon blacks of excluding the lower related classifications. As of 1976, the promotional pool for HEO and refuse truck driver was 10% black (6/60), and in 1978, 16.39% black (10/61) (Px 74). Based on 1976 figures, adding truck drivers would have increased the pool at that time to 22.54% black (Px 74). In 1978, the excluded pools of truck drivers, semi-skilled and unclassified laborer [sic] were, respectively 30.49%, 58.18% and 81.04% black (Px 74).

While these figures are persuasive in themselves, testimony established that there are several black truck drivers in the Streets and Sanitation Department who have performed capably as CEO's at the landfills for substantial periods of tie without commensurate compensation or hope of directly promoting to CEO. Trennon Nickerson testified that as a truck driver he had driven construction equipment at the New Georgia landfill since 1975 and full-time for seven of the last nine months before trial (Tr. 196-198, Testimony of Trennon Nickerson). Mose Shine, Jr., a truck driver, testified that his operation of construction equipment both at the Pratt City landfill and New Georgia landfill was extensive over the last several years (Tr. 220-222, Testimony of Mose Shine, Jr.). Two other black truck drivers have also had similar experience operating construction equipment out of their classification at the landfills (Pxs 132, 133; Tr. 202, Testimony of Trennon Nickerson).

The obvious qualifications of these black truck drivers to compete for promotion to CEO is admitted by their supervisor, who recommended to the Board that two years' experience as a truck driver at the landfill be sufficient requirement to take the CEO test (Px. 132, 133). The Personnel Board's investigation of the situation acknowledged "that the proportion of time spent in the operation of construction equipment by each of the named truck drivers (excepting Charles S. Jordan) is significant" and that these truck drivers "who have gained some skill in the operation of the equipment are called upon to provide some on-the-job training" to successful candidates promoted to CEO (Px. 134). Given these facts the Board recommended that they be paid CEO wages when performing such duties and that a new CEO position be created at the landfills (Px. 134). However, the Board refused to grant them eligibility to take the promotion examination for construction equipment operator even though it knew that these blacks were qualified candidates for that job.

Evidence of "adverse impact" notwithstanding, we submit that these facts constitute evidence sufficient to infer an intent on the part of the Board to discriminate against blacks in this area. This inference is not difficult to make, especially when the Board's actions are contrasted with the policy statement made in deposition by Mr. Fields, Deputy Director. There, in discussing why the job of CEO is promotional, he said:

> . . . but when we have people in the service who have had some experience in this type of operation, who are doing a real good job, and who have probably operated some of this equipment during sicknesses or absences or vacations of fellow workers, who have been trained to operate it and who have done well in performance at a lower level, [they] deserve an opportunity to qualify for the examination.

(Deposition of James Fields, April 5, 1977, pp. 96-97, Px 35).

Public Works Supervisor

The record concerning the in-service requirements for the classification of public works supervisor shows that in changing the announced line of promotion in 1975, the Board intentionally disregarded the known consequence that blacks would be excluded from consideration for that position. Until 1975 the in-service requirement for promotion to public works supervisor was permanent status as either a labor supervisor, HEO, CEO, or refuse truck driver (Px. 15). In 1975 the Board changed the requirement to include only those candidates with permanent

status as a construction supervisor or senior sanitation inspector or a labor supervisor with three years experience or a CEO with three years experience in a combination of CEO, HEO, labor supervisor or refuse truck driver (Px. 15).

There has never been a black public works supervisor in the Streets and Sanitation Department (Px 75). All 27 current incumbents are white (Px. 17)[.] Both as of May, 1976 and December, 1978, there were no black incumbents in the announced promotional pool (Px 75). However, if the lines of promotion had not been changed by the Board in 1975, 8 blacks, who comprise 23.53% of refuse truck drivers, and 2 black HEO's would be eligible presently to compete for public works supervisor (Px. 75).

The circumstances surrounding the Board's decision to change the lines of promotion indicate that its unilateral action was taken against the objections of the Superintendent of the Streets and Sanitation Department and with full cognizance that promotional opportunities for blacks would be eliminated. Mr. Fields testified that based solely upon his review of position classification questionnaires and a conversation with the consultant who performed the five year survey in 1974, he decided to drop refuse truck driver from the line of promotion (Deposition of James Fields, Vol. II, p. 97, May 25, 1979, Px 36). The purported basis for this deletion was that refuse truck drivers do not receive the knowledges [sic], skills and abilities needed to perform the job of public works supervisor, *as far as construction and maintenance is concerned* (*Id.* p. 91). However, when notified of the proposed change, the Superintendent of the Streets and Sanitation Department pointed out in a letter to the Board that since more than 50% of the work done in the department and the tasks considered most important involve the collection and disposal of solid waste, he favored the continuation of the direct line of promotion from refuse truck driver, (Deposition of James Fields, *supra*, Dep. Ex. 12). The Superintendent also opposed the addition of three years' labor supervisor experience (*Id.* Dep. Ex. 11), a requirement which Mr. Curtin testified as being unusual in the civil service system (Tr. 819, Testimony of Joseph Curtin).[23]

23 It is also significant to note that the additional in-service requirement suggested by the consultant was 2-4 years experience in public works maintenance (Deposition of James Fields, *supra*, p. 123). It was the Board's decision alone to formulate the specific requirement of three years' experience as labor supervisor, an all-white classification.

The absence of any viable justification for the deletion of refuse truck driver from the line of promotion is further evidence of the Board's intent to discrminate against blacks in this area.[24] Many present public works supervisors in the Streets and Sanitation Department promoted to that position from refuse truck driver without experience in other classifications which involved construction and maintenance (See Depositions of Public Works Supervisors, Px 42-50; Tr. 625, Testimony of Joseph Curtin). In deposition they stated uniformly that eliminating refuse truck drivers from promotional considerations was unreasonable (Deposition of Lem Odom, p. 9, Px 50; Deposition of Hugh Faucett, pp 7-8, Px 42; Deposition of Claude Massey, p. 32, Px 45; Deposition of Robert Woods, p. 48, Px 46; Deposition of Paul Henson, pp. 10-11, Px 43). Mr. Purvis testified that refuse truck drivers receive the same type of supervisory experience as labor supervisors and should be eligible to take the test for public works supervisor (Tr. 269, Testimony of James Purvis).

In redrawing the lines of promotion in 1975, both Mr. Curtin and Mr. Fields have admitted that they were aware that there were several black refuse truck drivers and a substantial number of blacks beginning to move into truck driver and semi-skilled positions (Deposition of Joseph Curtin, Vol. IV, p. 629, Px 33; Deposition of James Fields, Vol. II, p. 131, Px 36). Mr. Curtin testified at trial that he is aware that the in-service requirements adopted by the Personnel Board mean that no blacks are eligible to take the public works supervisor examination (Tr. 842, Testimony of Joseph Curtin). Despite this knowledge of the direct consequences to black refuse truck drivers and HEO's, and despite the lack of any necessity for a change in the line of promotion to public works supervisor in the Streets and Sanitation Department, the Board changed that line. As anticipated, the result has been to bar qualified black employees from taking the examination for public works supervisor (Tr. 246, Testimony of Alfred Mennifield; Tr. 313, Testimony of Willie Gossum; Tr. 345, Testimony of Clyde Hill; Tr. 366, Testimony of Major Florence; Tr. 426, 429, 430, Testimony of Cleo Lewis). With this line of promotion, the supervisory level in the Streets

24 Mr. Fields testified that he did suggest the creation of a new classification called refuse collection foreman but that the Superintendent of Streets and Sanitation balked at the idea because it would be a "dead end" position and he wanted interchangeability at the supervisory level. In *this* instance, the Board acceded to the wishes of the Superintendent.

and Sanitation Department will continue to be maintained as an all-white classification.

Based on the foregoing we submit that the Personnel's [sic] Board's in-service requirements have had a severe adverse impact on blacks in the Birmingham Streets and Sanitation Department. We further submit that the Board's conduct with respect to the administration and maintenance of those requirements in this Department was such as to infer an intent to discriminate against blacks. See e.g. *Columbus Board of Education* v. *Penick*, ___ U.S. ___ 47 USLW 4924, 4927-28; *Washington* v. *Davis*, 426 U.S. 229, 239-41 (1976)[.]

Such an inference of racial intent may and properly should be drawn when as here an employer engages in acts which reasonably and foreseeably result in an adverse impact on blacks and where it has been put on notice that there is no apparent justification for such acts. See *Columbus Board of Education, et al.* v. *Penick, et al.*, *supra* 47 USLW at 4927 n. 11.

D. Discussion

The In-Service Requirements of The Personnel Board Are Not Immune From Challenge Under Section 703 (h) of Title VII

The Board's practice of giving "preference" to the promotion of eligibles in the next lower rated job(s) and/or within the same department or jurisdiction is not, nor does it rise to the level of, a "seniority system" entitled to the Congressional immunity afforded by §703(h) of Title VII.

In its decision in *Teamsters* v. *United States*, 431 U.S. 324 (1977) the Supreme Court was careful to point out that under its earlier decision in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971) employment practices, such as the one challenged here, which are "fair in form but discriminatory in operation" will generally be found to be in violation of Title VII absent a showing of business necessity[,] 431 U.S. at 349. Cf. *Nashville Gas Co.* v. *Satty*, 434 U.S. 136 (1977). While the Court went on to acknowledge that the departmental seniority provisions contained in the collective bargaining agreements between the employer and the union in that case had a racially discriminatory

effect, they were nevertheless not subject to attack under Title VII because of the legislative immunity granted by §703(h).[25]

Since *Teamsters*, the appellate courts have, for the most part, narrowly construed the coverage of 703(h) to include only practices which are directly linked to seniority provisions contained in collective bargaining agreements. *Pettway* v. *American Cast Iron Pipe Co.*, 576 F.2d 1157, 1188-94 (5th Cir. 1978), *cert. denied*, 99 S.Ct. 1020 (1979); *Parson* v. *Kaiser Aluminum & Chemical Corp.*, 575 F.2d 1374, on rehearing 503 F.2d 132 (5th Cir. 1978), *cert. denied* 47 U.S.L.W. 3761 (May 21, 1979); *Patterson* v. *American Tobacco Co.*, 586 F.2d 300 (4th Cir. 1978), pending rehearing in banc (Nos. 78-1088, 78-1084); *United States, et al.* v. *Lee Way Motor Freight Inc., et al.*, ___ F.2d ___ (10th Cir. 1979) 20 FEP Cases 1345, 21 EPD ¶30,286; *Bryant* v. *California Brewers Association, et al.*, 545 F.2d 421, 427 (9th Cir. 1978), certiorari granted, 62 L. Ed. 2d 282. But see, *Alexander* v. *Aero Lodge 735, International Assn. of Machinists*, 565 F.2d 1364 (6th Cir. 1977), *cert. denied* 436 U.S. 946 (1978). See also *Acha* v. *Beame*, 531 F.2d 648, on rehearing 570 F.2d 57 (2nd Cir. 1978) extending 703(h) coverage to seniority systems established by State law.

These Courts have found outside the coverage of 703(h) restrictions in union contracts governing transfers between departments, *Parson, supra*, collectively bargained restrictions on eligibility for promotions within lines of progression, *Patterson, supra*, and employer rules prohibiting transfers between departments, *Lee Way supra*.

In this case the Board's decision to institute the practice of giving first preference on promotions to incumbents in the next lower rated jobs in the departments or jurisdictions in which a vacancy arises was made unilaterally. It was not collectively bargained, and as we have seen above, it was not specifically required by State law.

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25 §703(h) provides in pertinent part:

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice, for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, *** [sic] provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex or national origin***[sic].

We submit this practice does not differ in operation to any significant degree from the restrictions on transfer between departments and within lines of progression which were found to fall outside the coverage of §703(h) by the courts of appeals in *Parson*, *Patterson*, and *Lee Way*. Furthermore, since this practice was neither collectively bargained nor required by State law, the Board's claim of immunity for it under §703(h) is even less substantial than the claims raised by the employers and unions in the cases cited above.

In its Brief (p. 54) the Board argues, without reference to any authority, that each of the defendant municipalities are "separate employer(s)" and therefore each "has the right to maintain a line of progression separate from all other employers." However, there is no evidence that any municipality initiated or sought the restrictions here in question. On the contrary, the evidence indicates that the Personnel Board alone determined this policy.

Furthermore, each of these municipalities relies on the Personnel Board for the initial screening, testing and certification of candidates for promotion vacancies. Moreover, the Board in its discretion can elect to fill a promotional vacancy through an open competitive examination if it determines there are no qualified incumbents available for the job (Tr. Trans. 768, Personnel Board Rule 5.1)[.]

Since the content and duties of the jobs challenged here are alleged by the Board to be generally uniform in character throughout all of the defendant jurisdictions, and since vacancies in those positions are filled through the Board's centralized testing and certification procedures, there is no merit to the Board's arguments here. See *Russell* v. *American Tobacco Co.*, 528 F.2d 357, 362-63 (4th Cir. 1975); *Patterson* v. *American Tobacco*, *supra*, 535 F.2d at 266.

In sum, since the practice challenged here, which has been shown to have an adverse impact on blacks, is not part of and does not stem from a bona fide seniority system protected by 703(h), it is unlawful under Title VII. If this practice is allowed to continue it will in our view virtually insure the continuation of a predominantly white work force in the jobs challenged here by the plaintiffs. Such a result would be directly contrary to the primary purpose of Title VII which is "to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job

environments to the disadvantage of minority citizens." *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 800 (1973).

IV. CREDITS FOR YEARS OF CLASSIFIED SERVICE ON PROMOTION EXAMINATIONS

A. Evidence of Adverse Impact on Blacks

1. Racial Composition of the Classified Service Prior to 1972

As of January 1, 1966 there were a total of 3,430 employees in the classified service in all of the jurisdictions covered as of that date by the Jefferson County Personnel Board civil service system. Sixty-six or 1.9% of these employees were black (Dx 302)[.]

As of January 1, 1966 the City of Birmingham employed approximately 1,689 employees in the classified service of whom 10 (.59%) were black. All of these blacks were employed in the Parks Department (Dx 302).

As of January 1, 1966, Jefferson County employed approximately 1037 employees in the classified service of whom 23 (2.3%) were black. Of these 23 blacks, 14 were employed in the County Home, all as practical nurses; 6 were employed by the Juvenile Court as either juvenile supervisors or probation officers, and 3 were employed in the Engineering Department (bridge construction) as bridge maintenance men.

As of January 1, 1966 the Health Department employed approximately 257 classified employees of whom 33 (12.8%) were black. These blacks were employed primarily in the positions of registered nurse and nursing assistant (Dx 302).

Plaintiffs Exhibit 66 is a chart which identifies the total number of minorities employed by each of the defendant jurisdictions as of November 1967, July 1969, July 1970, July 1971 and July 1977. That exhibit is based on Personnel Board Exhibit 304 which contains the only information in the Board's files reflecting the racial composition of the classified service from 1967 through 1972. (Tr. Trans. 456-461). Exhibit 304 also does not further identify minorities by racial group. However, the Government concedes for purposes of this trial that the minority employee totals contained on that exhibit are for the most part reflective of the total number of black employees in the classified service.

Plaintiffs' exhibit 64 is a chart which identifies the total number of classified and unclassified employees in each of the defendant jurisdictions as of the end of each fiscal year (September 30) for the years 1967 through 1972.

Comparison of the total number of minorities in the classified service by jurisdiction as contained in Px 66 with the total number of classified employees by jurisdiction as contained in Px 64 reflects the following:

Minorities in the Classified Service
(1967 - 1972)

Jurisdiction by Year	1967	1969	1970	1971	1972
1. Jefferson County					
Total Class'd.	1,205	1,337	1,417	1,479	1,863
Minority Class'd.	23	49	53	64	204
% Minority	1.9	3.7	3.7	4.3	11.0
2. Board of Health					
Total Class'd.	303	319	322	331	355
Minority Class'd.	49	51	62	65	65
% Minority	16.2	16.0	19.3	19.6	18.3
3. Birmingham					
Total Class'd.	1,764	2,015	2,046	2,187	2,374
Minority Class'd.	28	69	109	113	148
% Minority	1.6	3.4	5.3	5.2	6.2
4. Bessemer					
Total Class'd.	230	251	257	262	282
Minority Class'd.	0	4	6	8	2
% Minority	0	1.6	2.3	3.1	.7
5. Fairfield					
Total Class'd.	57	55	60	64	63
Minority Class'd.	1	1	1	1	1
% Minority	1.7	1.8	1.7	1.6	1.6
6. Homewood					
Total Class'd.	83	96	101	106	112
Minority Class'd.	2	11	8	9	10
% Minority	2.4	11.5	7.9	8.5	8.9
7. Hueytown					
Total Class'd.	17	19	20	20	21
Minority Class'd.	0	0	0	0	0
% Minority	0	0	0	0	0

Jurisdiction by Year	1967	1969	1970	1971	1972
8. Mountain Brook					
Total Class'd.	78	84	91	92	96
Minority Class'd	0	0	0	1	0
% Minority	0	0	0	0	0
9. Tarrant					
Total Class'd.	34	35	35	37	39
Minority Class'd.	0	0	0	1	1
% Minority	0	0	0	2.7	2.6
10. Fultondale					
Total Class'd.	N/A*	N/A	N/A	33	32
Minority Class'd.	N/A	N/A	N/A	0	0
% Minority	-	-	-	0	0
11. Gardendale					
Total Class'd.	N/A*	N/A	N/A	36	34
Minority Class'd.	N/A	N/A	N/A	0	0
% Minority	-	-	-	0	0
12. Pleasant Grove					
Total Class'd.	N/A*	N/A	N/A	48	41
Minority Class'd.	N/A	N/A	N/A	1	0
% Minority	-	-	-	2.1	0
13. Midfield					
Total Class'd.	N/A*	N/A	N/A	31	34
Minority Class'd.	N/A	N/A	N/A	0	0
% Minority	-	-	-	0	0
14. Vestavia Hills					
Total Class'd.	N/A*	N/A	N/A	61	62
Minority Class'd.	N/A	N/A	N/A	5	5
% Mnority	-	-	-	8.2	8.1
TOTAL (all Jurisdictions)					
Total Class'd.	3,771	4,211	4,349	4,787	5,408
Minority Class'd.	108	185	239	268	436
% Minority	2.9	4.4	5.5	5.6	8.1

*These jurisdictions did not come under the coverage of the Jefferson County Personnel Board civil service system until1971.

The increase in minority employment in the classified service between 1967 and 1972 occurred primarily in Jefferson County and the City of Birmingham (Px 66). Within the City of Birmingham, the increase in minority classified employees occurred primarily in two departments, Parks and Police. In Jef-

ferson County this increase occurred primarily in three departments, the County Home, Family Court and Mercy Hospital[.]

Mercy Hospital was opened in 1972 (Px 66, Trial trans. 586). During 1972, at least 119 minorities were hired into this department (Px 66). This was the primary factor in the increase in the percentage of minority employees in Jefferson County from 4.3% in 1971 to 11.0% in 1972.

2. Racial Composition of the Classified Service After 1972

From 1973 through 1975 the percentage of blacks in the classified service rose from approximately 9% to over 16% (Dxs 307, 309, 313)[.]

A sizeable portion of this increase was attributable to the reclassification into the classified service of blacks formerly employed in the unclassified service (Px 20, Px 68). During this period of time over 200 blacks were added to the classified service through reclassification (Px 20, Px 68).

Important to this issue is the fact that these blacks were not given any credit for purposes of promotion within the classified service for their years of unclassified service (Tr. Trans. 776-779; Curtin Dep. Vol III, May 24, 1979, pp. 411-417)[.]

With the exception of Bessemer, there does not appear to have been a significant increase in the number of blacks employed in the classified service after 1972 in the smaller jurisdictions. As of May 1976 those jurisdictions employed the following number of blacks in the classified service (Px 65).

	Total	Black	% Black
Bessemer	291	25	8.6
Fairfield	69	3	0
Fultondale	46	0	0
Gardendale	41	0	0
Homewood	145	8	5.5
Hueytown	34	0	0
Midfield	37	2	5.4
Mountain Brook	132	4	3.0
Pleasant Grove	53	0	0
Tarrant City	58	3	5.5
Vestavia Hills	83	5	6.0

Plaintiffs Exhibits 67 and 147 are charts which reflect the average years of classified service seniority as of 1977 of whites and blacks in certain selected departments and jurisdictions.

Those departments and jurisdictions were selected on the basis of the proportion of blacks in those departments and the amount of promotion opportunities occurring in those departments (See Tr. Trans. 49-51). Plaintiffs [sic] exhibit 67 is based on total years of classified service while exhibit 147 computes years of classified service up to 20 years to reflect the Board's policy of not awarding credit on promotion examinations for time spent in the classified service beyond 20 years.

Both exhibits 67 and 147 reflect a significant and substantial disparity between the average years of classified service of whites and blacks. For example, exhibit 67 reflects that as of 1977 blacks in the Street and Sanitation Department of the City of Birmingham had an average of 3.0 years of classified service while whites in that department had an average of 12.1 years of classified service. Exhibit 147 shows the same average for blacks. The white average is 11.1 years.

B. Discussion

In our Pre-Trial Brief (pp. 27-30) we set forth in detail our arguments that the Board's practice of adding to test scores on promotion examinations points for years of classified service is in operation a selection device that is covered by the Uniform Guidelines on Employee Selection Procedures. This is because it is being used as a means of determining the relative qualifications and rank order of candidates for promotion.

In our Pre-Trial Brief we also discuss at length our arguments as to why this system should not be viewed as a seniority system within the meaning of §703(h). That discussion need not be reiterated here. We also believe the recent decisions of the courts of appeals interpreting §703(h), referred to in our discussion of the in-service requirements also support our arguments here.

