

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ALABAMA  
Southern Division**

UNITED STATES OF AMERICA, )  
Plaintiff, )

v. )

JEFFERSON COUNTY, et al., )  
Defendants. )

Civil Action No. 75-P-0666-S

JOHN W. MARTIN, et al., )  
Plaintiffs, )

v. )

CITY OF BIRMINGHAM, et al., )  
Defendants. )

DEC 29 1995

Civil Action No. 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. 74-Z-12-S

**ORDER MODIFYING THE  
CITY OF BIRMINGHAM CONSENT DECREE**

**I. INTRODUCTION**

1. The Consent Decrees in this action entered by the Court in 1981 resolved all issues raised by the complaints of the Martin plaintiffs, the N.A.A.C.P. and the United States in these consolidated cases. Those complaints alleged that the City of Birmingham (hereinafter "the City")

and the Jefferson County Personnel Board<sup>1/</sup> (hereinafter "the Personnel Board"), together with other named defendants, had engaged in a pattern or practice of discrimination against blacks and women with respect to recruitment, hiring, assignment, promotion, discipline, and other terms and conditions of employment. The 1981 consent decree with the City of Birmingham in this action (hereinafter "the City Decree") was entered following a fairness hearing. The actions the City took pursuant to the City Decree were challenged by a group of white male employees in the cases consolidated as In Re: Birmingham Reverse Discrimination Employment Litigation. Since the entry of the City Decree, changes in the workforce of the City, and in the entry-level hiring and promotional procedures used by the defendants, required that the City Decree be modified.

2. In 1990, the United States and the Wilks Intervenors filed motions for modification of both the Personnel Board and the City Consent Decrees. In 1991, after a hearing, the District Court issued an order dated May 20, 1991 granting those motions in part and denying them in part. Upon motions of the United States, the Martin and Bryant Plaintiffs and the City, the District Court amended its May 20, 1991 Modification Order by its September 25, 1991 Order. Both the United States and the Wilks Intervenors appealed the District Court's partial denial of their motions to modify.

3. In a revised opinion and order issued August 25, 1994, upon rehearing, the Eleventh Circuit affirmed in part, reversed in part and vacated in part this Court's May 20, 1991 and September 25, 1991 modification orders. Ensley Branch N.A.A.C.P. v. Seibels, 31 F.3d 1548 (11th Cir. 1994).

4. Pursuant to the mandate of the Court of Appeals for the Eleventh Circuit, the 1981 City Decree, as amended, is hereby amended as set out in this Order. The original provisions of the City Decree remain in force unless specifically amended herein. As used in this order the terms "party" or "parties" refer to the plaintiffs and defendants who are parties to the 1981 City Decree and the classes certified to participate in the modification proceedings (i.e., the Wilks and Bryant classes).

## II. GENERAL PROVISIONS

5. The long term objective of the parties through the City Decree and this Order is to ensure that any and all unlawful barriers to employment, assignment, and promotion that have existed for blacks and women are removed, that any present effects of past employment discrimination are fully remedied, and that equal employment opportunities with the City are available to all persons, regardless of race or sex, as required by Title VII of the Civil Rights Act of 1964, as amended.

6. Paragraphs 2 and 5-10b of the City's 1981 Consent Decree, as well as this Court's Orders of May 20, 1991 and September 25, 1991 are hereby vacated and replaced by the provisions of this Order.

## III. HIRING AND PROMOTION

---

1. The Jefferson County Personnel Board ("the Board") is an entity independent of the City, created by Alabama law to screen, test and certify candidates that are hired or promoted by participating jurisdictions in Jefferson County.

7. The City shall use its best efforts to develop and implement lawful non-discriminatory hiring and promotion procedures within the next four years. Applicants certified to the City will be considered without regard to their race or sex.