However, we wish to stress here that even if this Court finds that the Board's practice of awarding credits on promotional examinations based on length of service properly falls within the meaning of a "seniority system" as prescribed by §703(h) of Title VII, the Board's decision to disallow any credits on promotion examinations for years spent in the predominantly black unclassified service was an act of disparate treatment based on race. As such it constituted an independent and willful violation of Title VII. See *Allen* v. *Amalgamated Transit Union, Local 785*, 554 F.2d 876, *cert. denied* 434 U.S. 891; *Peters* v. *Missouri-Pacific Railroad Co.*, 483 F.2d 490, *cert. denied*, 414 U.S. 1002

(1973). *Cf. Washington* v. *Davis*, 426 U.S. 229, 239-41 (1976); *Arlington Heights* v. *Metropolitan Housing Corp.*, 429 U.S. 252, 266-8 (1977); *Columbus Board of Education* v. *Penick*, ___ U.S. ___, 47 USLW 4924, 4928 (July 2, 1979).

The Director of Personnel, Mr. Joseph Curtin, admitted at trial that in the past the Board has routinely credited for promotion purposes the full length of service of employees of the smaller municipalities who have entered the classified service through the process of "inclusion". This procedure is discussed further in our Pre-Trial Brief at p. 46 fn. 19. The employees of these municipalities were virtually all white (See Defendant Exhibit 304).

Curtin also admitted at trial that in his mind there was no "real degree of difference" between the procedures by which these employees were brought into the classified service and the procedures followed by the Board in bringing unclassified workers into the classified service (Tr. Trans. 779).

Curtin further admitted that when the unclassified workers were brought into the classified service they were given credit for their years of unclassified service for purposes of vacation and sick leave. When asked why they were not given similar credit for promotions, Curtin's only response was that he was acting on the advice of legal counsel (Tr. Trans. 778-779, 816), and that he didn't know what that opinion was based on (Tr. Trans 816). The Board presented no evdence of either the contents or basis of that opinion.

Finally, it is important to point out that the Board's decision to credit the full length of service of employees who entered the classified service through "inclusion" was discretionary and not required by State law. Section 10 of Act No. 248 of the Alabama State Legislature (1945), as amended, which is referred to in its entirety at p. 47 fn. 21 of the Personnel Board's brief, provides, *inter alia*, that:

> "[If] . . . at the time such municipality or other appointing authority becomes subject to the provisions of this subdivision it then has in its employ employees or appointees *who would come within the classified service* as defined in this subdivision, the Board in its discretion may extend or grant permanent status to any or all such employees or appointees." (Emphasis supplied).

Since the Board similarly had to determine whether employees in the unclassified service were performing jobs which "would come within the classified service" prior to their inclusion, the Board has presented no legitimate nonracial reasons for its disparate treatment of these workers, the majority of whom were black (Px. 68)[26]. *Allen* v. *Amalgamated Transit Union, supra*; *Peters* v. *Missouri-Pacific Railroad Co., supra.*

V. DISCRIMINATION AGAINST WOMEN

A. Post-Act Sex Restrictions In Job Announcements and Certifications

With the exception of juvenile supervisor and nurses aide the Personnel Board has presented no proof that sex was a bona fide occupational requirement for its practices of including gender restrictions in its job announcements and certifications after the effective date of the 1972 amendments to Title VII.

The record unequivocally reflects that after the Board became subject to the legal obligations imposed by Title VII it pursued these practices in the following positions: police patrolman (male), deputy sheriff (male), firefighter (male), warden (male), correctional officer (male), police woman (female), police radio dispatcher (male), radio dispatcher (male), facilities cashier (male), watchman (male), senior clerk (male), police property clerk (male), intermediate clerk (male), water pollution-inspector (male), tax agent (male), probation aide (male), probation officer (male), recreation leader (male), senior recreation leader (male), recreation center director (male), housekeeping aide (male), laundry worker (male), dietary aide (male), nurses aide (male), and juvenile supervisor (male) (See Pxs 9, 11).

These willful and admitted sex restrictions constituted a violation of Title VII absent a showing that they constituted bona fide occupational qualification requirements for those jobs. *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977); *Weeks* v. *Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228 (5th Cir. 1969); *Diaz* v. *Pan American World Airways*, 442 F.2d 385 (5th Cir.) *cert denied* 404 U.S. 950 (1971); *Blake* v. *City of Los Angeles* 595 F.2d 1367, 1377 (9th Cir. 1979).

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26 The unclassified service has by tradition been between 75% and 85% black (Dx 305). Of the 632 unclassified workers who to date have been reclassified into the classified service 421 or (67%) are blacks (Px 68, Px 20)

In its Brief (pp. 55-60) the Board attempts to obfuscate its failure to go forward with any proof establishing a bona fide occupational qualification (BFOQ) defense for these practices by mounting the spurious argument that the government has failed to establish statistically any "adverse impact" on women in these jobs. In advancing this argument the Board asserts that in many instances if one were to look at these jobs across jurisdictional lines or to lump them into certain EEO categories (i.e. professional/technical) there would be no significant gender imbalance. In other instances, such as policewoman and police patrolman, the Board asserts there is now no gender imbalance or "adverse impact" because these jobs were merged in late 1974.[27] Finally, in those positions where there were selective certifications based on sex there were in many instances more females certified than males.

All of this overlooks the fact that in each instance where the Board issued a "male only" or "female only" job announcement or reported to a "male only" or "female only" eligibles register for certifications, it was making an employment decision on the basis of sex, not merit. As such it constituted an unlawful employment practice under Title VII absent a showing that sex was a BFOQ for those employment decisions. *Dothard* v. *Rawlinson*, *supra*; *Blake* v. *City of Los Angeles*, *supra*. See also, *Marshall* v. *Kirkland*, 602 F.2d 1283, 1298-1301 (8th Cir. 1979).

Moreover, a careful examination of the record indicates that in many instances these selective certifications were made to fill "male only" positions within a particular department or jurisdiction. Since the job titles in the classified-service [sic] cross departmental and jurisdictional lines, combining for purposes of statistical comparison all of the employees in the job title masks the intentional exclusion of women from those jobs in the departments and jurisdictions which requested male only certifications.

For example, the record reflects that after 1972 and as recently as May, 1975, the Board issued separate announcements for police radio dispatcher positions limited to males only in the jurisdictions of Fultondale, Gardendale, Mid-

27 We note that as of October, 1976, almost two years after the merger of those classifications, only 32 or 3.7% of the 857 police officers and deputy sheriffs employed in the Jefferson County Civil Service System were women. (Px 2)

field, Mountain Brook and Tarrant (Px 9, pp. 23, 28). As of approximately October, 1976, all of the police radio dispatchers in these jurisdictions were males (Px 2, p. 23; See also Curtin Dep. June 18, 1972 Vol. IV, pp. 547444; See also Tr. Trans. 754-755).[28] As of that same date there were women employed as police radio dispatchers in some of the other jurisdictions (Px 2, pp. 22, 23).

In other male only announcements, such as facilities cashier (Px 9, p. 1), the Director of Personnel testified by deposition that this announcement was for positions in certain departments which were "physically isolated" and in "fairly high crime areas" which "indicated it would be a high risk category to a female" (Deposition of Joseph Curtin, June 18, 1979, Vol. IV p. 540-541).

Similarly, in instances where the Board selectively certified males for certain jobs such as water pollution inspector, intermediate clerk, and tax agent, they were for positions in particular departments such as finance in the City of Birmingham and public works in Jefferson County (see Curtin Dep. Vol. III, May 24, 1979 pp. 511-513). In explaining by deposition the reasons for the selective certification of only males for water pollution inspector positions in the Public Works Department of Jefferson County, Curtin testified, *inter alia*, that:

> "The male only designation was based on the duty assignment, and particularly geographical terrain in which that inspector had to traverse in order to take water pollution samples, very rough terrain, very deep woods, snake infested, environmental considerations on this, and stamina" (Curtin Dep. Vol. III, May 24, 1979 p. 511)[.]

Finally, in instances where the Board engaged in selective certifications of males and females for the same job within the same department, such as nurses aides and juvenile supervisors, the fact that more females may have been certified and employed in those jobs than males cannot as a matter of law absolve the Board from its obligation to establish a BFOQ justification for such intentionally sex based practices. Indeed, if one were to pursue the logic of the Board's "adverse impact" arguments here

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28 Px 2 is a computer printout listing employees by job. The printout lists the jobs within each jurisdiction by jurisdiction number. The numbers for these five jurisdictions are Fultondale (006), Gardendale (007), Midfield (010), Mountain Brook (011) and Tarrant (013). See Px. 6.

it would appear to countenance under Title VII the certification of only blacks for nurses aide positions in a predominantly black ward of Mercy Hospital and only whites to a predominately white ward. Under the Board's reasoning if there was no racial imbalance in the job and thus no "adverse impact", it could continue to follow such a racially based certification and assignment system. Such a result would clearly be at odds with the underlying purpose of Title VII which is to assure equal employment opportunities for all citizens regardless of race or sex. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 800 (1973).

B. The Board's BFOQ Defense For Nurses Aides and Juvenile Supervisors

Nurses Aides

At trial the Director of Personnel, Mr. Curtin, testified that in his opinion the selective certification of male nurses aides for assignment to positions which involved the care and lifting of non-ambulatory patients was based on a bona fide occupational qualification requirement. The only evidence offered by Curtin in support of his opinion was a summary exhibit purporting to represent the number of days absent from work of male and female nurses aides from 1975 through 1979 because of lower back injuries (See Dx 121).

However, we submit this exhibit neither clearly supports the basis for Curtin's opinion nor does it constitute sufficient evidence to establish a BFOQ defense.[29]

Curtin admitted that there is a substantially higher proportion of female nurses aides than male nurses aide [sic] (Tr. Trans. 752). Thus it is not surprising that there would be a higher number of women incurring work related injuries, including lower back injuries, than men.

More importantly, Curtin admitted that the figures contained on the summary exhibit fail to reflect the number of lower back injuries that were directly attributable to lifting non-amulatory [sic] patients from those attributable to other causes

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29 Moreover, as a matter of law, a BFOQ defense cannot be applied to jobs which turn on the ability of an individual to engage in heavy lifting or other physical acts. Instead, a BFOQ defense has to be related to the *uniqueness* of a particular sex to perform a particular set of tasks, such as females to play female leads in theatrical productions. See *Weeks* v. *Southern Bell Telephone & Telegraph Co. supra*; *Phillips* v. *Martin Marietta Corp.* 400 U.S. 542 (1971)

(Tr. Trans. 808-809). Further, the exhibit contains only 3 recorded lower back injuries for men. Thus any inference that there is a correlation between sex and the number of days absent from work because of lower back injuries is suspect because of the small number of lower back injuries incurred by males.

Finally, the Board presented no evidence to indicate that it would be impractical to administer a qualifying physical examination and/or to review the applicant's medical history to determine on an individual basis the physical fitness of both men and women to effectively perform the duties of this job.

We submit then that the Board has failed to establish a BFOQ defense for its filling vacancies in this job on the basis of sex. *Dothard* v. *Rawlinson, supra*; *Weeks* v. *Southern Bell Telephone & Telegraph Co., supra*; *Diaz* v. *Pan American World Airways, supra*. See also *Marshall* v. *Kirkland, supra*. As we point out in our Pre-Trial Brief (pp. 45-47), the burden of proving a BFOQ defense is a heavy one. The Board has not met that burden here.

Juvenile Supervisor

The only evidence presented by the Board to establish a BFOQ defense for this position was the testimony of the Chief Probation Officer of the Jefferson County Family Court, Mr. A.C. Conyers.

Conyers testified that in his opinion and based upon his experience as the Chief Probation Officer that it was necessary to employ only males to supervise boys in detention and only females to supervise females in detention.[30] Conyers based this opinion on (1) his view that only males could safely supervise boys in detention between the ages of 16 and 18, some of whom, according to Conyers, had a tendency to engage in violent and antisocial behavior;[31] and (2) the need to have male "role models" for boys in detention.

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30 The transcript of this part of the trial has yet to be forwarded to the parties. Thus we are relying upon our notes as to the substance of Conyer's testimony.

31 Conyers appeared to acknowledge in his testimony that this problem was largely attributable to a change in State law that became effective sometime in 1977 which raised the age limit for juveniles in detention from 16 to 18. Thus, this asserted reason for certifying only males to supervise boys in detention is of recent vintage and provides little support for the Board's prior and traditional practice of staffing and segegating these jobs on the basis of sex.

As to the first issue, no specific evidence was presented that would reflect the incidence of violence among boys in detention in the County Home, nor was there any evidence of the degree to which such acts of violence required a physical response on the part of the juvenile supervisor. Moreover, no evidence was presented that would establish that only men could safely and effectively respond to such acts. See *Reynolds* v. *Wise*, 375 F. Supp. 145 (N.D. Tex. 1974) and *Tracy* v. *Oklahoma Department of Correction*, 10 FEP Cases 1031 (W.D. Okla. 1974)[.]

Similarly as to the allged [sic] need to have male "role models" for boys in detention, no direct evidence was presented, other than the conclusory testimony of Mr. Conyers, that would either establish that in fact boys in detention respond to any significant degree to "role models" nor whether only males could effectively function as "role models" for these individuals. See *Marshall* v. *Kirkland*, *supra* 600 F.2d at 1300.

The Court's [sic] have generally found the conclusory testimony of interested officials of defendant employers to be, standing alone, insufficient to establish a valid defense for pursuing employment practices which would otherwise violate Title VII. See *United States* v. *Lee Way Motor Freight Inc.*, *supra*; 20 FEP cases at 1362; *Blake* v. *City of Los Angeles*, *supra* 595 F.2d at 1378.

It is not enough under Title VII to show some reasonable business purpose for the challenged practices. Rather, they must be shown by convincing evidence to be required by business necessity. See *Dothard* v. *Rawlinson*, *supra*; *Blake* v. *City of Los Angeles*, *supra*. That evidence has not been presented for this job.

Conyers admitted under cross examination that neither he nor anyone from the Personnel Board had ever conducted any formal studies to determine whether as a fact only males could safely and effectively perform the job of supervising boys in detention. Conyers further admitted under cross examination that on occasion women had been assigned to supervise boys in detention and that they had performed the duties of that job acceptably and with no adverse results.

On these fact [sic] we submit the Board has failed to establish by convincing evidence that sex is a bona fide occupational qualification requirement for the hiring and assignment of juvenile supervisors.

C. Assignment of Females To the Job of Policewoman

The record reflects that sometime in late 1969 or early 1970 the Personnel Board established the classification of policewoman. The first announcement for this position was issued on February 2, 1970 and it was a promotional announcement limited to employees of the City of Birmingham in the position of traffic citation officer (Px 8-Tab 3 (1969).[32] Prior to that time the job of traffic citation officer was a female only position (Px. 8 - tab 3 (1969).

As background to the issuance of this announcement the record reflects that two traffic citation officers of the City of Birmingham, Ms. Betty Jensen and Ms. Annalee Saunders, had sometime in 1969 complained to the mayor of Birmingham about their not being able to promote out of the traffic citation officer classification (Tr. Trans. 130-134). One of these women, Ms. Jensen, testified that since approximately 1960 she had made repeated requests to the Personnel Board to establish a promotion line from that classification. She was generally informed by the Board that no promotional examination was available because the Board had not established a position for "policewoman" (Tr. Trans. 128-129).

When the Board finally issued the promotional announcement for policewoman in February, 1970 both Jensen and Saunders passed the examination for that job and received their promotions.

Policewoman announcements issued by the Board subsequent to the February 2, 1970 announcement have generally been non-promotional, open competitive announcements (Px 8, Px 9). Siginificantly [sic] each of those announcements were limited to policewoman positions in the City of Birmingham (Px 8, Px 9). The Director of Personnel, Mr. Curtin, has testified by deposition that this was because only the City of Birmingham had expressed any desire to hire policewomen (Curtin Dep. Vol. III, May 24, 1979 p. 491)[.]

The policewoman classification continued in existence until approximately September or October of 1974 when it was merged with the police patrolman position (Curtin Dep. Vol IV, June 18, 1979, p. 561). After 1972 and up to the time the Board abolished the position of policewoman in the City of Birming-

32 This announcement appears in Plaintiffs' exhibit 8 under the tab of announcements for the year 1969.

ham, the Board continued to include male only restrictions in its announcements for police patrolman and deputy sheriff (Px. 9). Thus women who applied for policewomen jobs in the City of Birmingham were because of their sex not eligible to compete for police patrolman positions either in the City of Birmingham or any of the other defendant municipalities. Nor were they eligible to compete for deputy sheriff positions in Jefferson County.

The job description established by the Personnel Board for policewoman generally provides for their assigment to "cases involving youthful offenders and females. . . and cases involving neglected or dependent children" (Px 13 p. 2). No mention is made in the job description of their being assigned any patrol car duties. Plaintiff's exhibit 13, p. 1 contains the job description for police patrolman which specifically includes patrol car work as part of the duties of that position.

Several women who are now police officers for the City of Birmingham testified that during the time they were employed as policewomen they were not assigned patrol duties (Tr. Trans. 135, 143, 144, 153-154, 163-164, 176-177).[33] Jensen and Saunders testified that after passing the examination for policewoman in 1970 they were sent to rookie school where they received the same classroom training and firearm instruction as police patrolmen (Tr. Trans 135, 153). They were not given the same physical contact and gymnastic instruction as men (Tr. Trans. 135, 153).

After completion of rookie school Jensen and Saunders were assigned to the Youth Aid division of the Birmingham Police Dept. (Tr. Trans. 135, 143-144, 153). All of the sworn male officers in the Youth Aid division had the rank of sergeant or above (Tr. Trans. 136-137, 144, Px 84). Jensen testified that she was assigned to Youth Aid in 1970 and continued to work in that division until 1975 (Tr. Trans. 135, 144). During this time she performed the same duties as the male sergeants in that division (Tr. Trans. 137). Saunders testified that she was assigned to Youth Aid for approximately 3 1/2 years where she worked with male sergeants investigating sex crimes (Tr. Trans. 154). She was then reassigned to the Crimes Against Persons

33 The record also appears to indicate that after the merger of the job of policewomen with police patrolman, women continued to be denied patrol duties on a regular basis (See Tr. Trans 163-165, 173-177).

division where she worked for approximately a year or longer investigating rape cases.

When Jensen and Saunders were promoted to the job of policewoman, they were required to meet the full five year time in grade requirement for promotion to sergeant and were not given credit towards this requirement for their years of service as traffic citation officers (Tr. Trans. 137, 156). In 1975 when Jensen first became eligible to take the sergeant's promotional examination, she began to recieve [sic] promotional potential ratings below 85 which disqualified her from eligibility to take the sergeant's examination (Tr. Trans. 138-140; Px 87). Jensen testified that the reason given by her department chief for her low promotional ratings was her lack of experience in a patrol car (Tr. Trans. 139-140).[34]

D. Discussion

The continuation by the Board of the sexually segregated job classifications of policewoman and police patrolman/deputy sheriff after the effective date of the 1972 amendments to Title VII was unlawful absent a showing that sex was a bona fide occupational qualification requirement for those jobs. *Dothard* v. *Rawlinson, supra*; *Blake* v. *City of Los Angeles, supra*; *United States* v. *City of Philadelphia*, ___ F.Supp. ___, 19 EPD ¶9011, 19 FEP Cases 849 (E.D. Pa. 1979).

The Board has presented no evidence to establish a BFQO [sic] defense for these positions. The fact that the Board subsequently merged the jobs of policewoman and police patrolman does not absolve or otherwise mitigate its liability for this unlawful employment practice. Indeed, it is simply added evidence that sex was never a legitimate basis for excluding women from police officer positions in the first place. *Blake* v. *City of Los Angeles, supra.*

The assignment of officers Jensen and Saunders to the Youth Aid division by the City of Birmingham was dictated in part if not exclusively by the job description for policewoman established by the Board. Since the only sworn personnel in that division had the rank of sergeant or above, it is not surprising that Jensen and Saunders were given the same or similar type of

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34 Jensen also testified that in her belief the low ratings were not justified because she had obtained some field experience in the Youth Aid division, although she was not in a car all of the time and not in uniform (Tr. Trans. 140, 149-150).

duty assignments as these higher ranking and higher paid officers. This also constituted a violation of Title VII. See 42 U.S.C. 2000e-2(a), 2(h). *Peltier* v. *City of Fargo*, 533 F.2d 374 (8th Cir. 1976); *Gunther* v. *County of Washington*, 602 F.2d (9th Cir. 1979); *Laffey* v. *Northwest Airlines, Inc.*, 567 F.2d 429 (D.C. Cir. 1976), *cert denied* 434 U.S. 720 (1978); *United States* v. *City of Milwaukee* 441 F. Supp. 1371 (E.D. Wis. 1972). See also *Wood* v. *Mills*, 528 F.2d 321 (4th Cir. 1975).

The low promotion potential ratings given to officer Jensen allegedly because of her failure to have obtained sufficient patrol experience was causally related to the Personnel Board's job description for policewoman. First, the job description itself did not include patrol car work among the duty assignments for policewomen. Secondly, the assignment of Jensen to the Youth Aid division where she was not exposed to patrol car work, at least on any regular basis, was an inevitable consequence of the restrictions on the job duties set by the Board for policewomen. Therfore [sic], the low promotion potential ratings given to officer Jensen, which were themselves based on a system devised by the Personnel Board, perpetuated the effects of past discrimination against her in the policewoman classification. As such they constituted an unlawful employment practice under Title VII. *United States* v. *Jacksonville Terminal Company*, 451 F.2d 418, 453-54 (5th Cir. 1971), *cert. denied* 406 U.S. 906 (1971); *Rodriquez* v. *East Texas Motor Freight, Inc.*, 505 F.2d 40, 59 (5th Cir. 1974), *rev'd on other grounds* 431 U.S. 395 (1977); *United States* v. *City of San Diego*, 20 EPD ¶30,154 (S.D. Cal. 1979); *United States* v. *City of Buffalo*, 457 F. Supp. 612 (W.D. N.Y. 1978).

E. Height-Weight Requirements For Law Enforcement And Firefighter Positions

At trial the Board presented no evidence that the height-weight requirements previously followed by the Personnel Board for law enforcement positions (which includes the jobs of police patrolman, deputy sheriff and warden), and for firefighter positions were required by business necessity. Those height-weight requirements have been shown to have a disproportionate impact on women and thus they were unlawful employment requirements under Title VII. *Dothard* v. *Rawlinson*, *supra*.

In our Pre-trial Brief at pp. 47-49 we discuss in detail the evidence with respect to the Board's prior administration of its height-weight standards and the relevant case law in this area.

We see no need to expand upon that discussion other than to note that the evidence as set forth in our Pre-Trial Brief on this issues [sic] is supported by the record.[35]

F. Pre-Act Sex Restrictions In Job Announcements

The evidence reflects that between 1967 and 1972 the Board restricted on the basis of sex over 100 different classified service job titles (Px 8). These sex restrictions, the vast majority of which were male only restrictions, were included not only in the Personnel Board job announcements, but were also broadcast to the community in its radio, television and newspaper advertisements and in its recruitment brochures given out at local high schools and colleges (See Px. 14, Dx 335).

Evidence of pre-Act conduct is of course admissible in Title VII cases where it bears upon post-Act hiring and other employment decisions. *Teamsters* v. *United States, supra.* 431 U.S. at 324; *Hazelwood School District* v. *United States*, 433 U.S. 299 (1977).

As the Supreme Court stated in *Hazelwood*:

> Proof that an employer engaged in racial discrimination prior to the effective date of Title VII might in some circumstances support the inference that such discrimination continued, particularly where relevant aspects of the decision-making process had undergone little change 433 U.S. at 309 fn. 15

Plaintiffs exhibit 57 sets forth the number of women who from 1972 through 1976 were certified and hired in 49 of the jobs which prior to 1972 were restricted to males only by the Personnel Board.[36] That exhibit reflects a total of 1375 hires in those positions of whom only 18 (1.3%) were women and a total

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35 One minor clarification of the facts set out in our Pre-Trial Brief was made at trial by the Board's Chief of Classification and Pay, Mr. Fields. He testified that the eligibles list for police officers and deputy sheriffs which was based on a January 16, 1976 announcement that contained minimum height and weight restrictions expired sometime in early 1978. On his deposition he had testified that that eligibles list had continued in effect up to the time of his deposition (see Fields Dep. Vol. II June 18, 1979, pp. 80-81).

36 Of the other jobs for which there were pre-Act sex restrictions, they involved for the most part either female only positions, obsolete job titles, or jobs with few, if any, post-act hires (See Px 57 and Px 82)

of 4547 certifications to those jobs of whom only 89 (2.0%) were women.[37]

As we point out in our Pre-Trial Brief at pp. 43-44 and as reflected by the announcements contained in plaintiffs' exhibit 8, many of these jobs required little if any prior skill or experience, or if they did, they involved skills or experience which could be readily acquired. See *Hazelwood School District* v. *United States*, *supra*, 433 U.S. at 308 fn. 13 (1977).

At trial the Board presented no evidence that after the effective date of the 1972 amendments to Title VII it made any positive efforts to announce to the community that applicants need not be of a particular sex for these jobs.

Moreover, the Board's own exhibit on recruitment (Dx 335) reflects that after 1972 no positive efforts were ever made to recruit women for these traditionally male jobs.[38] The only testimony offered at trial concerning the Board's efforts to recruit women was the testimony of the Chief Examiner, Ms. Miriam Hall, to the effect that since she became Chief Examiner, which was in 1977, the Board has included some women's organizations on its job announcement mailing list.

On the other hand there is evidence before this Court that since at least 1975 another major employer in the community, the United States Steel Corporation, has successfully recruited and hired women in substantial numbers for jobs such as laborer, crane operator, truck driver, forklift operator, and inspector (Pxs 126, 127 and trial testimony of Mr. Truman Malone).

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37 The Board did not begin to keep applicant flow data for women until 1974. At trial the Board introduced several exhibits purporting to reflect applicant flow information for blacks and women from 1974 through 1977 (Dx 323-327). That data does not appear to us to contain complete applicant flow information for all of the classified service jobs. However, even if one compares the applicant flow information in the Board's exhibits where such information exists for the jobs listed on Plaintiffs exhibit 57, that comparison continues to reflect ~~a paucity~~ of women applicants. We have attached to this Brief as Appendix C our analysis of that data.

38 Indeed, that exhibit appears to reflect that even after the Board dropped the sex restrictions from the announcements for some of the jobs listed on plaintiffs exhibit 57, it continued as recently as early 1973 to include such sex restrictions in its recruitment brochures (See Dx 335 and recruitment materials for Jefferson County Board of Education Career Opportunity Program - April 12-13, 1973[).]

The Personnel Board, however, has since 1972 had few, if any, women applicants for similar positions which had traditionally been designated by the Board as male only jobs. See Plaintiffs exhibit 57.

In sum, given the evidence of, (1) intentional pre-Act discrimination against women in these jobs, (2) the virtual absence of female applicants, certifications and new hires in most if not all of these positions after the 1972 amendments to Title VII, and (3) the absence of any efforts by the Board after 1972 to engage in positive recruitment efforts towards women; that evidence establishes a *prima facie* case of hiring discrimination against women in these jobs. *Hazelwood* v. *United States*, *supra*.

VI. HIGH SCHOOL EDUCATION REQUIREMENT

Based on 1970 Census data as updated the plaintiffs' [sic] have shown that the requirement of a high school diploma or GED equivalent for the jobs for which this requirement is challenged[39] has had an adverse impact on blacks in the Jefferson County area. (See Px. 80).

At trial the question arose as to whether the 1970 Census data includes persons who obtained GED's . It appears that in collecting the data for the 1970 Census no systematic effort was made to include information as to GED attainment.

In response to that question, Plaintiffs' [sic] offered exhibit 145 which is a Census Bureau survey current as of March 1977 which contains data an [sic] educational attainment and which includes persons with GED's as part of the total population completing 4 years of high school.

The question then arose as to whether that exhibit in fact included persons with GED's in the population totals of persons completing four years of high school. Attached to this Brief as Appendix D is an excerpt from the Census Bureau's interviewers reference manual dated December, 1971 which specifically instructs interviewers to denote persons who pass a high school equivalency test (GED) as having completed high school. These instructions have continued in effect since that date. See Appendix C.

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39 Those jobs are: animal keeper/zookeeper, bailiff, engineering aide, firefighter, groundman, police radio dispatcher/radio dispatcher, and sewage plant operator.

Plaintiffs' exhibit 146 is a summary exhibit which is based on the educational attainment figures (which includes GED's) as set forth in exhibit 145. It continues to show a significant disparity between the percentage of blacks and whites completing four years of high school.[40]

In an effort to demonstrate the content validity of its high school education requirements analysts of the Personnel Board without the assistance of outside experts developed a questionnaire. That questionnaire was given to selected incumbents in the jobs for which the high school education requirement was being challenged, and it asked that they respond to the following question:

> (1) Given the duties and responsibilities placed upon the [job title] in performance of their job and taking into account all the situations encountered in performing the job duties, is reasonable [sic] to require that a [job title] have a high school diploma or its equivalence?

The incumbents were then given a rating form which asked that they indicate whether in terms of their job and the question asked a high school education or equivalent was: (1) unrelated, (2) fair, (3) good or (4) superior. See e.g. Dx 416.

These ratings were then tabulated by computer and an analysis of the ratings was then made which included the mean and median ratings for each job.

The procedures followed by the Personnel Board to establish the validity of the high school education requirement constituted in substance nothing more than a sample opinion poll of job incumbents.

No job analysis was performed to determine whether there are knowledges, skills or abilities (KSA's) required at entry in each of the jobs which KSA's could only and invariably be acquired by an individual who successfully completed four years of high school or who had obtained a GED. Failure to conduct an adequate job analysis meeting professional standards is itself fatal to a claim of content validity. *Vulcan Society of New York*

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40 The 1977 census figures are broken down only by geographical region (North, South, etc) and by the fifteen largest States in the Union. Plaintiffs' exhibit 146 shows that there is a substantial disparity between the percentage of whites and blacks completing high school both in the South as a whole and in each of the Southern States (Florida, Georgia, North Carolina, Texas, and Virginia) which comprise the 15 largest States in the Union.

City v. *Civil Service Commission*, 490 F.2d 387, 394 n. 8 (2d Cir. 1973); *Kirkland* v. *New York State Dept. of Correctional Service*, 374 F. Supp. 1361, 1371-72 (S.D.N.Y. 1974), *aff'd* 520 F. 420, 475 (2nd Cir. 1975), *cert denied* 429 U.S. 832 (1976), See *Albemarle Paper Co.* v. *Moody*, 401 U.S. 424 (1971); *United States* v. *City of Montgomery*, ___ F. Supp. ___ (M.D. Ala. 1979) 19 EPD ¶9239. See also APA Standards E 12.4; Uniform Guidelines on Employees Selection Procedures, §14c(2), Division 14 Principles p. 10.

It should also be noted that the Board's testing expert, Dr. Menne, testified that in his opinion it is extremely difficult to establish the content validity of a high school education requirement. Dr. Menne, we further note, was not asked by the Board to either review the high school validation studies or to give his opinion as to their evidence of validity.

In sum, we submit the Board has failed to establish that a high school education requirement is a content valid selection device for the jobs in question.

CONCLUSION

Based upon the foregoing we submit that the Personnel Board has engaged in a pattern and practice of discrimination against blacks and women in each of the areas set forth above.

Respectfully submitted,

/s/ Richard J. Ritter
/s/ S. Theodore Merritt
/s/ Steven Rosenbaum

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[Certificate of service, dated November 9, 1979, and appendices omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA, *Plaintiff,* v. JEFFERSON COUNTY, *et al.*, *Defendants.*	CIVIL ACTION NO. CV 75-P-0666-S
JOHN W. MARTIN, *et al.*, *Plaintiffs,* v. CITY OF BIRMINGHAM, *et al.*, *Defendants.*	CIVIL ACTION NO. CV 74-Z-17-S
ENSLEY BRANCH OF THE N.A.A.C.P., *et al.*, *Plaintiffs,* v. GEORGE SEIBELS, *et al.*, *Defendants.*	CIVIL ACTION NO. CV 74-Z-12-S

ORDER

The Court has before it for provisional approval two Consent Decrees in the above-captioned consolidated actions. They are: (1) a Consent Decree between the plaintiffs in the above styled actions, and the defendants Jefferson County Personnel Board, its Director and the members of the Personnel Board (Jefferson County Personnel Board); and (2) a Consent Decree between these same plaintiffs and the defendants City of Birmingham and the Mayor of the City of Birmingham (City of Birmingham). The Court has not been presented to date with any proposed Consent Decrees between the plaintiffs and the remaining defendants in these actions.

The Consent Decrees are intended to resolve all of the plaintiffs' claims of employment discrimination based on race and sex against the Jefferson County Personnel Board and City of Birmingham as raised by the plaintiffs' complaints. Having reviewed the Consent Decrees, the plaintiffs' complaints, and the trial record and other pleadings in these cases, the Court hereby ORDERS that:

1. The Consent Decrees appear to the Court to be fair, reasonable and lawful settlements of the plaintiffs' claims against the defendants who are signatories to the Decrees. Accordingly, the Court provisionally approves the Consent Decrees subject to further hearings. The Court will reserve final approval of the Consent Decrees until it has heard any objections which may be filed and presented at a fairness hearing in accordance with the procedures explained below.

2. The form and substance of the notice of this Court's Order provisionally approving the Consent Decrees and scheduling the fairness hearing is hereby approved and is attached to this Order.

3. Within ten (10) days after entry of this Order the notice attached hereto will be issued by publication in the Sunday edition of the Birmingham News for two consecutive weeks, and in the Birmingham Times on one weekday. These notices shall be directed to all interested persons informing them of the general provisions of the Consent Decrees, of their right to review copies of the Decrees on file with the Clerk of the Court, and of their right to file objections to the Consent Decrees. Within this same ten (10) day period, copies of the attached notice will be sent by regular mail to the last known addresses of the individuals within the subclasses identified in Appendix B to the Consent Decree with the Jefferson County Personnel Board and in Appendix C to the Consent Decree with the City of Birmingham.

All objections to the Consent Decrees must be filed in writing with the Clerk of the Court by July 14, 1981. The Clerk shall forward copies of any such objections to counsel for the parties to the Consent Decrees as they are filed. A fairness

hearing will be held on August 3, 1981 at 9:00 o'clock a.m. in Courtroom 2.

It is so ORDERED this 8th day of June, 1981.

/s/ Sam C. Pointer, Jr.
UNITED STATES DISTRICT JUDGE

Approved as to Form

For Plaintiff United States

/s/ Richard J. Ritter

For the Plaintiffs in *Martin, et al.* v. *City of Birmingham, et al.*

/s/ Susan Williams Reeves

For the Plaintiffs in *Ensley Branch of the N.A.A.C.P., et al.* v. *Seibels, et al.*

/s/ Oscar W. Adams, III

For the Defendant Personnel Board of Jefferson County

/s/ David P. Whiteside, Jr.

For the Defendant City of Birmingham

/s/ James P. Alexander

[Attachment omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA, *Plaintiff*, v. JEFFERSON COUNTY, *et al.*, *Defendants*.	CIVIL ACTION NOS. CV 75-P-0666-S CV 74-Z-17-S CV 74-Z-12-S (Consolidated Cases)

AFFIDAVIT OF PUBLICATION OF NOTICE OF CONSENT DECREE

STATE OF ALABAMA
JEFFERSON COUNTY

I, James K. Baker, being duly sworn according to law, deposes [sic] and says [sic] that:

1. I am employed by the City of Birmingham as its City Attorney.

2. Pursuant to and in compliance with the Order of this Court entered herein on June 8, 1981, I did cause to have published the "Notice of Proposed Settlement Agreements and Conditional Class Certification," which Notice was designated as Appendix F-1 in the within Consent Decrees as provisionally approved by the Court in newspapers and on the dates for each as follows:

a. The Birmingham Times, edition of June 11, 1981.

b. The Birmingham News, Sunday editions of June 14 [and] June 21, 1981.

3. True and correct copies of said Notices as published are attached to and made part of this Affidavit.

/s/ James K. Baker
James K. Baker

Sworn to and subscribed before me, this 25th day of June, 1981.

/s/ Notary Public
Notary Public

[Certificate of Service, dated June 25, 1981, and attachments, omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA *Plaintiff,* v. JEFFERSON COUNTY, *et al.*, *Defendants.*	CIVIL ACTION NO. CV 75-P-0666-S
JOHN W. MARTIN, *et al.*, *Plaintiffs,* v. CITY OF BIRMINGHAM, *et al.*, *Defendants.*	CIVIL ACTION NO. CV 74-Z-17-S
ENSLEY BRANCH OF THE N.A.A.C.P., *et al.*, *Plaintiffs,* v. GEORGE SEIBELS, *et al.*, *Defendants.*	CIVIL ACTION NO. CV 74-Z-12-S

MOTION FOR LEAVE TO APPEAR AND FILE BRIEF AMICI CURIAE

Comes now the Birmingham Firefighters Association 117 by and through its President, Billy Gray, and Billy Gray, individually, who show unto this Honorable Court as follows:

1. Birmingham Firefighters Association 117 is a labor organization of the firefighters of the City of Birmingham. For many years it has represented City firefighters in negotiations of items of import to City firefighters. The Firefighters Association is duly authorized to represent the views of the majority of City firefighters.

2. The proposed Consent Decrees presently pending before this Court in the above-referenced actions will have a severe and material impact upon the presently employed firefighters of the City of Birmingham and the members of the Firefighters Association regarding their potential for future advancement and promotion, the qualifications of those persons who are placed in positions of authority over the presently-employed firefighters, and the general welfare and safety of the presently-employed firefighters when fighting fires or otherwise engaging in emergency rescue activities.

3. Billy Gray is a lieutenant in the Birmingham Fire Department. He will be materially affected by the proposed Consent Decrees for the reasons specified in paragraph 2, above, and in his potential for advancement due to imposition of quotas for certain positions in the Fire Department and the elimination of time in grade requirements by the proposed Decrees.

WHEREFORE, PREMISES CONSIDERED, Birmingham Firefighters Association 117 and Billy Gray, pursuant to this Court's inherent jurisdiction over all matters pertaining to the above-referenced cases, and the Court's desire that all interested parties to the proposed Decrees be given an opportunity to be heard before the Court, respectfully pray for leave to file the following brief amici curiae in opposition to the proposed Decrees.

/s/ W. W. Conwell
W. W. CONWELL

/s/ Raymond P. Fitzpatrick, Jr.
RAYMOND P. FITZPATRICK, JR.
Attorneys for Birmingham
Firefighters Association 117
and Billy Gray

OF COUNSEL:

FOSTER & CONWELL
2015 Second Avenue North
Birmingham, Alabama 35203
(205) 322-6617

[Certificate of Service, dated July 14, 1981, omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA, *Plaintiff,* v. JEFFERSON COUNTY, *et al.*, *Defendants.*	CIVIL ACTION NO. CV 75-P-0666-S
JOHN W. MARTIN, *et al.*, *Plaintiffs,* v. CITY OF BIRMINGHAM, *et al.*, *Defendants.*	CIVIL ACTION NO. CV 74-Z-17-S
ENSLEY BRANCH OF THE N.A.A.C.P., *et al.*, *Plaintiffs,* v. GEORGE SEIBELS, *et al.*, *Defendants.*	CIVIL ACTION NO. CV 74-Z-12-S

PETITION OF BIRMINGHAM FIREFIGHTERS ASSOCIATION 117 AND BILLY GRAY TO APPEAR AS INTERESTED PERSONS

Pursuant to this Court's Order dated June 8, 1981, Birmingham Firefighters Association 117 and Billy Gray show unto this Honorable Court as follows:

1. Birmingham Firefighters Association 117 is a labor organization of the firefighters of the City of Birmingham. For many years it has represented City firefighters in negotiations of items of import to City firefighters. The Firefighters Association is duly authorized to represent the views of the majority of City firefighters.

2. The proposed Consent Decrees presently pending before this Court in the above-referenced actions will have a severe and material impact upon the presently employed firefighters of the City of Birmingham and the members of the Firefighters Association regarding their potential for future advancement and promotion, the qualifications of those persons who are placed in positions of authority over the presently-employed firefighters, and the general welfare and safety of the presently-employed firefighters when fighting fires or otherwise engaging in emergency rescue activities.

3. Billy Gray is a lieutenant in the Birmingham Fire Department. He will be materially affected by the proposed Consent Decrees for the reasons specified in paragraph 2, above, and in his potential for advancement due to imposition of quotas for certain positions in the Fire Department and the elimination of time in grade requirements by the proposed Decrees.

WHEREFORE, PREMISES CONSIDERED, Birmingham Firefighters Association 117 and Billy Gray respectfully request the Court to accept the following brief as objections to the proposed Consent Decrees from interested persons within the meaning of the Court's June 8, 1981 Order.

/s/ W. W. Conwell
W. W. CONWELL

/s/ Raymond P. Fitzpatrick, Jr.
RAYMOND P. FITZPATRICK, JR.
Attorneys for Birmingham
Firefighters Association 117
and Billy Gray

OF COUNSEL:

FOSTER & CONWELL
2015 Second Avenue North
Birmingham, Alabama 35203
(205) 322-6617

REQUEST FOR ORAL ARGUMENT

Birmingham Firefighters Association 117 and Billy Gray respectfully request such time as the Court will allow to present oral argument at the Fairness Hearing to be held August 3, 1981.

/s/ R. P. Fitzpatrick, Jr.
OF COUNSEL

* * *

SUMMARY OF ARGUMENTS AND ISSUES PRESENTED

The Birmingham Firefighters Association 117 and Billy Gray appreciate the opportunity to present to this Honorable Court, as amicus curiae and as representatives of interested parties, the following views and argument concerning the proposed Consent Decrees which are before the Court. Although the rank-and-file firefighter, as well as the other employees of the City of Birmingham, have not been made a party to this action, the proposed Decrees will have a materially adverse impact upon each individual firefighter and city employee. In addition, the Firefighters Association respectfully suggests to the Court that the implementation of the proposed Decrees will have a general effect of lowering the efficiency, effectiveness and overall quality of the City Fire Department — such loss being ultimately borne by the public.

This brief will discuss the following points:

1. The trial court is under an obligation to consider the legality of the provisions of the relief granted in the proposed Decrees and to avoid granting judicial approval of any remedy which provides more relief than an aggrieved party would have been entitled to had the matter been litigated to a conclusion before the judge.

2. The Court may not approve a consent settlement providing for affirmative relief for blacks and females which will adversely discriminate against whites and males without a judicial finding of actual discrimination.

3. Without findings of actual discrimination, the Court may not approve the proposed remedies which grant relief to blacks and females in general, to the detriment of whites and males, rather than simply providing necessary relief to the actual victims of discrimination.