8. It shall be the City's responsibility to ensure that each selection procedure<sup>2</sup> required or used by the City shall either: (1) have no adverse impact on the basis of race or sex as defined by the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607 *et seq.* (1994), (hereinafter "the Uniform Guidelines"); or (2) be job related for the job classification(s) in question and consistent with business necessity, in accordance with Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, the Uniform Guidelines and other applicable Federal law.<sup>3</sup> If a selection procedure or combination of selection procedures is used by the City to rank candidates, the parties and the Court will consider the candidates' relative ranking, and the actual effect of that ranking in determining whether the procedure has adverse impact for that use. In accordance with the Uniform Guidelines, as part of its consideration of the job relatedness and validity of any selection procedure, the City shall conduct a reasonable investigation of suitable alternative selection procedures and explore suitable alternative methods of using the selection procedures which have less adverse impact. Whenever the City or any party identifies a race and gender-neutral selection procedure that has less adverse impact than a selection procedure required by the City and that alternative procedure is also agreed by the parties to this Order to be job related for the job classification in question and consistent with business necessity in accordance with applicable law, such alternative selection procedure shall be used by the City, absent good cause shown.

#### IV. REVIEW OF CITY SELECTION PROCEDURES

9. Within 60 days from the entry of this Order, for each selection procedure (other than personal interviews) utilized to screen or select persons for hire or promotion in City employment, the City will provide the following information since January 1, 1990 (to the extent that information is known to or maintained by the City).

(a) a description of the selection procedures, the source and author of each selection procedure, the time period during which it has been in use, any changes in the selection procedures since January 1, 1990, and the job classification(s) for which it is used;

(b) the name, social security identification number, race and sex of each candidate participating in the selection procedure, the performance (including any scores) of each candidate on each step of the selection procedure, final scores and final ranking, to the extent applicants are ranked; (2) whether each candidates was excluded from any portion of the procedure and why; (3) whether the applicant failed to complete any stage of the selection

---

2. "Selection procedure" as used in this Order is defined as any measure, combination of measures, or procedure used as a basis for any employment decision, including the full range of assessment techniques from traditional paper and pencil tests, performance tests, training programs, or probationary periods and physical, educational and work experience requirements through informal or casual interviews and unscored application forms. See Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.16 (Q).

3. For all purposes relevant to this Order, adverse impact shall be defined as it is the Uniform Guidelines. However, the fact that the initial determination of adverse impact is to be made pursuant to the methodology outlined in the Uniform Guidelines will not preclude a party's use of different methodology in any resulting litigation.]

procedure(s); and (4) the selection procedure(s) or part thereof that the applicant failed, if any; and

(c) any documentation reflecting the operation of the selection procedure, the identification of the successful candidate(s) by name, social security identification number, sex, race, job classification to which he or she has applied, appointment or promotion date and whether the appointment was made pursuant to a goal in the City Decree.

(d) whether or not the City has completed a job analysis and/or a validation study for each of these selection procedures.

To the extent that any of this information is maintained in machine-readable form, the City will provide it to the parties in that form. Upon request of any party and to the extent it is available, the City shall provide data prior to 1990 for any job classification.

10. Within 60 days of the entry of this Order, the City shall submit to the parties the following information for each job classification in City employment to the extent this information is maintained by the City in machine readable form:

(a) the name, social security identification number, race, sex, job classification, job classification code, certification number and date of hire or promotion of each person hired or promoted by the City since January 1, 1990; and

(b) the name, social security identification number, race, sex, job classification, job classification code, certification number and disposition of each person certified by the Personnel Board to the City since January 1, 1990.

Upon request of any party, the City shall provide additional data for any job classification, to the extent it is available, including data that is not in machine-readable form. The parties to this Order agree to limit such requests to those job classifications where a party has a good faith desire to obtain additional information to evaluate the adverse impact of the City's selection procedures.

11. Within sixty (60) days of the parties' receipt of the City's submissions pursuant to paragraphs 9 and 10, including any supplemental submission pursuant to a request for additional information, the United States, the Martin/Bryant Plaintiffs and the Wilks Intervenors shall each submit to the City a list of up to twenty-five job classifications. Within ninety (90) days of its receipt of those lists, for each of those job classifications, the City shall provide the following information to the United States, the Martin/Bryant Plaintiffs and the Wilks Intervenors:

(a) whether or not a race or gender conscious goal was used by the City for any period since January 1, 1990 for that job classification and, if any goal was used, a description of the goal, the time during which it was in effect, and the authority for establishment of the goal (e.g., City Decree, City Affirmative Action Plan or other source); and

(b) the extent to which each selection procedure, or part thereof, that the City uses or has used for each job classification has had an adverse impact on the basis of race and/or sex (as defined by the Uniform Guidelines), from January 1, 1990 to the present, including the basis for its determination as to each job classification.