4. The proposed Decrees do not contain a finding of any discrimination on the basis of sex.

5. The provisions of the proposed Decrees would place blacks in the certified classes in a position to gain more seniority through the affirmative relief granted than they would presently have had they been certifed [sic] at the time they took the Personnel Board's examinations.

6. The removal of educational standards and time-in-grade requirements will adversely affect the overall quality and efficiency of the Fire Department which conflicts with the constitutional duty of government to provide for the general welfare of its citizens.

ARGUMENT

The Firefighters Association and Billy Gray will not burden the Court with an unduly protracted argument. We simply wish to point out to the Court, among other things, that:

(1) there is ample precedent to refuse approval of Consent Decrees similar to those in the instant case;

(2) there has been no finding of discrimination which warrants the type relief granted in the Decrees; and,

(3) the present City firefighters and other City employees who have worked hard to gain seniority and experience will be caused to suffer the real burden of the relief granted — all to the enrichment of those who will receive preferred status who were never even the actual victims of the alleged discriminations.

Paragraph 3 of the City Decree and paragraph 2 of the Personnel Board Decree provide:

> Remedial actions and practices required by the terms of, or permitted to effectuate and carry out the purposes of, this Consent Decree *shall not be deemed dis-*

> *criminatory* with the meaning of paragraph 1 above or the provisions of 42 U.S.C. 2000 e-2(h), (j), ... (Emphasis added.)

We submit that the sweeping relief granted by the Decrees (far in excess of that provided by this Court in its Order of January 10, 1977) have the effect of discriminating in violation of the cited statute. In effect, the parties to the Consent Decrees petition this Court to judicially approve illegal discriminations.

In *Myers* v. *Gilman Paper Co.*, 544 F.2d 837 (5th Cir. 1977), the appellate court reversed in part the consent decrees which were entered into between plaintiffs and the defendant employer to the exclusion of the defendant labor unions. The court found that the employer could not enter into a decree which violated the provisions of the collective bargaining agreement with the defendant unions. We are, of course, sad to admit that we have not achieved the right to collectively bargain with the City of Birmingham; however, we find certain statements in the *Myers* decision controlling in the instant case.

> IV. Challenges to the Consent Decree.
>
> The unions all vigorously object to the district court's approval of the settlement between the company and plaintiffs. They insist that the court had no power to substitute a Title VII remedy negotiated by a small group of employees and the company for the August, 1972, collectively bargained Title VII remedy, without any finding that the latter is unsatisfactory under Title VII. We find ourselves in substantial agreement with the union's contention.
>
> Before a court can grant any relief in a Title VII suit, it must find that the defendants engaged in the unlawful employment practice alleged in the complaint. 42 U.S.C. § 2000 e 5(g); *Cf. United States* v. *T.I.M.E., D.C., Inc., supra* at 319.
>
> * * *
>
> . . . There is an important reason for distinguishing between past and present discrimination, for *different remedies are involved.* Back pay is the remedy for past wrongs; injunctive and other equitable relief is the remedy

> for continuing wrongs. *Pettway* v. *American Cast Iron Pipe Company, supra* at 253.
>
> * * *
>
> . . . Further, in its order approving the settlement, the court made no finding with respect to the adequacy or inadequacy of the supplemental labor agreements. The court simply stated that "(a)n examination of the proposed Consent Decree shows that it follows generally settlements and decrees in other cases involving similar problems in the same industry. *See, e.g. United Papermakers and Paperworkers v. United States*, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919, 90 S.Ct. 926, 25 L.Ed.2d 100 (1970." *That seminal case, however, did not authorize wholesale revisions of a seniority system absent a finding of present perpetuation*. The district court in that case had specifically found that the seniority system "presently discriminates against Negro employees." 416 F.2d at 985.
>
> * * *

In speaking to the broader issue of the approach courts should take in exercising their remedial powers on neutral practices, the court in *Stevenson* said:

> (a) "neutral" seniority system should not be enjoined totally, but should be modified only as it applies to those employees who were previously subjected to discrimination, only to the extent necessary to remove the elements perpetuating that discrimination, and only for a limited period of time. 516 F.2d at 118.
>
> See also *Watkins* v. *Scott Paper Company, supra* at 1174. *Watkins* and *Stevenson* thus make it clear that before a district court can modify seniority provisions *there must be a challenge by the plaintiffs to the present provisions* and *a finding by the court that the present provisions still perpetuate discriminatory effects of prior action.*

544 F.2d 837, at 854, 855 (emphasis added).

The Firefighters Association earnestly contends that there is no finding in the proposed Decrees that there is any *ongoing present discrimination* being conducted by the defendants warranting the relief provided. The Personnel Board Decree provides:

> The Personnel Board *denies* it has engaged in any pattern or practice of discrimination or other types of discrimination on the basis of race or sex in carrying out its employee selection functions. . . . The plaintiffs and the defendant Jefferson County Personnel Board wish to avoid the expense and delay of further litigation and to insure that any *alleged* disadvantages to blacks and women that *may* have resulted from any *alleged past* discrimination against them . . . are remedied . . . .
>
> * * *
>
> *This Decree shall not constitute an adjudication or admission by the Personnel Board of any violation of law or findings on the merits of these cases.*

Personnel Board Decree, pp. 2, 3 (emphasis added). The City Decree similarly states:

> This Decree shall not constitute an adjudication or admission by the City of Birmingham or others signatory to this Decree of any violation of law, executive order or regulations.

City Decree, p. 2. The City Decree, in fact, acknowledges how the City has undertaken a vigorous affirmative action program:

> The plaintiffs recognize the adoption by the City of Birmingham of Sections 2-4-51 through 2-4-56 of the Birmingham City Code ("the fair hiring ordinance"), the annual preparation and implementation by each department of the City of Birmingham of affirmative action plans in accordance with the fair hiring ordinance, and the issuance by the Mayor of the City of Birmingham of Administrative Directive AA-1 and Executive Order 17-77, as evidence of good faith efforts by the City of Birmingham to take meaningful affirmative action to increase

> minority and female participation throughout the City's work force.

It is difficult to imagine how plaintiffs could contend that the City is continuing a present pattern of discrimination when they recognize "good faith efforts by the City of Birmingham to take meaningful affirmative action" at the same time.

Myers was quoted from and cited as authority by the U.S. District Court for the Eastern District of Virginia in its refusal to approve a proposed consent decree. *Carson* v. *American Brands, Inc.*, 446 F.Supp. 780 (E.D. Va. 1977). The District Judge "expressed concern that certain provisions of the Decree would affect parties other than those before the Court." As in the proposed Decrees before the Court in the instant case, the proposed Decree in *Carson* provided that the defendants denied violation of any law, regulation or order and, conversely, the plaintiffs do not by consent admit the legality of defendant's hiring practices. In finding a constitutional duty to scrutinize the legality of the proposed Decree, the Court stated:

> Thus, the Fifth Amendment may well protect citizens against arbitrary and capricious federal action in the form of a federal court Consent Decree that would place a federal stamp of approval, with the full force and effect of contempt proceedings, to what would otherwise be a mere agreement between private parties. *See Shelley* v. *Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed 1161 (1947). In sum, we opine that the mandates of the United States Constitution as well as the statutes invoked by plaintiffs require us to insure that this Court plays no role in perpetuating, promulgating or acquiescing in improper discrimination on the basis of race.

446 F.Supp., p. 84. Examining 42 U.S.C. § 2000e-2(a) and (j), the Court opined:

> Title VII plainly and distinctly prohibits racial discrimination in any and all aspects of employment practices including but not limited to *recruitment, promotions, seniority* and benefits. The language clearly prohibits discrimination against whites as well as blacks on account of race and clearly makes no exception for alleged benign

> motives such as rectifying the effects of past discrimination. Indeed, Subsection (j) explicitly states that preferential treatment is not required to rectify racial imbalance. To be sure, Title VII does not exclude use of extraordinary measures *to make those individuals who actually suffer from the results of past or present discrimination whole, but such action is more aptly characterized as equitable, not preferential, treatment. And even in this context, the courts have been careful to minimize whatever adverse effects may result with respect to innocent third parties.*

446 F.Supp., pp. 784, 785 (emphasis added). The District Judge examined at depth the legislative history of Title VII and a number of cases before making a conclusion concerning the propriety of the relief provided by the proposed decree:

> Senator Williams' understanding as above expressed in advocating passage of Title VII was shared by Senators Clark and Case:
>
> > There is no requirement that an employer maintain a racial balance in his work force. *On the contrary, any deliberate attempt to maintain a racial balance, whatever the imbalance may be, would involve a violation of Title VII* because maintaining such a balance would require an employer to hire or refuse to hire on the basis of race. It must be emphasized that discrimination is prohibited as to any individual. (110 Cong.Rec. 7213, April 8, 1964)
>
> Further, at the behest of the bill's sponsors, the Department of Justice submitted a memorandum stating:
>
> > *Finally, it has been asserted that Title VII would impose a requirement of "racial balance." This is incorrect.* There is no provision, either in Title VII or in any other part of this bill that requires or authorizes any federal agency or federal court to *require preferential treatment for any individual group for the purpose of achieving racial balance.*
> >
> > No employer is required to hire an individual because that individual is a Negro. No employer is required to maintain any ratio of Negroes to whites,

Jews to gentiles, Italians to English, or women to men. (110 Cong.Rec. 7207, April 8, 1964.)

* * *

The Supreme Court, in the more recent decision of *McDonald* v. *Santa Fe Transportation Co.*, 423 U.S. 923, 96 S.Ct. 264, 46 L.Ed.2d 248 (1976), made clear though not in the factual context of an affirmative action program, that Title VII's protection from racial discrimination applied to whites as well as blacks. Close in time to *McDonald*, the Court in *Franks* v. *Bowman Transportation Co.*, 423 U.S. 814, 96 S.Ct. 25, 46 L.Ed.2d 32 (1976) *did award constructive seniority and back pay to remedy racial discrimination against blacks and this remedy may have adversely affected seniority rights of innocent white employees.* However, this relief was *unequivocally restricted to individual, identifiable, persons who were otherwise qualified for the positions they sought but had been denied on account of race.*

Similarly, the Fourth Circuit has consistently *limited remedial relief under Title VII to actual persons who were victims of unlawful discrimination,* thereby *minimizing disruption of the working lives and expectations of other innocent employees.*

* * *

(8) Title VII, by its own terms, does not *require* preferential treatment to rectify racial imbalance. This language may be interpreted to mean that, although permissible, it is not mandated. *Patterson* (*Patterson* v. *American Tobacco Co.*, 535 F.2d 257 (4th Cir. 1976) *states in no uncertain terms that preferential treatment is banned absent proof of discrimination. As in Russell the Court in Patterson carefully tailored the relief to cover only actual victims of discrimination. See also, United Sates* [sic] v. *Chesapeake & Ohio Railway Co.*, 471 F.2d 582 (4th Cir. 1972).

446 F.Supp. pp. 785-787 (emphasis added).

Examining the proposed Decrees in the instant case, Firefighters and Gray earnestly submit that the relief granted

provides far more than a rectification of any wrongs done to the alleged actual victims of discrimination, but in fact, grants preferred status to all blacks and females. As detailed earlier, the proposed Decrees contain no finding or admission of race or sex discrimination. In fact, this Court's January 10, 1977 Memorandum of Opinion noted that "any attack on the 10-C and 20-B tests based on sex was . . . dropped for lack of evidence." Page 2, note 5. Despite the lack of any findings of fact that discriminations continue against the plaintiff class, the proposed Consent Decrees provide for such sweeping relief as: imposition of a quota system for the hiring of blacks and females at the entry level and on a promotional basis (prefers blacks and females for promotion); judicially mandated affirmative action programs within City agencies; judicially mandated recruitment programs which favor blacks and females to the exclusion of recruitment programs geared toward recruiting qualified white males; elimination of time in grade requirements for promotion (discriminates against present employees who have served their required time in grade and who now must compete on an equal basis with new employes who have not served the required time). There have been no findings that the foregoing relief is necessary to correct *present* acts of discrimination. We submit that the individual relief granted adequately provides for the individual, *actual* alleged victims of discrimination, and the general equitable relief granted unnecessarily prefers blacks and females, thereby constituting a violation of §2000e-2(j).

The Firefighters Association and Gray also suggest that the proposed Consent Decrees may conflict with the negotiated "agreements" between present City employees and the City in that the system of promotions and standards by which fellow employees are hired all constitute a part of the "agreement" which labor and employer have abided by for many years. See *Myers, supra.*

The proposed Decrees will grant seniority to members of the certified classes back to the date they claim they should have been certified. In effect, such a ruling would grant to the plaintiffs seniority over those employees (white and black) who passed the test which plaintiffs failed but did not enter the service until some later date because they were lower down on the

list of those who passed. Such a preference for those blacks who failed constitutes a violation of 2000e-2(j).

Finally, the Firefighters Association members are concerned about the dropping of educational, criminal record and physical strength standards for their potential future co-employees and supervisory personnel. A firefighter's job is daily becoming more complex and technologically oriented as new firefighting equipment enters the marketplace and Birmingham moves into the mainstream of American society as a progressive Sun-Belt city. The firefighter is no longer a person who wears red suspenders, rescues cats from trees, and simply aims a hose at the flames. Rather, the firefighter is the first medical person on the scene of a multi-vehicle accident or location of heart attack, uses toxic chemicals and other sophisticated equipment, battles fires in high-rise buildings (e.g., the recent hotel fires across the nation), and is the only person willing to go into a smoke-filled building to rescue persons overcome by smoke inhalation. The firefighters of Birmingham do not wish to perpetuate any of the injustice of the past based on race or sex — they welcome equal opportunity for all; however, the firefighters of Birmingham are concerned about their ability to fulfill their mandate to provide for the safety of the public when their fellow firefighter may be untrainable due to the lack of educational standards at the entry level, and their supervisor lacks necessary on-the-job training due to the lack of time in grade requirements.

CONCLUSION

The Firefighters Association and Gray oppose the proposed Consent Decrees as persons who will be adversely affected and illegally discriminated against under the terms of the Decrees. The Decrees give preference to blacks and females in general to the deference of white males. Without necessary findings of discrimination, the law will not permit such a far-reaching remedy of quotas, etc. The proper remedy is back pay for the actual victims of discrimination. The present employees of the City should not be made to pay the price for the alleged discriminations conducted by the City in the past. The City is due to make restitution, at its expense, not that of its employees.

If the Court refused to sign the proposed Decrees, the aggrieved parties will not suffer any great loss as they have an immediate right to appeal. *Carson* v. *American Brands, Inc.*, ____ U.S. ___, 67 L.Ed.2d 59 (1981). What recourse do the present employees of the City have if the Decrees are approved?

Respectfully submitted,

/s/ W. W. Conwell
W. W. CONWELL

/s/ Raymond P. Fitzpatrick, Jr.
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[Certificate of Service, dated July 14, 1981, omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA, *Plaintiff,* v. JEFFERSON COUNTY, *et al.*, *Defendants.*	CIVIL ACTION NO. CV 75-P-0666-S
JOHN W. MARTIN, *et al.*, *Plaintiffs,* v. CITY OF BIRMINGHAM, *et al.*, *Defendants.*	CIVIL ACTION NO. CV 74-Z-17-S
ENSLEY BRANCH OF THE N.A.A.C.P., *et al.*, *Plaintiffs,* v. GEORGE SEIBELS, *et al.*, *Defendants.*	CIVIL ACTION NO. CV 74-Z-12-S

OBJECTIONS TO THE PROPOSED CONSENT DECREES

Come now Johnny Morris, Jessie Sprayberry, B. R. Stephens, J.R. Davis, John Dipiazza, Juanita Eaton and Barbara Buckland by and through their attorneys of record and files this their objections to the proposed Consent Decree in the above-reference [sic] cases. The undersigned respectfully object to the proposed Consent Decrees on the following basis separately and severally:

1. The proposed Consent Decrees will have an adverse impact on the hiring and promotion of whites who have a vested interest in the merit system.

2. There is no relationship between the approximate percentages of blacks and women in the civilian labor force of Jefferson County and the percentages of blacks and women who are actually qualified to hold merit system positions in the Birmingham Police Department.

3. The goals for blacks and women for hiring and promotion to the position of Police Officer and Police Sergeant are not representative of the percentages of qualified blacks and women of the civilian labor force in Jefferson County.

4. The proposed Consent Decree of the City of Birmingham discriminates between women and blacks in that it provides that at least two blacks will be promoted to the next four (4) Lieutenant vacancies in the Police Department and at least one (1) black shall be promoted to the next two (2) Captain vacancies in the Police Department. The Decree further provides that the City shall seek to achieve the interim goals promoting blacks to vacancies in lieutenant and captain positions in the Police Department at twice the black percentage representation in the job classifications from which promotional candidates are traditionally selected for these jobs.

There is no such preference provided for female personnel who will be promoted to positions above the rank of sergeant on approximate equivalent percentages of their representation in the job classifications from which promotional candidates are traditionally selected.

5. The proposed Consent Decrees do not recognize the vested interest of employees who have been rolled back to a lower rank or classification and have permanent status on the lay-off lists.

6. The certification of blacks and females who are not incumbent employees of the City of Birmingham would be discriminatory toward white males who are eligible for promotion under the Personnel Board Rules and Regulations.

7. Any valid height and weight requirements should be equally applied to applicants of any race or sex.

8. Provisions relating to background investigations and dismissal from the Police Training Academy should be

equally applied to applicants of any race or sex. Certain provisions of Paragraphs 49 and 50 of the proposed Consent Decree of the City of Birmingham violate the right of privacy.

9. The provisions of Paragraph 53 of the proposed Concent [sic] Decrees of the City of Birmingham violate the right of privacy.

10. The provisions of the Decrees are detrimental to the merit system and in some instances would be contrary to the provisions of 36-21-46 of the Code of Alabama of 1975 which relates to minimum standards for applicants and appointees for employment as law enforcement officers.

Respectfully submitted,

LAW OFFICES OF
EDWARD L. HARDIN, JR., P.C.

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[Certificate of Service, dated July 14, 1981, omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA, *Plaintiff,* v. JEFFERSON COUNTY, *et al.*, *Defendants.*	CIVIL ACTION NO. CV 75-P-0666-S
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RESPONSE OF UNITED STATES TO OBJECTIONS TO THE PROPOSED CONSENT DECREE

Introduction

The Court's Order of June 8, 1981 provisionally approving the Consent Decrees provided interested persons the opportunity to file objections to the decrees. No party to the litigation has filed an objection. Nor has any member of the class of plaintiffs in the private suits filed an objection. Two organizations and a group of individuals have filed such objections. None of the objectors asserts a deprivation of any rights under a collective bargaining agreement. In this memorandum plaintiff United States responds to the objections raised, and supports the entry of the Consent Decrees.

The United States filed its complaint in these consolidated actions in 1975 after the Attorney General found reasonable cause to believe that defendant Jefferson County Personnel Board, defendant City of Birmingham and other defendant jurisdictions in Jefferson County were engaged in a pattern or practice of employment discrimination against blacks and women. The complaint alleged that defendants discriminated on the basis of race and sex with respect to recruitment, hiring, assignment, promotion, discipline, and other terms and conditions of employment.

To date this case has resulted in two trials. The first trial concerned the Personnel Board testing practices for entry level police, deputy sheriff and fire positions and culminated in this Court's Decision and Order of January 10, 1977, 14 FEP Cases 670, *aff'd in part, rev'd in part and remanded*, 616 F.2d 812 (5th Cir. 1980), *cert. denied*, 49 U.S.L.W. 3443 (Dec. 15, 1980). The second trial took place in 1979, and a complete record was developed concerning testing practices of the Personnel Board for certain other positions, promotional practices, and other selection and employment practices alleged to be discriminatory against blacks and women. The proposed decrees would obviate the need for decision on the second trial. They also would eliminate the need for any further trial proceedings with respect to the City of Birmingham and the Personnel Board.

The parties have resolved all issues raised in the complaint with respect to defendant Personnel Board and defendant City of Birmingham, and have tendered to the Court two Consent Decrees which embody that settlement. Plaintiff United States believes that the terms of the decrees represent lawful and appropriate relief to remedy the effects of any past or continuing discriminatory practices.

Summary of Argument

A district court should enter a consent decree if the provisions are lawful, reasonable and equitable. *United States* v. *City of Alexandria*, 614 F.2d 1385 (5th Cir. 1980), *United States* v. *Allegheny-Ludlum Industries*, 517 F.2d 836 (5th Cir. 1975), *cert. denied sub nom., N.O.W.* v. *United States*, 425 U.S. 944. Consent decrees submitted jointly by the parties should be entered despite objections by third persons if the court determines that a decree's

provisions are consistent with the allegations of the complaint, the substantive law, and public policy. See, *EEOC* v. *American Tel. & Tel. Co.*, 556 F.2d 167 (3rd Cir. 1977), *cert. denied*, 438 U.S. 915, *S.E.C.* v. *Dennett*, 429 F.2d 1303 (10th Cir. 1970).

Here the proposed decrees should be entered, not only because of the general policy in favor of voluntary resolution of cases, but because "[i]n a Title VII case, as here, the policy favoring settlement is even stronger in view of the emphasis placed upon voluntary conciliation by the Act itself." *Cotton* v. *Hinton*, 559 F.2d 1327, 1331 (5th Cir. 1977). See 42 U.S.C. 2000e-5(b). Neither an admission nor a finding of liability is necessary to the entry of a consent decree. *Swift and Co.* v. *United States*, 276 U.S. 311 (1928); *United States* v. *City of Alexandria, supra.* In the context of equal employment opportunity, the Supreme Court has held in the absence of a judicial finding of discrimination that Title VII does not proscribe employers from voluntarily adopting race-conscious affirmative action plans. *United Steelworkers of America* v. *Weber*, 433 U.S. 193 (1979). Nor has the Supreme Court recognized any constitutional impediment to race-conscious relief embodied in Congressionally authorized administrative actions, such as consent decrees under Title VII. *Regents of University of California* v. *Bakke*, 438 U.S. 265, 302 n. 41 (1978).

The objections directed at the lawfulness of the decrees should be rejected. Similarly, the provisions of the Consent Decrees are equitable and reasonably adapted to correct the effects of the alleged discriminatory practices in a suitable time frame without excessively infringing upon the interests of white or male employees. Thus, the Court should enter the proposed Consent Decrees.

Argument

I. The Consent Decrees' Provisions are Lawful, Reasonable, and In Accord with Public Policy

A. The Proposed Decrees are Consistent with Allegations of the Complaint and the Substantive Law

In determining whether to enter a consent decree, a district court must assure itself that the provisions of the decree are lawful, reasonable and equitable. *United States* v. *City of Alexandria*,

614 F.2d 1385 (5th Cir. 1980);[1] *United States* v. *Allegheny-Ludlum Industries*, 517 F.2d 826 (5th Cir. 1975), *cert. denied sub nom., N.O.W.* v. *United States*, 425 U.S. 944; *United States* v. *City of Jackson*, 519 F.2d 1147 (5th Cir. 1975); *Airline Stewards & Stewardesses Ass'n* v. *American Airlines, Inc.*, 573 F.2d 960, 963 (7th Cir. 1978).

A district court should enter a consent decree if the relief provided is consistent with the relief which a court could properly grant after findings which reflect the facts alleged in the complaint. *United States* v. *City of Alexandria, supra.* See also, *EEOC* v. *American Tel. & Tel. Co.*, 556 F.2d 167 (3rd Cir. 1977), *cert. denied*, 438 U.S. 915; *Airline Stewards & Stewardesses Ass'n.* v. *American Airlines, Inc.*, 575 F.2d 960, 963 (7th Cir. 1978), *supra, S.E.C.* v. *Dennett*, 429 F.2d 1393 (10th Cir. 1970).

The complaint in this action alleges that defendant Personnel Board and defendant City of Birmingham, among others, have engaged in a pattern or practice of employment discrimination against black and female applicants and employees, and seeks monetary and injunctive relief to end the discrimination and rectify its effects. Complaint at ¶14, 15 and prayer for relief. The Consent Decrees resolve the allegations raised in the complaint against the Personnel Board and the City of Birmingham by providing a mechanism for the payment of individual monetary relief and requiring affirmative certification, hiring and promotional obligations.

Almost all of the objections to the decrees concern the prospective affirmative hiring and promotion provisions. However, this type of relief has been approved repeatedly by the Fifth Circuit both in the context of a consent decree with the United States, *United States* v. *City of Alexandria, supra; United States* v. *Allegheny-Ludlum Industries, supra; United States* v. *City of Jack-*

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1 *United States* v. *City of Alexandria, supra*, was a companion case to *United States* v. *City of Miami*, 614 F.2d 1322 (5th Cir. 1980), *pet. for rehearing en banc granted and opinion vacated*, 625 F.2d 1310 (5th Cir. 1980). *City of Miami* involved a challenge to a consent decree by police unions which were defendants in the action and had collective bargaining agreements with the City. In *City of Alexandria*, as in the instant case, there are no issues involving any deprivation of rights under collective bargaining agreements.

son, supra; and as an appropriately ordered judicial remedy, *Morrow* v. *Dillard*, 580 F.2d 1284 (5th Cir. 1978); *NAACP* v. *Allen*, 493 F.2d 614 (5th Cir. 1974). Thus, the objections of the Firefighters Association - that the affirmative relief unlawfully discriminates against whites and males and goes beyond what an aggrieved party could obtain through litigation - have been answered by a consistent string of decisions in this Circuit.[2]

B. A Judicial Finding of Liability Is Not A Prerequisite To the Entry of the Consent Decree

Because the relief addresses the violations alleged in the complaint, neither a finding by the Court nor an admission of liability is a prerequisite to the entry of the decrees. *Swift & Co.* v. *United States*, 274 U.S. 311 (1928); *United States* v. *City of Alexandria, supra*.

The inclusion of goals and timetables in the decrees does not negate the applicability of this general proposition. *Id.* See also *Patterson* v. *Newspaper and Mail Deliverers' Union*, 514 F.2d 767, 769 (2d Cir. 1975), *cert. denied*, 427 U.S. 911. In *United Steelworkers of America* v. *Weber, supra*, the Supreme Court held that Title VII does not forbid employees and unions from voluntarily agreeing upon affirmative action plans that accord racial preferences. In view of the decision in *Weber* from a purely statutory perspective it would be ironic indeed if an employer and the Attorney General could not enter into a consent decree with race-conscious relief after the Attorney General had reasonable cause to believe that the employer was engaging in a pattern of discrimination.

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2 The Firefighters Association's reliance on *Myers* v. *Gilman Paper Corp.*, 544 F.2d 837 (5th Cir. 1977) is misplaced. That decision does not support their broad objections. In *Myers*, the Fifth Circuit reversed the district court's approval of a consent decree insofar as it modified certain provisions of a collective bargaining agreement not found to be either in violation of Title VII or insufficient to eliminate the present effects of past discrimination. The Firefighters Association admits that these consent decrees have no effect upon any collectively bargained seniority system, as in *Myers* (Brief, p. 5). *Myers* did not hold, as the Firefighters Association suggests, that a judicial finding of ongoing discrimination must precede all affirmative equitable relief. Such a reading is not only contradicted by a solid line of cases in the Fifth Circuit but is not supported by the factual context of *Myers* itself.

While *Weber* did not involve state action, there is no reason that the outcome should be different from a constitutional perspective. See, *Detroit Police Officers Association* v. *Young*, 608 F.2d 671 (6th Cir. 1979), *cert. denied*, ___U.S.___, No. 79-1080, June 15, 1981. In *Regents of the University of California* v. *Bakke, supra*, the opinion of Justices Brennan, White, Marshall and Blackmun rejected the notion that judicial findings of discrimination are necessary to the implementation of race-conscious remedies by governmental bodies. Disagreeing with the argument that the *Bakke* case is distinguishable from employment discrimination cases that approved race-conscious remedies because those remedies were supported by judicial findings of prior discrimination, they stated:

> These cases cannot be distinguished simply by the presence of judicial findings of discrimination, for race-conscious remedies have been approved where such findings have not been made. Indeed, the requirement of a judicial determination of a constitutional or statutory violation as a predicate for race-conscious remedial actions would be self-defeating. Such a requirement would severely undermine effects to achieve voluntary compliance with the requirements of law. And, our society and jurisprudence have always stressed the value of voluntary efforts to further the objectives of law. Judicial intervention is a last resort to achieve cessation of illegal conduct or the remedying of its effects rather than a prerequisite to action. 438 U.S. at 364 (citations omitted).

In addition, Mr. Justice Powell, announcing the judgment of the Court, specifically made reference to consent decrees under Title VII containing such remedies. While stating that the Court had never approved preferential classifications in the absence of constitutional or statutory violations, he carefully pointed out that:

> This case does not call into question congressionally authorized administrative actions, *such as consent decrees under Title VII* or approval of reapportionment plans under §5 of the Voting Rights Act of 1965. In such cases, there has been detailed legislative consideration of the various indicia of previous constitutional or statutory violations. . .and particular administrative bodies have been charged with monitoring and formulating ap-

propriate remedies. 438 U.S. at 302, fn. 41 (emphasis added, citation omitted).

In the instant case not only do we have an administrative determination by the Attorney General of a pattern of discrimination by defendants, but also a history that includes this Court's January 10, 1977 Decision and Order and an extensively developed record in subsequent trial proceedings. Thus, the absence of a judicial finding of liability for each specific violation presents no obstacle to the entry of the Consent Decrees.

C. The Voluntary Elimination of Employment Discrimination Is National Public Policy

The elimination of discriminatory employment practices prohibited by Title VII of the Civil Rights Act of 1964, as amended, is a policy of the "highest priority." *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 763 (1976); *Alexander* v. *Gardner-Denver*, 415 U.S. 36, 47 (1974); *United States* v. *Allegheny-Ludlum Industries*, *supra* at 846-47.

The enforcement scheme of Title VII relies primarily on obtaining voluntary compliance. As the Supreme Court noted in *Emporium Capwell* v. *Western Addition Community Organization*, 420 U.S. 50, 72 (1975), "Congress chose to encourage voluntary compliance with Title VII by emphasizing conciliatory procedures before federal coercive powers could be invoked." See also, *Alexander* v. *Gardner-Denver*, *supra*, 415 U.S. at 44; *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417-18 (1975).

The Consent Decrees represent a satisfactory settlement which achieve voluntary compliance with Title VII and further Congressional intent without additional litigation burdens and expense to the parties and the taxpayers.

II. The Affirmative Hiring and Promotion Provisions are Reasonable, Fair and Appropriate

A. The Civilian Labor Force of Jefferson County is an Appropriate Yardstick to Measure Achievement of Long Term Goals

In both Consent Decrees the defendants agree to adopt as a long term goal, subject to the availability of qualified applicants, the employment of blacks and women in each job classification

specified in the decrees in percentages which approximate their respective percentages in the civilian labor force of Jefferson County. Personnel Board Decree ¶5; City of Birmingham Decree, ¶23. The Guardians Association has suggested that the racial composition of the population of the City of Birmingham should be reflected in any long term goal. Johnny Morris, et al. have objected to the civilian labor force as a measurement device because they say there is no relationship between the percentage of blacks and women in the Jefferson County civilian labor force and those qualified to hold merit positions in the Birmingham Police Department. Beside providing no support for any more reliable or appropriate labor force figures, the objectors fail to account for the concept of a relevant labor pool and the flexibility built into the decrees to address that issue.

The Supreme Court has noted that "absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired." *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 340, n. 20 (1977). The vast majority of employees in the Jefferson County Personnel system reside in the County. Moreover, the County constitutes the labor market from which most applicants are derived. Thus, the selection of the county civilian labor force comports with the factual background of this case, including the relevant geographical area of applicants and incumbents. See *Patterson* v. *Newspaper and Mail Deliverers' Union, supra*, 514 F.2d at 772.

Where it is shown that blacks and/or women possess qualifications required for any of the job classifications in percentage terms which are inconsistent with the specified goals, the Consent Decrees permit appropriate adjustment. Personnel Board Decree, ¶24; City of Birmingham Decree, ¶5. This flexibility allows the parties to adapt the goals to the relevant labor market in accordance with the teaching of *Hazelwood School District* v. *United States*, 433 U.S. 299 (1977). However, where no special qualifications are required for a position, such as entry level police and fire positions, the civilian labor force represents an appropriate yardstick consistently recognized by Courts throughout the country. See, e.g., *NAACP* V. *Allen*, 493 F.2d 614 (5th Cir. 1974); *United States* v. *City of Chicago (Police Dept.)*, 549 F.2d

415 (7th Cir. 1977), *cert. denied sub nom. Arado* v. *United States*, 434 U.S. 975 (1975).

B. The Interim Certification, Hiring and Promotion Goals are Reasonable and Appropriate

The interim goals in the Consent Decrees for different job classifications range from 25 to 50 percent for blacks and from 15 to 30 percent for women. As objective measures of progress in meeting the long term goal, the achievement of the interim goals is subject to the availability of applicants deemed qualified on the basis of job related selection criteria. The goals are temporary and do not create a bar to the hiring or advancement of white males.[3] See *United Steelworkers of America* v. *Weber*, *supra*. Interim goals of this kind have of course repeatedly been approved in this Circuit. *United States* v. *City of Alexandria*, *supra*; *NAACP* v. *Allen*, *supra*.

Of course whites and males will be affected by the operation of the Consent Decrees. However, it is an overstatement to say that they have "vested" rights in the merit system, when aspects of the system have been alleged and, with respect to police and fire testing, found to be discriminatory. In any case it is not unreasonable for third parties' interests to be affected by the decrees even though the third parties did not cause the discrimination. As the Supreme Court has stated:

> . . . we find untenable the conclusion that this form of relief may be denied merely because the interests of other employees may thereby be affected. If relief under Title VII can be denied merely because the majority group of employees, who have not suffered discrimination, will

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3 In the objections of Johnny Morris, et al., it is pointed out that the decrees do not recognize the vested interest of employees who have permanent status on the layoff lists. (Brief, ¶5). It was not the intent of the signatories to the decrees that the interim goals would supersede the operation of bumping or recall rights. The goals apply to new hires or promotions only.

be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed.

Franks v. *Bowman Transportation Co.*, 424 U.S. 747, 774-75, 777-78 (1976) (citations omitted).

III. Recordkeeping and Reporting Provisions are Instrumental to the Implementation of the Consent Decrees

Johnny Morris, et al. have objected to the recordkeeping and reporting provisions of the City of Birmingham Decree on the grounds that they violate the right to privacy. Such provisions are necessary to monitor effectively the progress of compliance with the decrees. Recordkeeping and reporting provisions of the kind included in these decrees have been ordered both in consent decrees and in litigated cases. See *United States* v. *Allegheny-Ludlum Industries*, *supra*, *United States* v. *City of Jackson*, *supra*, *United States* v. *Jacksonville Terminal*, 451 F.2d 418, 460 (5th Cir. 1971); *James* v. *Stockham Valves*, 559 F.2d 310, 356 (5th Cir. 1977). Johnny Morris, et al. do not articulate how these provisions intrude on any protected rights of privacy. Moreover, the judically [sic] recognized need for such provisions outweighs any vague claims of privacy.

Conclusion

For the foregoing reasons, this Court should enter the Consent Decrees with the terms and provisions as agreed to by the parties and submitted to the Court.

Respectfully submitted,

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[Certificate of Service, dated July 28, 1981, omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA, *et al.*, *Plaintiffs*, v. JEFFERSON COUNTY, and BEN L. ERDREICH, THOMAS W. GLOOR, CHRIS H. DOSS, COMMISSIONERS, *et al.*, *Defendants*.	CIVIL ACTION NO. CV 75-P-0666-S

* * *

[Page 4]

August 3, 1981 9:00 A.M.

PROCEEDINGS

THE COURT: Case 75-666, United States of America vs. Jefferson County and others, and related cases.

This matter is before the Court at this time for consideration of whether to give approval to a proposed consent decree tendered by the private plaintiffs in these cases, the United States of America, the Jefferson County Personnel Board, and the City of Birmingham.

Notice of the general terms of the proposed settlement have been previously given by newspaper. A certificate to that effect has been filed with the Court. The consent decrees themselves as proposed have been on file.

The notice provided that any persons who wished to object to the decrees should have until July 14th, at 4:00 o'clock

in which to file written objections, then they would be heard at this time, along with any evidence or argument presented by those proposing the consent decrees.

There was filed by the deadline an objection on behalf of three separate groups. Johnny Morris and six other individuals filed objections, Billy

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Gray, and the Birmingham Firefighters Association, No. 117, filed objections, and the Guardian Association likewise filed timely objection to portions of the decree.

Received after the deadline was a protest or objection filed by a James F. Miller. I don't know if Mr. Miller is in the court or not. Is Mr. Miller here?

Mr. Miller, that objection was filed out of turn. I don't know whether you wish to be heard in connection with why I should permit any consideration of your objection by virtue of it being filed too late. I don't know whether the parties proposing the decree have any objection to Mr. Miller's objection being considered.

Essentially it mirrors to some degree objections filed on behalf of the others, in effect saying that his rights would be jeopardized by preferential treatment given to others. That's in essence the nature of his objection.

Is there any objection by the proponents of the settlement to the Court's considering Mr. Miller's objection, even though it was filed some five days late?

MR. RITTER: Your Honor, we probably wouldn't

[Page 6]

have an objection, but before we formally indicate our position on the record we would like to see a copy of Mr. Miller's objection. I don't believe any counsel for the parties have had an opportunity to look at that objection.

THE COURT: I can read it to you. It's very short.

MR. RITTER: Thank you.

THE COURT: "I, James B. Miller, do hereby request to be present at the hearing in order to oppose your decision on the hiring process and back pay for minorities simply because it does not meet the standards that the Jefferson County Personnel Board has set for hiring for Civil Service jobs. I oppose the decree because it has affected my family and myself by not being hired as a patrolman, and the pay increase I would receive if the decree had not been issued." Signed James B. Miller.

MR. ALEXANDER: The City has no objection to the consideration of the Miller objection, Your Honor.

MR. SPITZ: The Martin plaintiffs have no objection, Your Honor.

MR. RITTER: No objection.

MR. ADAMS: No objection.

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MR. WHITESIDE: And the Personnel Board, Your Honor.

THE COURT: All right. It will be considered, Mr. Miller, although untimely.

First of all, the question before the Court is the status for purposes of this hearing of those filing the objections, and more particularly the status of the Guardian Association, and of Birmingham Firefighters Local 117. It's my view that I should treat the objections filed, or the papers filed on behalf of those two organizations as being a request to be heard Amicus Curiae, and I should permit hearing from those two groups Amicus Curiae, although not as formal parties, that insofar as the individuals are concerned, which would be Mr. Morris and the others who joined in his petition, Mr. Gray and now Mr. Miller, I should treat them as interested parties, persons, and accorded that position which is a little bit more direct interest than the interest of the Guardians and the Firefighters, No. 117.

Does anyone wish to be heard contrary to the Court's view on that?

MR. FITZPATRICK: Judge, Ray Fitzpatrick for the Firefighters and Gray, I don't have anything contrary to that. I would like to state that we

[Page 8]

would — we plan to request intervenor status in the case, and I plan on filing a motion this afternoon requesting such status.

THE COURT: Well, I'll have to deal with that when it's filed. But, insofar as the present papers are concerned, you would agree that they should be treated, or allowed the status of Amicus Curiae?

MR. FITZPATRICK: Yes, sir. That's what we asked for.

THE COURT: All right. The same thing I take it would be true insofar as the Guardians are concerned.

MR. THOMPSON: That's correct, Your Honor.

THE COURT: All right. It will be so ruled then.

Now, I'm not sure what those filing objections or those proposing the settlement had in mind in terms of either argument or evidence. Perhaps I could have some statement by counsel as to your desires in that respect.

MR. RITTER: Your Honor, we have some computer printouts that we would like to offer into evidence to supplement the rather extensive trial record that has been generated to date. There are a couple of summaries that are based on those printouts

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that we would also like to put in the record. And beyond that I don't believe there would be any further evidence that the parties to the consent decree would wish to present to the Court.

However, there may be some additional matters that we may wish to present in rebuttal after we've heard in detail the substance of the objections.

THE COURT: All right. If I understand you correctly, you will be asking to file certain summaries of data, and beyond that, to reserve the right to put on evidence or argument after hearing from the objectors?

MR. RITTER: That's correct, Your Honor.

THE COURT: Is that statement true for all of the existing parties?

MS. REEVES: Yes, sir.

MR. ALEXANDER: We join in, Your Honor.

MR. ADAMS: Yes, sir.

THE COURT: Let me take a look first at the nature of the materials tendered.

I take it that these exhibits in large part relate to statistics concerning the City of Birmingham, although one of the exhibits is one from the Jefferson County Personnel Board that presumably affects more than the City of Birmingham?

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MR. RITTER: Yes, Your Honor. The exhibit that you have there, that you're looking at now, we would probably wish to reserve offering that exhibit into evidence until we have heard the objections. The exhibit that you have before you would be used to address the time in grade issue. I'm not sure whether additional evidence is going to be necessary on that or not. But, the other computer printouts that you have, Your Honor, are exhibits that we would like to offer before the objections are heard. That would be Plaintiff's Exhibits 1 through 4.

THE COURT: All right. Exhibits 1 through 4 will be received, and the tender of the Exhibits 5 and 6 and 7 will be deferred.

MR. RITTER: Thank you, Your Honor.

THE COURT: All right. What is the position with respect to the objections insofar as presenting either evidence or arguments?

MR. FITZPATRICK: I had just planned on presenting a very short oral argument.

MR. THOMPSON: Your Honor, the Guardian's position would be a rather brief statement in support of the position they have taken in the memorandum.

THE COURT: I thought we had three groups.

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Mr. Miller, did you wish also to be heard either by way of evidence or argument?

MR. MILLER: Yes, sir.

THE COURT: All right. Then, I'll call on the Objectors for their statements of position and outline of their position.

MR. FITZPATRICK: May it please the Court, I feel a little bit like a fish out of water here with all of these eminent Government attorneys who are so skilled in this area of the law, and I really am a little bit overwhelmed.

But, I would like to state that I did receive two briefs on Friday, one on behalf of the City, and the other on behalf of the Government. I would request a few days leave to file a reply brief to their briefs.

And I also did receive a brief on behalf of the Martin plaintiffs this morning, which was short, and I'm not sure if it even spoke to the objections that we raised, but I would request leave to file a short reply brief by the end of the week.

Upon a reading of the briefs, of the Government's brief and the City's brief, it would seem to me initially upon a quick scanning of the brief that there's no question of the propriety

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of the decrees. But, as I looked closer at the cases that they relied on, it appeared to me that their primary reliance is on two

companion cases, *U. S. v. City of Miami, Florida*, and *U. S. v. City of Alexandria, Virginia*, which are both cases out of the Fifth Circuit.

THE COURT: Alexandria, Louisiana?