In the event that the United States, the Martin/Bryant Plaintiffs or the Wilks Intervenors wish to obtain information required by this paragraph from the City for more than twenty-five job classifications, the parties shall attempt to agree on a schedule for the City to provide additional information. The parties agree to limit such requests to those job classifications where a party has a good faith desire to obtain additional information to evaluate the adverse impact of the City's selection procedures. If within thirty days of such a request, the City and the requesting party have not agreed on the information to be provided or an appropriate schedule for providing the requested information, any party may submit this matter to the Court for resolution.

12. Within 90 days of the parties' receipt of the City's submission pursuant to paragraph 11, each of the other parties shall file a response, listing any job classifications in the City's submission (or any other job classification) it contends has selection procedures that have an adverse impact on the basis of race and/or sex, along with an explanation for the basis of its contention. If any party contends that the information submitted by the City is insufficient to assess whether a selection procedure at issue has adverse impact, in its initial response that party shall also list each such selection procedure and state the basis for its contention. A pending request for additional information for a job classification will not affect the party's duty to file a timely response with respect to job classifications for which it has no outstanding request for information.

13. If no party challenges the City's determination that a selection procedure does not have an adverse impact and no party contends that the information supplied by the City is insufficient to make an assessment of adverse impact, there shall be no annual interim appointment goal for that job classification and the City will not be required to provide any additional evidence that the selection procedures for that job classification meet the requirements of paragraph 8 of this Order. At any time, the parties may agree that there shall be no annual interim appointment goals for any particular job classification and that the City shall not be required to provide any additional evidence that the selection procedures for that job classification meet the requirements of paragraph 8 of this Order.

14. In advance of the schedule established pursuant to paragraphs 25 of this Order, the City may notify the parties of any selection procedure it administers that it believes satisfies the requirements of paragraph 8 of this Order. The City shall notify the parties of the basis for its contention and provide the information set forth in paragraph 29 of this Order. Within ninety (90) days of receiving such notice and the information described in paragraph 29 of this Order, each party shall advise the City, in writing, whether it objects to the City's claim that the selection procedure meets the requirements of paragraph 8 of this Order. If a party does object and, after an additional thirty (30) days the parties cannot reach agreement on whether such a selection procedure meets the requirements of paragraph 8 of this Order, any party may submit that matter to the Court for resolution.

15. For each job classification that the City or any other party identifies as having one or more selection procedures that have an adverse impact on the basis of race or sex, unless the Court determines the selection procedure(s) in question meets the requirements of paragraph 8 of this Order or the City revises its selection procedure to eliminate adverse impact, the City shall complete a written job analysis according to the timetable set out in its second semi-annual report. Using the results of the completed job analyses, the City shall revise its selection procedures

consistent with implementing selection devices which are job related and which reduce or eliminate adverse impact.

16. For each selection procedure that has been identified by any party as having an adverse impact on the basis of race or sex, until the parties agree, in writing, or the Court finds, that selection procedures meeting the requirements of paragraph 8 of this Order are in place for a particular job classification, the City shall establish an interim plan designed to counteract the identified adverse impact. That plan may include annual interim goals of making appointments of black and/or female applicants (if that selection procedure has adverse impact against that group) at rates in proportion to the representation of blacks and/or females in the "qualified applicant pool" for that job classification, under the following conditions:

(a) The interim goal is a temporary one, narrowly tailored to counteract the identified adverse impact;

(b) The City has determined that no feasible race or gender blind remedy would adequately counteract or eliminate the identified adverse impact and meet the immediate needs of the City; and

(c) The plan was filed with the Court and the Court approved the implementation of the plan. The "qualified applicant pool" for classified service positions is defined to include applicants who are certified to the City by the Personnel Board for the job classification and who submit to any additional selection procedures required or administered by the City for the relevant period of consideration. It may also include the attainment of a standard or the passage of any selection procedure if that selection procedure is agreed, in writing, by the parties or found by the Court to meet the requirements of paragraph 8 of this Order for its proposed use or to be exempt from further review pursuant to paragraph 13.

17. The City shall modify its interview procedures to ensure that a written record is kept of each interview. Beginning twelve months from the date of the entry of this Order, all standard interview questions and interview report forms shall be approved in writing by the City's Director of Personnel or his or her designee prior to their use. Prior to receiving any certification list, the department seeking to fill a vacancy must submit to the Personnel Department for review a written detailed description of the position to be filled, the essential applicant qualifications, the proposed interview questions and a proposed rating form. Upon completion of the interview process, the department will submit to Personnel the appointment recommendations, with a completed applicant interview rating form.