MR. FITZPATRICK: Yes, sir. The *Miami* and *Alexandria* cases were the first occasion for the Fifth Circuit to address the propriety of a code of policy since the decisions of the Supreme Court in [*Bakke*] and *Steelworkers v.* [*Weber*], which came out in June of '79. The *Steelworkers* was a five to two decision, in which the Supreme Court upheld the voluntary quota plan entered into between a private employer and the Government, over the objections of the Steelworkers Union.

The Court expressed at the outset in its opinion the narrowness of the decision. It stated that the subject affirmative action plan did not involve State action, and hence there was no alleged equal protection violation.

In the *City of Miami* case there were three decisions filed, three opinions filed. Judge Goldburg's prevailing opinion upholds the consent

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decrees entered into between the City and the Justice Department over the objections of the Miami FOP. Judge Goldburg expressly acknowledges in footnote 27 that the *Steelworkers* case was not controlling in a situation involving municipal employers.

Judge Gee's dissenting opinion rejects the proposed consent decrees, and notes that the prevailing Judge's opinion constitutes a landmark decision in that it sustains preferential treatment of classes based on race and sex in the form of hiring and promotion quotas against Constitutional attack on the Fourteenth Amendment grounds.

Judge Thornbury concurred with Judge Goldburg. In so doing he stated that the authority for approval of the consent decrees was debatable. He stated, "Certainly we cannot say that the decision is compelled by Supreme Court or Fifth Cir-

cuit precedents, but just as emphatically we urge neither is it prohibited by any controlling authority."

In answer to that statement we would state that the clear perception of Congress in Title VII at 2000(e)(2)(j) is enough of a prohibition without a Supreme Court decision to the contrary.

We acknowledge that Judge Goldburg's opinion articulates the position of the proponents of these

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decrees as far as their legality is concerned.

On the other side, Judge Gee's dissenting opinion stands for the arguments of the Firefighter objectors.

A petition for rehearing en banc was filed in the *Miami* case, and the case was submitted to the full Court on January 11th of this year. I checked with Atlanta Friday afternoon, and there was no decision at that time. The case is still under submission and has been so for some seven months.

If the program of quotas urged by the proponents is routinely legal, as the proponents allude in brief, then why has the *Miami* case remained under submission for seven months? The decision of Judge Goldburg is not final and not of controlling authority. We submit that there is no authority that a municipality may discriminate on the basis of race and sex under the color of a consent decree without a present ongoing discrimination.

The Justice Department's counsel did not allege that Miami is good law as the City does in its brief. Justice relies more on the companion case of City of Alexandria.

THE COURT: Let me get you off for a moment of the discussion of the Fifth Circuit cases, to be

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more specific about the actual objections that you are filing, which you have listed six.

MR. FITZPATRICK: Okay. I was winding up in the case law and coming to that, sir.

THE COURT: Okay.

MR. FITZPATRICK: In essence, as far as the case law is concerned, we take the position that it's unsettled at this time, it's still pending in the Fifth Circuit, and it's not clear that in a case involving a municipality, as we have here, the *Miami* case is very similar to this case, it's not clear that the quota system as far as entry level and promotional positions is proper.

We do not yet have findings by the Court of an ongoing actual present discrimination against blacks and females by the City or the Personnel Board at this time. The City decree in fact acknowledges the good faith efforts of the City in furtherance of affirmative action.

I stand firm on the citation of our brief of *Myers v. Gillman Paper*, that back pay is the proper remedy for past wrongs, while injunctive relief is the only proper remedy for a continuing wrong. It's our position that there is no continuing wrong at this time.

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I stand firm on our objections to the quotas provided for females. It was acknowledged in the Court's '77 decree that the sex discrimination claims were dropped for lack of evidence.

We object to the broad injunctive relief ordering the City and the Personnel Board to drop the high school education requirement, and the lack of a criminal record requirement.

At the present time we have no findings that such requirements constitute ongoing discriminations against blacks and females. In fact, such requirements are reasonably related to the efficient functions of the Fire Department. In order to efficiently perform their jobs more and more firefighters are being trained as paramedics, who operate in the field, while in communication with an emergency room physician.

I recently received a telephone call from an emergency room physician at Carraway Hospital, who was distraught about the possibility of people being under his supervision, while administering medical treatment in an emergency situation, who could be convicted criminals or inadequately trained in their field.

He stated to me that Federal and State law

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prohibits convicted criminals from being able to administer controlled substances, which paramedics do on a routine basis.

And he stated to me unequivocally that one would have to have at least a high school diploma to comprehend the complex material that today's firefighter medic needs to be apprised of.

We stated in brief and we state here again today that we do not oppose equal opportunity for all. That is our national policy. We do question whether quotas is national public policy.

I have recently read in the ABA Journal of the Reagan Transition Team's report on the EEOC. The report concluded that EEOC has not been following Title VII in pushing for consent decrees with hiring and promotion quotas. I seriously question whether these decrees are consonant with the public policy of our current administration.

The law provides that the provisions of a class action consent decree may not be unlawful, unreasonable, or inequitable. The proposed consent decrees are, one, outside of the provisions of the law under both Title VII, and violate the Constitutional rights of these objectors, without evidence of ongoing present discriminations; two, they unreasonably

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go too far in the scope of relief when the City is already achieving its objectives under its affirmative action ordinance; and three, they are inequitable in making the present white male employees of the City bear the burden and cost of the past viola-

tions of the civil rights of the plaintiffs by the City and the Personnel Board.

The City should make restitution through adequate back pay to the victims, to the actual victims of the discrimination, rather than passing the burden on to its innocent employees.

We respectfully urge the Court not to approve the decrees and to return the parties to the negotiating table.

THE COURT: I would like you to indicate what specific portions of the decrees you object to. I understand you to be generally objecting on the basis that there's not been evidence of or a finding of present ongoing discrimination, and that would impair in your view the entirety of the agreements.

MR. FITZPATRICK: Yes, sir.

THE COURT: Beyond that, which covers and permeates the entire agreements, what portions of the agreements are you objecting to?

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MR. FITZPATRICK: Specifically what comes to mind, and not just limited to this, the hiring quotas for females.

THE COURT: That's with respect to the City of Birmingham's decree, and in turn the Personnel Board's decree as it relates to the Firefighters in the City of Birmingham?

MR. FITZPATRICK: Yes, sir. We object to the dropping of the high school education requirement with respect to both decrees. We object —

THE COURT: As it relates to the Firefighters?

MR. FITZPATRICK: Of course. We object to the dropping of the criminal record requirements, the criminal records standards.

THE COURT: You understand that the only thing that has changed there is that it shall not automatically bar a person from employment?

MR. FITZPATRICK: Yes, sir.

THE COURT: And that there shall be taken into account various factors concerning what criminal offense, when it was committed, rehabilitation, and indeed the nature of the job for which the person is being considered?

MR. FITZPATRICK: I understand that was in the decree, yes, sir. Offhand —

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THE COURT: I take it there is at least one other, which is the preferential selection of a black to the position of Fire Captain?

MR. FITZPATRICK: Fire Captain. Well, on each level up the line in the providing of quotas for the promotional positions.

We also would object to the dropping of the time in grade requirements. We think those are reasonably related to the efficient functioning of the department.

It's the position of the Firefighters that on-the-job experience cannot be exchanged for book knowledge, or whatever, and the Firefighters are concerned that their superior officers do have adequate on-the-job experience.

THE COURT: You do understand that the same time in grade would apply to whites, blacks, males and females, so at least as I understand it there's no distinction made between the time in grade requirements for any person.

MR. FITZPATRICK: I understand that, yes, sir. I do question whether that is the proper subject for civil rights litigation.

THE COURT: Well, I have some question about that in the abstract myself.

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On the other hand, I'm not sure that I have any power particularly to say no. If they want to do it, why not?

MR. FITZPATRICK: I believe that it is, under the class action, under Rule 23, when the Court approves a decree, the

Court must be satisfied of the legality of all provisions of the decree, and

THE COURT: Well, there's nothing illegal about changing the time in grade. It's something that is incorporated in the proposed settlement by virtue of some complaints that have been made on behalf of the plaintiffs.

MR. FITZPATRICK: There's nothing that says it's legal and there's nothing that says it's illegal, right.

THE COURT: But, why would I have any role to play in terms of preventing the change on time in grade, unless that it were shown that the change on time in grade contravenes some Federal law, which as far as I can see it doesn't, and there's been no indication that the change of the time in grade would adversely affect blacks or whites, or males or females.

I have some difficulty understanding how I would get involved in deciding on that particular

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issue. If the parties want to do it, why not?

MR. FITZPATRICK: I can think of no response offhand, Your Honor.

THE COURT: It seems to me that the same basic response is, with respect to the criminal record and the high school education, that if the parties want to do it, it may or may not be generally speaking in the public interest, in a broad context, but if the parties want to do it, they are free to do it, with or without the Court's approval.

MR. FITZPATRICK: Well, I think, though, that the Court is approving this, and the Court is putting its stamp of approval on this, and with them — I don't think the Court should endorse something that is outside of the public interest.

THE COURT: Well, suppose they pulled it out of the consent decrees, didn't have it in the consent decrees, but nevertheless the Personnel Board and the City made the changes on high school education and criminal record, it doesn't violate

anybody's rights. The people may not like the change, but whose rights are violated by it?

MR. FITZPATRICK: I cannot think of anything offhand, sir.

THE COURT: It seems to me that the critical

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matter relates, insofar as your argument goes, to the hiring and promotional quotas.

MR. FITZPATRICK: Yes, sir. And the overall scheme of the consent decrees. And as I stated earlier, we do plan on requesting intervenor status, and will file the appropriate motions.

THE COURT: It may be a little late, but I am hearing you.

MR. FITZPATRICK: Well, I wrote it out yesterday, but I didn't have anyone to type it.

THE COURT: Okay.

MR. FITZPATRICK: Okay. Anything further, sir?

THE COURT: Thank you.

MR. FITZPATRICK: Thank you, sir.

THE COURT: The Guardians?

MR. THOMPSON: May it please the Court, Your Honor, our position here, the Guardian's position, is somewhat of a difficult one in that the Guardians don't really object to all of the features in the proposed consent decree. In fact, probably to do so would be more like cutting your nose off to spite your face.

Obviously the Guardians would take whatever encouragement it could in seeing that a consent

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decree is effectuated, because that would then give them a better position in terms of employment and promotions than they enjoy at the present time.

Now, what the Guardians have done is to file an objection that is more in the nature of saying that the proposed consent decree does not deal with some fundamental issues that will make it fully effective in achieving promotions and employment opportunities that the Guardians would suggest that the proposed consent decrees are designed to do.

Now, the Guardians have objected in terms of police officers admitted to the Academy, they have objected to the promotions in regards to superior positions of Sergeants, Lieutenants, Captains, and up the line.

Let me begin by saying that one of the reasons the Guardians have proposed that the number of individuals admitted in the Academy class be increased to seventy-five percent black is that that is the only way that the number of black police officers that are actually employed, not necessarily ones that are interviewed as applicants, but are actually employed, can be increased, that is, by increasing the number of individuals actually admitted

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and graduated from the Academy.

Now, some of the statistics that we have in terms of just numbers is that, and this information is available to me from a related, well, not a related matter, but a lawsuit that involves this department, and was provided me as late as six months ago. But, let me just give the Court some statistics in regard to the sworn police officers that are not employed by the City of Birmingham.

In the latest data that we had for the year 1980, where you had five hundred and sixty-six white male police officers employed, you had thirty-seven white females, you had a total of fifty-eight black males, and seventeen black females.

In the year of 1979, the year ending for 1979, you had, of a total number of sworn police officers, you had five hundred

and forty-seven white males, thirty-one white females, forty-four black males, and eight black females.

For the year ending 1978 you had a total number of five hundred and eighty-three white males, thirty-two white females, forty-five black males, and nine black females.

And for the year ending 1977, you had a total of five hundred and seventy-three white males,

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twenty-six white females, forty black males, and six black females.

Now, just dealing with the police population itself, we look at — in 1977 you only had forty black males that were sworn police officers.

In 1980, and incidentally, this is only up to November, October of 1980, you only had fifty-eight black males that were employed as police officers. This raised serious questions with the Guardians, because they cannot see any significant increase, and they recognize that the only way that you can have a significant increase is the number of officers that are actually graduated from the Academy. So, that is the question of why they are saying that if you merely set some non-specific goals, or if you set some general philosophic goals of saying fifty percent, without having some precise standards in which to implement this, and without having some precise measures that go into effect immediately, you will not achieve the admirable goal of fifty percent black police officers, if that is in fact a goal of the proposed consent decree, or as a result of the tenor of the entire consolidation of the lawsuits that have been filed.

Additionally, we have raised objections regarding

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the promotions of police officers. black police officers from the position of Patrolman to Sergeant and above.

Again quoting some statistics in terms of the police officers, in 1977, with the year ending, we had, of the number of

Sergeants we had, there were one hundred and forty-six white male Sergeants, zero females, and two black males.

In 1978 there were a hundred and forty-four white male Sergeants, one female, and three blacks.

In 1979 you had a total of one hundred and forty-one white male Sergeants, three white females, three blacks.

And in 1980, up until October of that year, you had a hundred and forty-two white male Sergeants, two white females, and three blacks.

Again, it is a significant concern to the Guardians, the position of Sergeant, because that is the entry level in which the blacks, or women, or whoever are aspiring to these positions begin to rise to the other superior officers, such as Lieutenant, Captain, Deputy Chief, and indeed Chief of the Police Department.

The issues that concern the Guardians particularly is that unless you have a significant

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infusion of blacks into that level of Sergeants on some significant basis, that you will never have any black officers ever to rise, and not just in five years, which may be a number that is tossed in the consent decree, or in the language of the lawsuit, but in the next fifty years if you do not have that infusion of blacks into that level, then it is unlikely that you will ever have blacks rising to the positions that would qualify them to serve in other superior officer positions.

Now, I guess the tenor of our argument as regards the position of Lieutenants and Captains are parallel to those that I tried to iterate with regard to the position of Sergeant.

One of the — another objection that we have raised that ties into this whole matter is the issue of how officers, patrolmen, become superior officers, how they rise to the ranks of Sergeant and above. And, of course, in the past there has been the testing as a chief mechanism for the advancement of patrolman to the position of Sergeant and above.

One of the main concerns that has been raised by the Guardians is that this issue of testing has had a long range and continuous effect in terms of adverse impact on blacks, and that should be looked at

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seriously.

And one of the ways of trying to reduce or eliminate impact of the testing is to eliminate that, and to get to standards and criterions that are effective in measuring the individual's ability to perform in these positions of Sergeants and above. And we have suggested that perhaps the consent decree really ought to look at ways of measuring those in terms of experience, education, leadership skills, ability, knowledge, and goals and objectives of a police department, longevity and training. We believe that these are criterions that truly measure the ability of an individual to perform in the position of Sergeant, and indeed of superior positions above that of Sergeant.

So, we suggest and submit that if the consent decree does not get to this issue of how you increase the number of blacks in the Police Department in those superior positions, and merely set out the, for example, that they will fill the next four positions, or the next in Sergeant, or the next two positions in Lieutenant, that that really does not get at the issue of improving the positions of blacks in the ranks of police officers.

Merely to say that we will fill those in terms

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of promotion itself is that the number, first of all, is meaningless. If you look at now, there are currently around a hundred and thirty Sergeants that are white males and females on the books today, and then to merely have a number of six black Sergeants, and to look at the ratio that I have indicated in the statistics that I read earlier, we will see that merely suggesting that number will not at any point in time achieve the effectiveness that I think the consent decree is designed to achieve. And that would be true, too, in terms of Lieutenant. That is why the Guardians have proposed that some significant number, and the

number that came forth from that organization was twenty-five blacks be immediately promoted to the position of Sergeants, and that the next four Captains and the next eight Lieutenant slots be filled by black police officers. That way we think that you — in a sense you do have a rather dramatic impact, but you also have an impact that is sure to have some effect in terms of a realistic goal of having an integrated Police Department that truly reflects not only the work force, but the composition of the City of Birmingham.

Another objection raised by the Guardians, of course, goes to the issue of getting individuals

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as applicants into the Police Academy as it is now structured, and that issue is one of background investigations. The Guardians have been privileged on a number of instances to have had individuals to come before them, to indicate that they have been arbitrarily denied because of the way the background investigation is conducted by the City of Birmingham. The objection is that this process should be evaluated and substantially modified, so that the way it is conducted now, with its arbitrary questions, and with its arbitrary way of determining the physical fitness, would be subject to the scrutiny and some articulated standards that would insure that an individual would not be rejected to the Police Academy based on one individual asking an arbitrary question and not having to answer to anyone as a result of excluding that individual.

THE COURT: Well, doesn't the City decree provide a mechanism so that people who are disqualified by virtue of the background investigation would have an opportunity to know why and be heard?

MR. THOMPSON: This proposed consent decree does provide a mechanism. The only thing that we are not sure of is that even by giving an individual who has been rejected the right to reply to that,

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that you cannot avoid that simply by having a panel of some group that you can repose trust in in terms of not rejecting people in the first place.

THE COURT: I'm not sure I understand.

MR. THOMPSON: In other words, you do give the rejected individual, the grievant, the right to come back and to be told why he was rejected, or why she was rejected. That individual does have a right to express that, is that correct? Yeah.

What our position is, is that instead of having to subject that person to have to come back, that some group ought to be set up that we consider would be a group that is composed of black and white that would be fair in making their evaluations.

THE COURT: Well, is there not a provision for an affirmative action committee within the Police Department?

MR. THOMPSON: Presently there is, I think there is an individual who sets up to hear problems like that in the Police Department.

THE COURT: I'm referring to the consent decree, does it not provide for some such committee?

MR. THOMPSON: That's correct. There is a mechanism for that.

THE COURT: Well, if I understand you

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correctly, in asking for twenty-five black Sergeants immediately, you're asking that one out of every three black policemen be made a Sergeant?

MR. THOMPSON: Out of the present number that would be what it would amount to. The only other thing, Your Honor, is that we're saying that unless you have some significant numbers being made Sergeants, then you are back into the issue of tokenism, and it doesn't really make any difference whether you have three or six.

THE COURT: Thank you. Is there anyone here to speak on behalf of Johnny Morris, Jesse Sprayberry, B. R. Stevens, J. R. Davis, John Dipiazo, Juanita Eaton, or Barbara Buckland? They, of course, may speak on their own, as well as being heard through counsel.

All right. Other than what is stated by way of written objection, then the Court takes it that those objections are not otherwise being asserted in this hearing.

Mr. Miller, if you would come forward, please, sir.

MR. MILLER: First of all, I would like to thank you for my opportunity to speak. Thank you.

May it please the Court, Your Honor, I would

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like to more or less give my own statements as to why this has affected me. An unrelated case that has just recently been on file with the U. S. Court of Appeals out of the Chicago District, April 16, 1981, *Carl Parker, Jr. v. B & O Railroad*, this is a promotional process that was just handed down where — excuse me, I've never been here before — Carl Parker was passed over, a white man was passed over through promotion for a supervisor because of an affirmative action program, where they promoted three blacks ahead of him. He filed a suit, and he won his case.

And I would like to think that that would stand as far as the way the public view has changed, that we want the best qualified people for the job. And the way he won this is that he proved that his rights were trampled, the same way mine were, I feel.

I am employed by the City of Midfield as a police dispatcher. I took the Personnel Board test, I scored an 89.78. I was placed 318th on the list. With Judge Pointer's ruling I have been unable to be certified as a patrolman.

My wife worked when we were married. I went through school. I have not been able to finish. My wife worked hard, and I feel like my rights have

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been violated. I have not been able to achieve the goal which I set out.

THE COURT: Let me interrupt you just a minute. Mr. Miller, you said that you are now employed by the City of Midfield as a dispatcher, and that you have been seeking to become a patrolman. Is that for the City of Birmingham, for the City of Midfield, or —

MR. MILLER: That's for Jefferson County.

THE COURT: Within any jurisdiction within Jefferson County?

MR. MILLER: Yes, sir.

THE COURT: And the test that you are referring to was one of the earlier police officer tests, Deputy Sheriff tests?

MR. MILLER: Yes, sir.

THE COURT: Have you been certified to any employing agency?

MR. MILLER: No, sir, I have not. With the practice as has been handed down, and according to the Personnel Board, if they had gone with their final decision, I would have been certified as a patrolman, or somewhere in that capacity as a Deputy Sheriff. Otherwise, with the way things have gone, I have been set back, people have been put ahead of

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me that either have failed the test or scored below me.

I feel like my score was an achievement that I tried all of my life to follow up. I promised my family that. And I have been set back in the way things are going now. There's no way of telling when I'll be hired, if I will be hired.

Racial barriers have been put up through the judicial courts, and this can go on and on and on, to achieve a racial balance. I do not see how we can, with the Guardian's decision, or statements that there were forty black police officers in the

City of Birmingham in '79, and there are fifty-eight now, if we check our statistics through, I would like to know how many black police officers have got ten years or more experience. This is not only with blacks, this is also with whites. People tend to quit, pressure gets to you, the pay is not all that good.

Also, another aspect I would like to bring out is the breakdown. Right now this is only associated with blacks and whites, male and female. Eventually it's going to get to Cubans, Germans, Indians, short people, tall people, and also homosexuals. Eventually it's going to come to it. And I would like to know

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where the Courts would stand when it does come down to those other ethnic groups.

I myself, I can claim that I am Indian and possibly be hired. I can claim I am homosexual and probably be hired as a minority. A change in status would not be that hard.

A recent decision with the Equal Employment Opportunity Commission, where a Sally Rodriguez was being certified as a minority, it was brought to the question that she put on her application, a white female. A supervisor with the Equal Opportunity Commission said that she had to be qualified as minority with the name Rodriguez, that she could change it and be classified as a Mexican-American. To me there's no way to prove the difference. There's no way to prove that I am a white male, there's no way to prove that there is a black male.