18. The City shall continue to give to certified applicants the opportunity to be interviewed without regard to their race or sex.

19. Within twelve (12) months of the date of the entry of this Order the City's Personnel Department shall provide training in employee selection and applicant evaluation for each City employee with authority to interview or to recommend appointments or promotions. This training shall also be provided to newly hired or promoted officials with authority to interview or appoint applicants. City officials who have not attended such training may not interview applicants for employment or promotion until they complete the required training.

## V. TEMPORARY INTERIM REMEDIES

20. (a) If any party to this Order, including the City, determines for any classification that there is ongoing racial or gender discrimination in the City's hiring/promotional practices, or that there are lingering effects of specific past discrimination against blacks or women, that party shall notify the parties to this Order of its determination and request that the City implement a plan to remedy the discrimination. The parties shall submit any agreed upon remedial plan to the Court for approval.

(b) If the parties cannot agree on a plan to remedy the ongoing discrimination or the lingering effects of past discrimination, any party may petition the Court for relief.

21. Any temporary appointment goals established pursuant to this Order shall terminate as to any job classification when the parties agree or the Court finds that all selection procedures for that job classification meet the requirements of paragraph 8 of this Order or that the interim goal is no longer necessary. At any time a party may move for the termination of a temporary appointment goal. No goals shall continue beyond the life of the Decree.

22. Any party may apply to the Court to continue or modify the temporary interim goals established pursuant to paragraphs 16 and 20 of this Order, or for other appropriate relief, on the grounds that vestiges of earlier unlawful employment discrimination against blacks and/or women by either the Personnel Board or the City] continue to exist in that job classification.

## VI. RECRUITMENT AND COOPERATION

23. The City shall continue to develop and reassess its present affirmative recruitment program for the purposes of meeting the objectives of this Order. The City shall request that the Personnel Board engage in additional recruitment if the City believes that additional efforts by the Personnel Board to recruit blacks and women for a particular job classification or group of job classifications would assist the City in obtaining additional qualified black and female applicants and overcoming vestiges of prior discrimination. The City agrees to cooperate with the Personnel Board's recruitment efforts.

24. The City shall continue to make its employees available when their participation in a job analysis or validation study is requested by the Personnel Board or by a party.

## VII. RECORDS AND REPORTS

25. This section supplements but does not replace Section X, paragraphs 52-53 of the City's 1981 Consent Decree.

26. Within six (6) months after the entry of this Order, and at six (6) month intervals thereafter, the City shall submit a report to the Court and to the parties (including the Wilks Class which is considered a party in all respects to this modification order) on its efforts to comply with this Order. Each of the City's semi-annual reports will describe in detail the efforts made by the City to meet its obligations under this Order to use lawful selection procedures. The semi-annual reports shall specifically address the progress made during the preceding six months, areas of agreement and disagreement among the parties, allegations of non-cooperation, and a compliance timetable for the accomplishment of tasks within the next six months. Any party may supplement a report within thirty (30) days after it is filed by the City.

27. The City's second semi-annual report, due twelve months after the entry of this Order, shall include a proposed schedule for the City to review and, if necessary, revise its selection procedures to meet the requirements of paragraph 8 over the following thirty-six (36) months. At least thirty (30) days prior to submitting that proposed schedule, the City shall provide copies of its proposed schedule to the parties and attempt to obtain their agreement to a schedule.

28. The City shall submit to the parties a proposal for revised selection procedures it intends to administer for promotional fire service positions in the Fire Department and promotional police service positions in the Police Department eighteen (18) months from the date of the entry of this Order, unless none of the parties object to the selection procedures in their paragraph 12 submissions.

29. The City shall submit to the parties a proposal for revised selection procedures it intends to administer for firefighter and police officer candidates within eighteen (18) months from the date of entry of this Order, unless none of the parties object to the selection procedures in their paragraph 12 submissions.

30. For job classifications other than those in which the only selection procedure is an interview, in the event that the City identifies a selection procedure it uses as having adverse impact, or a party alleges in its paragraph 11 submission that such a procedure has adverse impact, the City shall either produce evidence as to the job relatedness of its procedures or change its procedures to eliminate adverse impact according to the timetable set out in the City's second semi-annual report.

31. The City shall make all data concerning the development, adverse impact, use and job relatedness of each selection procedure used or proposed to be used by the City, including but not limited to, test scores, job analyses, expert reports and validation studies, promptly available to counsel for the parties upon written request. This data will be provided to the parties to this Order in a machine readable form as well as hard copy to the extent that it exists in that form.

32. The City shall retain during the period of this Order all records concerning its implementation. These records shall be made available to any party for inspection and copying within thirty (30) days upon written request. The City agrees that it will henceforth maintain applicant and selection procedure data (including an applicants's name, identification number, race, sex, job classification applied for, date of certification, City administered selection procedure ratings and score(s), whether the applicants was disqualified and the reasons for disqualification, and whether an applicant was hired or promoted) in machine readable form and provide this data in such form to the parties to this Order within thirty (30) days of their written request.

33. All material related to the development of tests or other selection procedures, including copies of tests or proposed tests, test keys and test results, shall be marked "Confidential Test Material Under Seal" by the City prior to being forwarded to counsel for the parties. This confidential test material shall not be disclosed to anyone other than counsel, their immediate staff, the court and its staff, and expert consultants retained by the parties and their staffs, without the written permission of the City or an Order of this Court. Such confidential test material shall not be filed with the Court unless it is filed in a sealed envelope marked "Confidential Testing Material Under Seal." Any material that is marked "Confidential Testing Material Under Seal" shall not be disclosed by the Clerk of the Court to the public without an Order from this Court.



## VIII. NOTICE AND IMPLEMENTATION

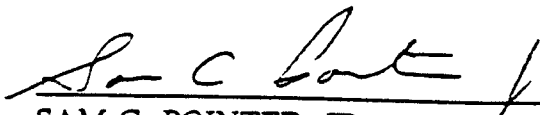
34. In the event any party seeks to enforce any provision of this Order, that party shall provide notice of its intentions to the counsel for the parties. Such notice shall state, with reasonable particularity, the nature of the alleged violation and the relief sought. The parties shall attempt to resolve informally any disputes which may occur under this Order. If the parties are unable to reach agreement within thirty (30) days after a matter has been brought to the attention of one of the parties by another party, the issue may be submitted to the Court for resolution. Any party to this Order may apply to the Court at any time for an Order concerning an urgent matter.

35. Within ten (10) days after provisional approval of this Order by the Court, notice, in the form attached as Appendix A, will be issued by publication at the City's expense in the Sunday edition of the Birmingham News for two consecutive weeks, and in the Birmingham Times on one weekday and directed to all interested persons informing them of their right to review a copy of the Order which will be on file with the Clerk of the Court.

Individual notice shall also be provided by the City by delivering a copy of this notice with the paycheck of each person employed by the City. Additional notice shall be provided by the City to affected persons as is further ordered by this Court. This notice shall inform persons to whom such notices are directed of their right to be heard and to file objections, if any, to this Order. Such objections must be filed with the Clerk of the Court by a date to be set by the Court in its Order granting provisional approval to this Order. The Court will hold a fairness hearing at 9 am, February 28, 1996, at which those persons who file timely objections to the Order will be heard. At the close of such hearing, or as soon as practicable thereafter, the Court shall rule upon such objections and grant final approval to or reject this Order.

36. This paragraph amends paragraph 55 of the 1981 City Consent Decree. The Court retains jurisdiction of this action for such further relief or other orders as may be appropriate, including enforcement of this Order and resolution of disputes that may arise between the parties. This Order, as well as the 1981 City Consent Decree, shall expire five years from the date of the entry of this Order unless its term is extended by the Court. Prior to its termination any party may move, for good cause shown, for the extension of this Order and/or the 1981 Consent Decree. In that event, this Order and the 1981 Consent Decree shall remain in effect until the Court rules on the Motion for Extension. In considering whether the City of Birmingham 1981 Consent Decree and this Order should be dissolved, the Court shall take into account whether and to what extent the purposes of this Order have been achieved and whether there is any continuing unlawful employment discrimination or vestiges of prior unlawful discrimination against blacks and/or women prohibited by Federal law.

Provisionally approved this 19<sup>th</sup> day of December, 1995.

  
\_\_\_\_\_  
SAM C. POINTER, JR.  
UNITED STATES DISTRICT JUDGE