I myself can go back through my records, trace my roots, as you would, and probably come up with some different kind of line that everybody is a minority in the United States.

I would like to see Judge Pointer either totally abolish the Personnel Board, let every municipality in Jefferson County, the City of Birmingham, set up their own hiring practices, or

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let the Personnel Board operate the way it's supposed to operate, the best qualified for the job.

When I took my test, on the back of my card it said you would be hired regardless of race, creed, color, or national origin. I took that test with the understanding that when I passed it they would take into consideration my score, and be placed on the list according to that, and not a two list, a black list, white list, male and female list.

THE COURT: When did you take the exam, Mr. Miller, that you are referring to?

MR. MILLER: The last one was in September of 1979.

THE COURT: Is that list still current? Are you still on it?

MR. MILLER: I'm still on the list. The way I have checked, now they are roughly somewhere in the two hundreds in the white list, and they have gone below the five and seven hundreds in the black list. And that's with, I understand, your ruling certifying one black candidate to every white, to every two whites. Thank you.

THE COURT: Okay. All right. Proponents of the consent decree?

MR. RITTER: Your Honor, I would first like

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to make some general comments on the two consent decrees, and then to address some of the specific objections to the decrees that have been raised.

Before I do that, it's my — we are assuming in our brief and in our comments here today that the Court has the benefit of the full trial record in the two trials that have been conducted to date, and that in reviewing the two consent decrees the Court can properly take notice of the trial record that has been developed to date.

THE COURT: I certainly will, and intend to take notice of that trial record. Whether you call that a benefit or not, I'm not sure whether the word is apt, but —

MR. RITTER: All right. Thank you very much.

Your Honor, we believe that the consent decrees that you have before you today for final approval are fair, reasonable and lawful. The decrees are designed to bring to a close over seven years of rather complex litigation and rather costly litigation between the parties. We developed a rather extensive trial record as a result of two trials and one appeal.

As we point out in our briefs, the law generally favors settlements, and this is particularly

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true in Title VII litigation where you have these kinds of social interests involved.

We believe to the extent that the two decrees contain affirmative hiring goals and promotion goals for blacks and women, that these goals are lawful, that they do not unlawfully discriminate against whites. The goals are contingent upon the availability of qualified applicants. They do not totally foreclose the hiring and promotion of white males, and they are temporary measures which are designed to end when certain minimum attainment levels are met.

So, we believe that under Supreme Court decisions and relevant Fifth Circuit law that the provisions of the decree, including the affirmative hiring and promotion relief, are lawful and proper.

Now, in addressing some of the specific objections that have been raised today, first with respect to the state of the law in the Fifth Circuit, I believe that the Court has the benefit of an earlier case involving the City of Jackson, in which the Fifth Circuit approved a consent decree that contained affirmative hiring goals for blacks and women, and that case is still good law in the Fifth Circuit, and we also believe that the *City of Alexandria* case is still good law, and that the

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decision of the Fifth Circuit to rehear en banc the *City of Miami* case does not affect its holding in the *City of Alexandria* case.

Your Honor, we don't believe that it's necessary for the Court, to approve these two decrees, to have entered findings on the record of unlawful discrimination against blacks and women. However, we do note that with respect to the entry level police and fire tests, that the Court has entered specific findings of fact and conclusions of law that have been upheld on appeal with respect to that part of the litigation.

We also have presented to the Court evidence that would suggest that there was unlawful discrimination against women after 1972 in a variety of positions, including the positions in police and fire.

As the Court may recall, the City and the Personnel Board had male only designations for police officer and firefighters after March 24th, 1972, and the Personnel Board also established certain minimum height requirements, which we contended had a discriminatory effect on women.

Without going in extensively to the trial record, we believe that it contains evidence of post-1972 discrimination against both blacks and women, and that while we don't believe that it's necessary

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to have that as extensive a record for the Court to approve these decrees, we would like to simply point that out for the benefit of the objectors.

As I said in my opening remarks, with respect to the affirmative relief provisions of the decree, we don't view the decrees as incorporating racial quotas, because it does not — the decrees do not totally foreclose the hiring or promotion of blacks and women. And we believe that the case law as I referred to amply supports those provisions of the consent decrees.

Furthermore, we don't believe it's necessary for the Court to find that there is present discrimination in order to approve remedies which are designed to correct for the effects of past discrimination.

However, again we would like to point out to the Court that the subject of the two trials concerned certain testing practices and other selection practices of the Personnel Board which were used and relied upon by the City of Birmingham, which were continuing, ongoing practices, so that we believe that there is evidence of present discrimination, or at least there was at the time of the two trials in the case.

With respect to the effect of the consent

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decree on high school education requirements, we would simply like to point out to the Court that during the second trial we presented evidence of the adverse impact of that requirement on blacks. In our judgment there was no showing of validity on the part of the Personnel Board to the high school education requirement, but in any event, the parties have, in settling the litigation, have decided not to further contest the issue of validity.

And so, we think that the adjustments that are being made in this selection standard are appropriate. And moreover, there are a number of Courts that have acknowledged the propriety of eliminating high school education requirements in firefighter-type cases as a remedy for past discrimination.

THE COURT: Could you come back for a moment to the sex designation in announcements subsequent to 1972? You said that there were announcements for male only positions in the Police and Fire Departments after 1972?

MR. RITTER: That's correct, Your Honor.

THE COURT: It's been now almost a year and a half since, or about a year and a half or more since the evidence was taken. Could you refresh

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my memory on that aspect of the evidence?

MR. RITTER: We have an exhibit in the record, Your Honor, I'm not sure of the number, that contains job an-

nouncements from the Personnel Board after 1972. I would be happy to get the number of that exhibit if the Court wishes it.

THE COURT: I would like to have that. I had a recollection that the evidence as related to that matter went back maybe to 1956 or '57, and there was some question as to whether it might have been into '59 or so, but that there wasn't anything after '72.

MR. RITTER: Your Honor, that was with respect to the racial designations in the job announcements. The Personnel Board ceased including white only restrictions in its job announcements in '57, but the male only restrictions continued past 1972.

THE COURT: Well, my recollection was that there were a few positions in which there was a male only designation, either because of the position such as juvenile correction officer, or that maybe there was a dispatcher for two or three jurisdictions, although not the City of Birmingham, that might have been after '72, although was unclear about that, and that I didn't recall anything about firefighters, or generally about police officers after '72. If

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there is an exhibit, if you could call that to my attention so that I could look at it.

MR. RITTER: Your Honor, it's Plaintiff's Exhibit 9, Plaintiff's Exhibit 9 and Plaintiff's Exhibit 11. I have a listing here of the jobs, but if the Court would just prefer to look at the exhibit, we could do it that way.

THE COURT: Well, perhaps if it's a very short list —

MR. RITTER: There are about ten or eleven different jobs for which there were post-1972 sex designations, including police officer and firefighter.

THE COURT: Perhaps you can give me a copy of that after we conclude the hearing this morning.

MR. RITTER: Again, Your Honor, I wish to stress that besides this kind of evidence of discrimination we also have a

variety of statistical evidence that will show that blacks and women even today are still substantially underrepresented in a variety of departments and jobs within the City, and that that evidence in our judgment alone would be sufficient for the Court to approve this kind of voluntary settlement between the parties.

THE COURT: Well, as I view it, the Court

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is confronted with two different concepts. One is the concept that there has been evidence showing evidence, whether or not it was ultimately accepted, or would be accepted by the Court, of discrimination. That largely, however, was related to discrimination against blacks. And the position of the Court, looking at a consent decree then that deals with that kind of problem is stated in various decisions. But, then there is the other problem of some relief in the form of goals for groups, and here I'm particularly talking about women, where there has probably been very little proof in the way of discrimination, and at most a showing of under-utilization, so to speak.

It seems to me here that the Court is in a different situation in terms of evaluating the rights of the parties to create goals, where the evidence has not perhaps shown discrimination, but only a failure to have employed at a certain level women. And it seems to me there are two different problems the Court has to deal with.

MR. RITTER: Your Honor, we would view — the evidence is certainly different, but in terms of the degree of discrimination, we don't view that that discrimination against women to be any less significant

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in terms of its effect than discrimination against blacks.

And besides the two exhibits that I have referred the Court to, we also presented to the Court other exhibits showing male only restrictions in a large variety of jobs other than the ones that continued after 1972, which were in place as recently as 1967 and 1968. So, what we have presented to the Court to

date is evidence that there was a wide variety of jobs in which there were male only restrictions in place as part of the Personnel Board job announcements and we would ask the Court to look at those exhibits also.

With respect to the Guardian's objections, Your Honor, in essence it's an objection that we didn't go far enough in the consent decrees to remedy the perceived discrimination against blacks. In our judgment, we think that that decree is adequate. To the extent that the Guardians would like to have twenty-five blacks immediately promoted to Sergeant positions, while that would perhaps bring the percentage of blacks in Sergeant positions up to something roughly equivalent to parody with respect to their percentage in the labor force, we're concerned that that kind of relief would totally

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foreclose the opportunity of whites to receive promotion during this limited period of time. And that raises, of course, legal concerns for us, so that in our view the kind of race-sensitive relief contained in these two consent decrees, which does not totally foreclose the opportunity for white males to obtain hiring and promotion with the City, is the more appropriate way to go, and we think it's lawful and Constitutional.

With respect to Mr. Miller's objection, we, of course, regret that he hasn't been able to obtain a job to date in a police position with the City. As I understand it, he is still on the eligibility list, so that there is still a possibility that he will obtain employment. However, I don't believe that there's any vested right on the part of any test taker to a job. They are all in competition with others for these positions. And the Court has already found that the test that Mr. Miller took did not have predicted validity, so it did not differentiate clearly at least as between those that would be better police officers than others. And the remedy that the Court included in its 1977 order was designed to foreclose any past discrimination that the Personnel Board may have used in those tests.

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So, we think the Court was certainly appropriate. It's been upheld on appeal. So, we think the relief provided in the decree, which is simply the incorporation of the Court's 1977 order, is certainly proper.

Your Honor, I have no further comments to make at this time. We would like — if I could have just a moment to consult with counsel, there is one other matter that we may wish to bring to the Court's attention.

Your Honor, we have no further comments to make at this time.

THE COURT: Are there any comments from other counsel?

MR. WHITESIDE: The Personnel Board has no comments, Your Honor.

THE COURT: I would like to ask the Personnel Board one question.

MR. WHITESIDE: Yes, Your Honor.

THE COURT: This is really with further inquiry concerning Mr. Miller's statement.

In what he had to say, it seemingly indicated, and perhaps he was not intending to do this, that a higher percentage of blacks were being certified for police officer positions than whites, when measured as against those taking the test.

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The decree of the Court, which was affirmed in relevant part by the Fifth Circuit, had directed that no higher percentage of blacks than whites be certified out of the Personnel Board.

MR. WHITESIDE: Your Honor, the certification right now is at applicant flow rates. The applicant flow rate as of 1979 was forty-six percent black. So —

THE COURT: Well, are there more than forty-six percent of those certified blacks, to your knowledge?

MR. WHITESIDE: No. No. No.

THE COURT: Okay.

MR. WHITESIDE: Within one or two decimal points.

THE COURT: But, in general, the percentage of blacks being certified is the same as the percentage of blacks who took the test, and the same with whites?

MR. WHITESIDE: That's true. The reason he was down at seven hundred on the list is that more of the blacks were at the bottom of the list.

MS. REEVES: Just briefly, Your Honor. I represent the Martin plaintiffs, and the Martin plaintiffs urge the approval of the City of

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Birmingham and the Personnel Board decrees for the same reasons that have already been expressed.

We would also like to call to the Court's attention that in the Martin case the action was filed on January 7th, 1974, and from 1974 to 1981 represents a long period of time. Although there have been two trials, and there have been orders from the Court to some degree curing or affecting what we believe to be rampant discrimination, that this order brings to the City of Birmingham, and through the Personnel Board, brings relief now.

We have in our very brief memorandum that we cited to the Court, brought to the Court's attention a footnote in the *American Airlines Stewards* case. It says, and I would call this to the attention in the context of Mr. Thompson's objections, in the Guardians objections. It may well be that minority members of the class will have to forego the full retroactive competitive seniority provided in *Franks*, so that the majority may acquire some benefits, and yet avoid the cost and uncertainties of litigation.

Of course, we can all speculate what relief might be awarded were we to continue with litigation for years to come. In the history of this case, it has been so complex, it has been well fought, it has —

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there have been a number of appeals, and were the case not settled we could certainly expect that, based on the past track record, we could expect that for the future. And we urge that as an important consideration for the Court.

Although it may be that this relief is not as full as the Court may award, yet it is relief now, and that in itself is of importance.

It may be that the Court would order less relief than we have, but that is the nature of a consent decree. No one does know.

We would point out to the Court, in *Williams v. Bethlehem Steel*, and also *United States v. Allegheny Ludlum*, that to the extent that the conditional class order is approved, that there remains relief for people who have not been conditionally included in the class order, and that for those people they still do maintain their individual remedy and their right to file an action. They would not be prohibited by any order which the Court would approve here.

Thirdly, we would point out to the Court that these decrees are intended to operate in tandem. It was a position that was urged by the plaintiffs all through the litigation that the cases be tried

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together, and we now think that we have achieved that which is workable by having at least for the City of Birmingham and the Jefferson County Personnel Board a joint operation of a joint process.

But, also the decrees have this benefit:

The decrees have a mechanism that also allows for independence, that is to say, should one decree not be workable, or should there be violations of one decree, the other defendant does not necessarily fall, or to put it from their perspective, they don't incur further back pay or financial liability. That in itself is a factor, and we believe an important feature of a decree which the Court could enter now.

We would also say that there are numbers of defendants. In the Martin case there is only one other defendant, that is to say, Jefferson County, but we believe that an entry of the decrees here has a salutary effect on other remaining litigation, and may encourage settlement with respect to the other jurisdiction in the Martin case.

I represent to the Court that the settlement negotiations have been long and they have been difficult. The United States and the private plaintiffs at sometimes have had differing interests, and yet this decree, as the Court knows, at least

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that the settlement negotiations have been long, while not knowing the terms of those negotiations, or the proposals, we would say that the negotiations have been at arm's length, and it represents the best that we can do under the circumstances.

There is with these two decrees a total amount of back pay of three hundred thousand dollars. That is not a world of money, but we have to consider municipal defendants and public defendants, and consider the public interest and that which we can do.

For those reasons we think that the decree is fair and just and reasonable. There is in this — for the reasons and the cases cited in our memorandum, and that of the Department of Justice, we would urge the Court to enter approval of the decree. Thank you.

MR. ADAMS: The Ensley Branch has no argument, Your Honor.

MR. ALEXANDER: Your Honor, we would like to be heard very briefly.

Your Honor, the proceedings this morning seem to have instilled a legal argument focusing largely on the propriety of the remedial goals and timetables in the decrees. The City has addressed those

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arguments at some length in its brief, and I do not want to burden the Court with hearing a regurgitation of those now.

I do want to comment a little bit on the practical aspects of the posture in which we find ourselves in. As Ms. Reeves asserted, the negotiations between the City and the United States, the private plaintiffs, in parallel with the Personnel Board, have been protracted and difficult. We originally apprised the Court that they would take about six weeks. They have taken a good bit longer than that. And that that effort, that time has been devoted to trying to reach a compromise that will satisfy all parties, as well as the interest of those who are objecting to the decree.

Obviously, as a compromise, we have not satisfied each of our parties, but we think it is a reasonable accommodation, and we urge Your Honor's approval.

The *Valentine* case cited in our memorandum sets forth the criteria for the approval of race-conscious remedies. We think that that is a good summary, and one which if this Court were to adopt which would compel approval of this decree.

The goals for both women and blacks relate

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to the percentage in the civilian labor force of Jefferson County. They are subject to the availability of qualified women and blacks, and with respect to positions that require professional license or degree, they are subject to amendment to affect the availability of those persons with the requisite qualifications.

As Mr. Ritter points out, whites and males are by no means foreclosed from promotion and/or hiring during the period of the decree, although it's evidence that blacks and females will receive some special considerations, which on behalf of the City we assert they are due.

The decree is temporary in nature. It contemplates not any long term changes in the operations of the mechanics of the Personnel Board and/or the recruiting process. But —

THE COURT: Well, let me interrupt you there. By language it's temporary, but it terms of the projected period of time for various things to be accomplished, do you have any estimate about the length of time that would be involved, given the rate of employment in various positions?

MR. ALEXANDER: I think that, Your Honor, depends, will vary dramatically depending upon the

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particular position. The decree is one for limited time, and to the extent we can attain success during that period, it would expire. To the extent we are unable to do so, to meet the goals of the private plaintiffs, or the United States, presumably it is a question for additional negotiation at that time, or perhaps some petitions on their behalf.

Finally, with respect to the *Valentine* criteria, there appears both in the Firefighters and in Mr. Miller's objections to be some concern about the qualifications of firefighters and police officers in the City of Birmingham. We share that concern. By adopting this decree we do not in any respect believe that we are abdicating our prerogatives to insist that firefighters and police officers be qualified to do the jobs they are selected to do. We believe that we can retain our standards, and at the same time correct what, as the evidence before Your Honor will indicate, are obvious racial and sexual imbalances.

We have been a tag-along defendant to date, we have not been active in either of the trials. We are not as familiar as Mr. Ritter and Ms. Reeves, Mr. Whiteside with the material offered. We have had little trouble, however, in dealing with the

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question of remedial relief with respect to women, which Your Honor has isolated.

The evidence handed to Your Honor this morning will reflect that of six hundred and thirty persons who are in the Firefighting Department of the City of Birmingham, eight are women. Those women are assigned to office and clerical posi-

tions. We think that that is a matter which we by agreement are legitimately entitled to address.

Finally, as we assert in our brief, the fact that we are parties with the United States in this agreement provides to us an additional measure of protection, a presumption of validity, if you will, for the reasons that Judge Goldburg points in the footnote in the *City of Miami* case, the United States is presumably more disinterested, although not necessarily obviously, than private counsel, who may be suspect of having other considerations involved. By saying that I certainly don't impugn any parties to this litigation. But, we do think that the fact that the United States is a party to this settlement is indeed a helpful factor.

As we also indicate in our paper filed before the Court, we believe the burden is on the objectors to come forward and demonstrate either by

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legal argument or evidence why the decrees should not be put into effect.

Certainly there has been no evidence to support a variety of the assumptions in both the Firefighters and Morris objections, and for that matter the objections of the Guardians.

One final comment: If I understand the Firefighters' position, they would say that the City of Birmingham is not entitled to attempt to resolve this difficult matter absent a finding of discrimination by this Court. As Judge Thornbury indicated in his concurrence in *Miami*, that puts an extraordinary and difficult burden on the City, who is a defendant. The law is such that we must not only pay our own attorneys, which I personally don't object to, but if we lose we must also pay for the other side as well, at least for the private cases. The cost of litigation is extraordinary in these cases. And while the City of Birmingham has put forward a great deal of money over a period of time, that pales in comparison to what it could anticipate if it were in effect required to go to trial.

The Firefighters argue that Your Honor sends us back to the bargaining table. I think that this, while I'm not saying that some minor suggestions

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might not be accommodated, but I think that the compromise that is before the Court represents in many respects the limits to which the various parties were to go.

Ms. Reeves asserts that three hundred thousand dollars is not a world of money. The City of Birmingham has a very different view about that, and we think that certainly the Court is entitled to consider the fact that if the Court sends us back to the bargaining table it may well be sending us back to necessary litigation. Thank you.

THE COURT: I have a couple of questions aimed at the City. There's no provision in the City consent decree dealing with weight-height requirements comparable to that in the Personnel Board, in that the Personnel Board consent decree specifically indicates that Class A, B, and C physical standards may be imposed provided the height-weight aspects of those are disregarded. The City's consent decree simply says no height and weight requirements.

MR. ALEXANDER: — requirements which would have an adverse impact.

THE COURT: Now, I'm not sure what the distinction is, and particularly as it relates to the question of strength requirements of strength requirements for certain

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jobs, what the parties are really saying.

MR. ALEXANDER: As I interpret the City's decree, and I indicate this is strictly the City's view, that the City would not impose any height or weight requirements absent some demonstration that that had a valid job related goal, where there was an adverse impact, as I think we could probably but not necessarily expect with respect to women.

THE COURT: Well, to be more specific, do you understand that the physical standards, Class A, B, and C, as may be imposed under the Personnel Board, would relate to matters of strength, physical strength, which in turn might be utilized by the City, for example, in certain firefighting positions?

MR. ALEXANDER: I really can't answer that question, Your Honor. I am not familiar with it.

THE COURT: Perhaps the Personnel Board or the United States can respond to it.

Let me tell you the other comment or question that I have about the City consent decree, and that relates to paragraphs 10-A and 10-B. I am concerned, as was really presented in a letter from the Personnel Board, as to really what that 10-A and 10-B means specifically as it relates to the City's reserved right to go outside of certification lists.

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MR. ALEXANDER: What the City intends, and as is evident, there may be some area of disagreement among the codefendants, is this: That it would request the Personnel Board to certify to it applicants with gender and racial preferences consistent with the goals we have stated. That's step one.

To the extent that the Personnel Board either fails or refuses to do that, then the City through its own personnel organization would recruit and seek women or blacks to meet a particular requirement. It would then send those persons to the Personnel Board and request that the Personnel Board certify them through the normal process.

THE COURT: Let me use this as an illustration: Suppose the City of Birmingham wanted two police officers, it would be unusual simply to be asking for two, but that would typically mean you would have what, five, four people certified to fill those two positions? You've got a goal for certification and for hiring of, what, fifty percent? Suppose the Personnel Board responds and gives you the names of two blacks and two whites; suppose the City finds that the two whites who were certified are demonstrably better qualified

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than the two blacks who are certified, what is your view in terms of what the City can do under this decree?

MR. ALEXANDER: I think that the City would be required over a period of time to see to it that the racial goals were met. Assuming that the demonstrable qualifications were assessed by job-related standards that cause the plaintiffs no difficulty, and further assuming that the blacks were not minimally qualified in some view of the City, then we would take the whites. We would try to balance over a period of time to get that goal.

Assuming that both the whites and the blacks were both qualified, but assuming by some standard, and it's a little bit difficult for me to put it in a factual context, but some standard the whites were perceived to be better, if the blacks were perceived minimally qualified, and we required additional blacks to meet our goals, then we would take them.

THE COURT: Suppose the blacks certified from the Personnel Board declined appointment, you selected them, they declined appointment, you've still got on my hypothetical two whites who have been certified, can you then go outside the Board and in effect directly recruit a black?

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MR. ALEXANDER: I think that we would take the position that we could recruit a black, but we would refer the black to the Personnel Board, then it would be incumbent upon the Personnel Board to determine whether recruited black or blacks met the various criteria.

THE COURT: Do you view these paragraphs as in some way giving the City the right to conclude that those certified by the Board are not in fact qualified?

MR. ALEXANDER: No different than we do now, Your Honor. The answer is yes. We think that the Personnel Board and the City look at different criteria.

THE COURT: Well, you would not attempt to utilize the provisions of paragraph 10 to give you any powers with respect to rejection of Board-certified persons that you do not already have?

MR. ALEXANDER: Yes, sir.

THE COURT: That is, by treating them as not qualified?

MR. ALEXANDER: Yes, sir.

THE COURT: Okay.

MR. ALEXANDER: I would emphasize, Your Honor, and recognizing there is some controversy about

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these provisions of the decree, as the Court is aware, I would emphasize that it's a, it's an overriding position. That's how we refer to it in our brief. And one would hope in the perfect world that we would never have to utilize it. I don't know whether that's true. I don't know whether either Mr. Whiteside or I can comment that at some later point there might be some dispute with respect to its operation in a particular case. I obviously don't think we can do that. But, the City has found itself in a position, as we say in our brief, where the recruiting practices of the Board have cost it money, if you will. That's not putting off on the Board, it's not meant to be. But, to the extent that the 10-B override provisions would prevent the City from incurring additional liability with respect to the placement of either blacks or women, we think it's a very necessary part of the decree.

THE COURT: Perhaps some counsel for the proponents in a better position to comment could address the question of strength requirement.

MR. RITTER: Your Honor, I would just like to comment briefly on that.

I don't have the Class A, Class B, and

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Class C physical requirements with me. It's my understanding that those requirements do not specifically address any strength test that may be given by individual fire departments as a selection criteria for firefighters. They are more in the nature of general medical standards for various types of jobs. Now, I could be wrong on that, and Mr. Whiteside is here to comment further on that.

I believe that if there is a strength test given by the City of Birmingham Fire Department, or by other fire departments, and if the Personnel Board is involved in the development of that test, and I'm not sure that they are, then we believe that the early paragraphs of the consent decree with the Personnel Board dealing with selection standards generally would cover that. And if it turns out that the strength test is having an adverse impact on women, then we would assume that the Board would have some evidence to show that that test is content valid, if the Board is involved in any way with those kinds of tests.

Quite frankly, Your Honor, I don't believe the parties were specifically focusing on the tests given for firefighters in negotiating those two parts of the consent decree that you have referred to.

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But, that would be my reading of the decrees, if this in fact became a problem during the operation of the decrees.

MR. WHITESIDE: May I argue, Your Honor? Your Honor, the height and weight — there is no maximum or minimum height and weight standards under the Class A, B, and C physicals, but the Class A, B, and C physical standards do eliminate certain percentiles, the extreme percentiles of both males and females, about the tail-end, if you take a bell curve, with ten percent on each end are the males and females. Their physical or their lack of physical standards are such that they may not have the strength or endurance to be able to meet some of the requirements for either police officer or firefighter, or anybody else under Class A standards.

But, we do not have a strength test as such. That is a problem. The City of Birmingham's decree and our decree do not measure in that area.

I am confident that we will be able to work it out and I don't think that will cause a problem.

It's the same thing with paragraph 10, we view paragraph 10 as an escape mechanism for the City of Birmingham in the event the Personnel Board fails to live up to the terms of its consent decree.

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We don't view it as a, I think as I stated in my letter, an end run around the Personnel Board's merit system.

THE COURT: Do you view the decrees as precluding the use of a strength test if that strength test were found to have adverse impact on women?

MR. WHITESIDE: No, I don't.

THE COURT: For a particular job?

MR. WHITESIDE: At least not under the Board's decree. Now, I don't want to speak for the City's decree, because I wasn't involved in the negotiations on that. But, there are several references in the Board's decree that allows the use of any test that has adverse impact, if it can be demonstrated to meet the requirements of the guidelines. We may have placed an additional burden. I think in some cases we have to refer to the Justice Department first on some selection devices. But, no, I do not.

THE COURT: All right. Any further comments or questions?

MR. RITTER: Your Honor, just for the benefit of the Court, I would like to refer the Court to a couple of other exhibits that we put in the record at the second trial dealing with discrimination against women, Plaintiff's Exhibit 8 and Plaintiff's

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Exhibit 148.

And also I would like to refer the Court to pages 110 to 124 of the Plaintiff's post-trial brief in the case that contains a discussion of that evidence.

THE COURT: Is there any further comment by the objectors?

MR. FITZPATRICK: If I may speak from here, sir. Mr. Ritter stated that he relied on *U. S. v. Miami* and *U. S. v. City of Jackson*. I think we have said too much about *Miami* already. As far as the *City of Jackson* goes, my reading of this case, it does indicate in a footnote that there were quotas involved in the consent decrees there, although it's apparent from a reading of the case that that was not the subject of the appeal. The question is still open.

THE COURT: All right. Before I close the hearing, is there anyone here to speak on behalf of Johnny Morris, Jesse Sprayberry, B. R. Stevens, J. R. Davis, John Dipiazo, Juanita Eaton, or Barbara Buckland, or are they here to speak on their own behalf?

The Court will take under submission the question of whether or not to approve the consent

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decrees. I will receive any supplemental brief, but would ask that it be filed by Wednesday afternoon late if at all possible. I would like to be able to deal with the question by the end of the week.

I would also suggest that a proposed, that is, a form of order be drafted by the parties if the Court should ultimately approve the decree. I say that because there are certain technical aspects of the order, among which is that it's not a final order with respect to at least one aspect of the case dealing with certain monetary liability, where there are other provisions, and because of the triggering mechanism that the entry of the judgment would have.

That also might mean, however, something on the nature of a 54(b) certification notwithstanding those other aspects.

In any event, I would ask the parties at least to get together and consider, if you've not already done so, the format of a judgment if the Court should rule in favor of the proponents of the settlement.

Insofar as the question of intervening by the Firefighters with respect to the decree, certainly you may file such a motion to intervene. It would be my expectation frankly to deny that motion for

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intervention as untimely.

The matter as it relates essentially to the Firefighters and the Firefighters exam has been going on a long time. We have even had one trial and an appeal of that decision, and that's really the core of the items that the Firefighters are complaining about. And so, I just say that while I don't foreclose you from filing the motion for intervention, it would be my view that I probably would deny it as being untimely.

MR. FITZPATRICK: I understand that, sir.

THE COURT: All right. With that then, the matter is taken under submission.

END OF PROCEEDINGS

[Certificate omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA *Plaintiff,* v. JEFFERSON COUNTY, *et al.*, *Defendants.*	CIVIL ACTION NO. CV 75-P-0666-S
JOHN W. MARTIN, *et al.*, *Plaintiffs,* v. CITY OF BIRMINGHAM, *et al.*, *Defendants.*	CIVIL ACTION NO. CV 74-Z-17-S
ENSLEY BRANCH OF THE N.A.A.C.P., *et al.*, *Plaintiffs,* v. GEORGE SEIBELS, *et al.*, *Defendants.*	CIVIL ACTION NO. CV 74-Z-12-S

AFFIDAVIT OF BILLY GRAY

My name is Billy Gray. I am a lieutenant in the Birmingham Fire Department. I am President of the Birmingham Firefighters Association No. 117. When the above referenced litigation was commenced in 1974, I consulted with Mr. Joseph Curtin, Director of the Personnel Board, concerning the status of the Birmingham Firefighters Association and the Firefighters in general, as far as the above referenced litigation is concerned. We expressed to the Personnel Board our concern that the interest of the firefighters and of other City employees be adequately represented in resisting the claims of the

Government and other persons in these cases. We were assured that the Personnel Board would defend these cases vigorously. Relying on the Personnel Board, the Firefighters did not petition the Court for status as parties in the litigation.

During the intervening years in which these suits have been tried and appealed, we kept in contact with the Personnel Board and assisted them by supplying pertinent data requested by them.

The proposed consent decrees which are presently before the Court are the first instance in which the interests of the Personnel Board and the Firefighters have become opposed to one another. The Firefighters desire to intervene in this action solely for the purpose of contesting the legality of the proposed consent decrees. Neither I nor the Firefighters were aware of the negotiations which were taking place between plaintiffs and defendants in these cases until the formal notice of the consent decrees was given.

This 4th day of August, 1981.

/s/ Billy Gray
Billy Gray

Subscribed and sworn to
before me this 4th day
of August, 1981.

/s/ Notary Public
Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA, *Plaintiff,* v. JEFFERSON COUNTY, *et al.*, *Defendants.*	CIVIL ACTION NO. CV 75-P-0666-S
JOHN W. MARTIN, *et al.*, *Plaintiffs,* v. CITY OF BIRMINGHAM, *et al.*, *Defendants.*	CIVIL ACTION NO. CV 74-Z-17-S
ENSLEY BRANCH OF THE N.A.A.C.P., *et al.*, *Plaintiffs,* v. GEORGE SEIBELS, *et al.*, *Defendants.*	CIVIL ACTION NO. CV 74-Z-12-S

MOTION TO INTERVENE

Pursuant to Rule 24, FRCP, BIRMINGHAM FIREFIGHTERS ASSOCIATION 117, BILLY GRAY and Tommy Sullivan petition the Court to intervene as parties in the above-captioned litigation on the side of the defendants. In support hereof, intervenors state:

1. Birmingham Firefighters Association 117 is a labor association of firefighters employed by the City of Birmingham Fire Department. It represents the interests of the majority of the presently-employed firefighters of the City of Birmingham,

negotiates on their behalf, and is duly authorized to represent the interests of the firefighters of the City of Birmingham.

2. Billy Gray is a firefighter lieutenant in the Birmingham Fire Department. Gray is a white male. He has served the currently necessary time-in-grade to take the test to become a captain in the Fire Department. He presently contemplates applying to be certified as a candidate for captain in the Fire Department. He has a material interest in having the most-qualified persons possible as his co-employees in the Fire Department.

3. Tommy Sullivan is a firefighter with the Birmingham Fire Department. Sullivan is a white male. Sullivan has built up several years seniority in the Fire Department. The provisions of the proposed Consent Decrees will materially affect the relative value of Sullivan's seniority.

4. Intervenors have material and real interests in the transactions which are the subject of this litigation. Specifically, the proposed Consent Decrees will have a material impact upon the firefighters of Birmingham in that said Decrees will materially affect the qualifications of the future co-employees of intervenors, the provisions of the Decrees will constitute discriminations against intervenors on the basis of race and sex, the Decrees will affect the potential advancement in grade of currently employed firefighters, the Decrees will materially affect the level of on-the-job safety of Birmingham firefighters, the Decrees will affect the quality of service provided to the public, and the Decrees will adversely affect substantive rights of intervenors protected by Title VII of the Civil Rights Act and the Constitution of the United States.

4. Intervenors will fairly and adequately represent the interests of currently employed Birmingham firefighters.

5. The present parties to this action do not now fairly and adequately represent the interests of intervenors. The Personnel Board formerly represented the interests of these parties. The Personnel Board's position in these cases has now become adverse to that of these parties.

6. The present disposition of this action without intervenors as parties may as a practical matter impair or impede their ability to protect their interests relating to the transactions which are the subject of this litigation.

7. Intervenors submit the Affidavit of Billy Gray in further support hereof.

WHEREFORE, your petitioners request leave to enter on the side of the defendants in the foregoing actions in order to adequately protect their interests.

/s/ W. W. Conwell
W. W. Conwell

/s/ Raymond P. Fitzpatrick, Jr.
Raymond P. Fitzpatrick, Jr.
Attorneys for Intervenors

OF COUNSEL:

FOSTER & CONWELL
2015 Second Avenue North
Birmingham, Alabama 35203

[Certificate of Service, dated August 4, 1981, omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA, *Plaintiff,* v. JEFFERSON COUNTY, *et al.*, *Defendants.*	CIVIL ACTION NO. CV 75-P-0666-S
JOHN W. MARTIN, *et al.*, *Plaintiffs,* v. CITY OF BIRMINGHAM, *et al.*, *Defendants.*	CIVIL ACTION NO. CV 74-Z-17-S
ENSLEY BRANCH OF THE N.A.A.C.P., *et al.*, *Plaintiffs,* v. GEORGE SEIBELS, *et al.*, *Defendants.*	CIVIL ACTION NO. CV 74-Z-12-S

REPLY BRIEF OF FIREFIGHTER OBJECTORS

The Firefighters appreciate the leave granted to file this Reply. The Court appeared to be interested in reasons why certain injunctive provisions of the proposed Consent Decrees could not be agreed to by the parties. We will discuss these points first:

I. High School Education Requirement

The proposed Decrees provide for the dropping of the high school education requirement for all City employees.

Alabama Code 1975, § 36-21-46 prescribes minimum standards for applicants and appointees for any law enforcement officer position in Alabama. The education requirement is as follows:

> The applicant shall be a graduate of a high school accredited with or approved by the State Department of Education or shall be the holder of a certificate of high school equivalency issued by general educational development.

That statute alone is enough to find the provision in the Decrees illegal when there is no finding that the requirement of a degree discriminates on the basis of race and sex.

Until 1980, Code 1975, § 36-32-7 prescribed the same requirement for firefighters in Alabama. Act 809 of the 1980 Regular Session of the Alabama Legislature modified § 36-32-7 so as to require firefighters to meet the employment qualifications of the appointing authority. Although we question the validity of Act 80-809 on state constitutional grounds (inadequate title renders the Act void under Section 45 of State Constitution), we submit that the regulations of the State Department of Public Safety and City Fire Department necessitate a high school diploma requirement for the following reasons:

> 1. All City firefighters, as part of their initial training, are required to become certified as medics under the Regional Training Institute of the University of Alabama in Birmingham. The State Department of Public Safety, pursuant to Code 1975, § 22-18-1, et seq., prescribes rules and regulations concerning medics. Pursuant to state law, Emergency Medical Services Regulation 302.2 states: "All licensed personnel should have completed high school." In addition, the Emergency Medical Services program, required of all firefighters, is an accredited University of Alabama in Birmingham college level course program for which all applicants must submit a high school transcript before they will be admitted.
>
> 2. The efficient functioning of a firefighter requires certain basic knowledge to which a high school

diploma is rationally and reasonably related. All firefighters must become qualified to operate the pumper system on a fire truck. The operation of this system requires the employment of complex hydraulic formulas. All firefighters must comprehend scientific gas laws. Firefighters must have a basic knowledge of chemistry in order to deal with emergency situations on the highways involving trucks carrying dangerous chemicals.

3. The hiring of persons who are not adequately equipped with basic educational skills constitutes a safety hazard to the persons who are actually hired, as well as the present firefighters.

The high school diploma requirement was not shown to have an impact upon the alleged discriminations against blacks and females in the City case. Without such a showing there is no power in this Court to amend the provisions of certain state statutes and regulations which require high school diplomas of certain City employees.

As previously stated, Code 1975, § 36-21-46 prescribes requirements for police officers. Subsection (a)(5) requires:

(5) Character. The applicant shall be a person of good moral character and reputation. His application shall show that he has never been convicted of a felony or a misdemeanor involving either force, violence or moral turpitude and shall be accompanied by letters from three qualified voters of the area in which the applicant proposes to serve as a law enforcement officer attesting his good reputation.

It was stated above that City firefighters are required to take medic training. Medics are required to administer controlled substances during the course of their work. Code 1975, § 20-2-54 prohibits persons who have been convicted of violation of state or federal felonies from administering controlled substances.

We respectfully urge to the Court that the language in the Decrees does not reasonably conform to the strict requirements of the applicable statutes.

III. Time in Grade Requirements

Time in grade requirements are reasonably related to the need for supervisory personnel to have adequate on-the-job experience. It is submitted that the defendants' desire to drop this requirement is not the result of a desire to change their personnel policies, but instead is forced upon them under the threat of a great potential exposure under the claims of the plaintiffs. There was no showing at trial that the time in grade requirements continue to foster the alleged discriminations by the City.

IV. Quotas for Females

We again reiterate that there has been no adequate showing that the alleged discriminations conducted by the defendants discriminated against females. Without ongoing, present discrimination being shown, the injunctive relief prescribed by the Decrees is improper. *Myers v. Gilman Paper Corp.*, 544 F.2d 837 (1977).

V. Quotas in General

We stand firm on our contentions at the August 3, 1981 hearing that the law is not settled in this Circuit concerning the power of a municipality to set hiring and promotional goals based on race and sex. The question is currently pending before the Fifth Circuit, en banc, in *U.S. v. City of Miami,* Case No. 77-1856 (submitted January 12, 1981). Without clear authority to the contrary, this Court should not permit the City and Personnel Board to discriminate on the basis of race and sex. The provisions of the decrees constitute state actions which deny the equal protection of law. We urge the Court to also consider the excellent constitutional arguments made in *Carson v. American Brands, Inc.*, 446 F.Supp. 730 (E.D. Va. 1977) and Justice Rehnquist's dissent in *Steelworkers v. Weber,* 443 U.S. 193, at 219-255 (majority opinion expressly noted case did not involve state action - unlike the instant case). What the plaintiffs ask the Court to do is indeed a landmark—they request this Court's stamp of approval on a state action which discriminates on the basis of race and sex. The firefighter objectors respectfully request the Court to refuse to do so.

These objectors have filed a Rule 24 Motion To Intervene. We feel that intervention is necessary to preserve our rights to object to the provisions of the Decrees. An appropriate brief in support of the Motion To Intervene will be supplied to the Court prior to the setting of the Motion.

These objectors appreciate the Court's consideration of their arguments.

Respectfully submitted,
/s/ W. W. Conwell
W. W. Conwell

FOSTER & CONWELL
2015 Second Avenue, North
Birmingham, Alabama 35203
(205) 322-6617

[Certificate of Service, dated August 5, 1981, omitted]

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

UNITED STATES OF AMERICA, *Plaintiff,* v. JEFFERSON COUNTY, *et al.*, *Defendants.*	CIVIL ACTION NO. CV 75-P-0666-S and related cases CV 74-Z-0012-S CV 74-0017-S

ORDER GRANTING, IN PART, MOTION TO INTERVENE AND GRANTING INTERVENORS' APPLICATION FOR TEMPORARY RESTRAINING ORDER

The motion of Birmingham Fire Fighters Association, Birmingham Association of City Employees, Billy Gray, and Gerald L. Johnson, individually and representatively, to intervene in the above-styled causes is granted only for the limited purpose of considering the intervenors' application for a temporary restraining order. In all other respects and for all other purposes the motion to intervene is deferred by this court for later consideration.

Intervenors' motion to consolidate is deferred in whole for later consideration by this court.

As to intervenors' application for a temporary restraining order, the court concludes that there is a substantial likelihood that intervenors will be able to prove that Fred L. Plump was improperly certified by the Jefferson County Personnel Board. The court therefore concludes that it is appropriate to restrain the City of Birmingham from appointing Plump a fire lieutenant pursuant to the Board's certification until August 31, 1983, which date is acknowledgedly more than ten (10) days from the date of this Order, but to which extension the parties have agreed, understanding that no prejudice will attach as a result of the extension. Accordingly, it is hereby ORDERED that

intervenors' application for a temporary restraining order be GRANTED, pending further consideration by this court in supplemental proceedings, until August 31, 1983.

This the 5th day of August, 1983, at at [sic] 2:49 p.m. o'clock.

/s/ Sam C. Pointer, Jr.
United States District Judge

CLERK'S COURT MINUTES

United States District Court

FOR THE

NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CASE NUMBER:

UNITED STATES OF AMERICA, Plaintiff,

CV 75-P-0666-S

and related cases

BIRMINGHAM FIRE FIGHTERS ASSOCIATION 117; et al, Intervening Plaintiffs,

vs.

JEFFERSON COUNTY; et al, Defendants.

This action came on for hearing on September 14, 1983, before the Court, Honorable Sam C. Pointer, Jr., United States District Judge, presiding, and the issues having been duly heard,

It is ORDERED and ADJUDGED that pursuant to the findings of fact and conclusions of law dictated into the record by the Court, the application of the intervening plaintiffs for a temporary restraining order is denied.

FILED

SEP 15 1983

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
JAMES E. VANDEGRIFT, CLERK

ENTERED

SEP 15 1983

dlm

DATED: September 14, 1983

Birmingha, , Alabama

Court Reporter: Mayra B. Malone

JAMES E. VANDEGRIFT, CLERK

BY: Linda P. Clark

DEPUTY CLERK