IN THE

COMMONWEALTH COURT OF PENNSYLVANIA

No. 1047 C.D. 1976

JOHN S. CHMILL, DAVID HIROSKY, JOHN G. HOLTZ, THOMAS PFLUM, DAVID J. PUCIATA, LAWRENCE T. YAKICH and PAUL R. MYERS,
Appellants,

v.

CITY OF PITTSBURGH, PITTSBURGH CIVIL SERVICE COMMISSION, STEPHEN A. GLICKMAN.

BRIEF FOR THE COMMONWEALTH OF PENNSYLVANIA AND PENNSYLVANIA HUMAN RELATIONS COMMISSION AS AMICUS CURIAE

Appeal from the Order of the Court of Common Pleas of Allegheny County, Pennsylvania at No. GD 76-08187 and S.A. Nos. 614, 615 661-664 and 750 of 1976

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I. INTEREST OF AMICUS CURIAE

A. COMMONWEALTH OF PENNSYLVANIA

The Commonwealth of Pennsylvania, by and through its Attorney General, is vitally concerned with remedying the adverse economic, social and psychological effects of employment discrimination. Its specific concern in this regard with the Pittsburgh Bureau of Fire is demonstrated by the litigation which it instituted in 1972, Commonwealth of Pennsylvania v. Glickman, 370 F. Supp. 724 (W.D. Pa. 1974).

Because of the Commonwealth's own interest as well as its interest as parens patriae in vindicating the constitutional rights of its citizens, it has maintained five employment discrimination cases in federal court.[1]

In each of these cases, the Commonwealth requested affirmative relief in the form of preferential hiring to remedy the continuing effects of discriminatory employment practices.

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[1] Commonwealth of Pennsylvania v. O'Neill, 473 F.2d 1029 (3d Cir. 1973), aff'g in part and rem'g in part 348F. Supp. 1084 (E.D.Pa. 1972). Commonwealth of Pennsylvania v. Sebastian, 408 F.2d 917 (3d Cir. 1973), aff'g per curiam 368 F. Supp. 854 (W.D.Pa. 1972). Commonwealth of Pennsylvania v. Rizzo, 9 EPD 9891 (E.D.Pa. 1975). Commonwealth of Pennsylvania v. Flaherty, 11 EPD 10,624 (W.D.Pa. 1975) and Commonwealth of Pennsylvania v. Glickman, supra. Also, the Commonwealth filed an amicus brief in Erie Human Relations Commission v. Tullio, 493 F.2d 371 (3d Cir. 1974)

This Honorable Court must now consider the propriety of the preferential affirmative hiring plan proposed by the Pittsburgh Civil Service Commission to remedy discrimination in the Bureau of Fire. The Commonwealth, by and through its Attorney General, files this Brief as amicus curiae to urge that the decision and Order of the Court below, upholding the plan, be affirmed.

B. PENNSYLVANIA HUMAN RELATIONS COMMISSION

The Pennsylvania Human Relations Commission is an administrative agency, established in the Governor's Office by Act of October 27, 1955, P.L. §744, as amended, 43 P.S. §951 et seq., known as the Pennsylvania Human Relations Act, and charged with the enforcement of said Act which prohibits discrimination in employment on the basis of race, color or sex. The Pennsylvania Human Relations Act places primary reliance upon voluntary conciliation and settlement to achieve compliance with its provisions. See, Section 9, 43 P.S. §959.

Administrative agencies, such as the Commission, have extensive experience and expertise in the particular areas of their jurisdiction, in this case, discriminatory employment practices and the appropriate remedies for such practices. Thus, the views of the Commission may provide guidance to this Honorable Court in reaching its decision in the instant case.

The issues raised herein are of vital importance to the Commission. The actions of the Pittsburgh Civil Service Commission, which amount to a remedy voluntarily undertaken to alleviate discrimination, are the very measures which the Pennsylvania Human Relations Act is designed and intended to achieve. This Honorable Court's determination as to the validity of such actions will affect the efforts of the Pennsylvania Human Relations Commission to eliminate unlawful discrimination throughout the Commonwealth, whether by conciliation or by enforcement action.

COUNTER-STATEMENT OF THE QUESTIONS INVOLVED

I. Whether the Findings of Fact made by the Court below are supported on the Record?

(Answered in the affirmative by the Court below)

II. Whether the Pittsburgh Civil Service Commission properly disregarded the provisions of the Civil Service Law, requiring hiring from the top of the competitive list, where adherence to such requirement would result in unlawful discrimination?

(Answered in the affirmative by the Court below)

III. Whether the Pittsburgh Civil Service Commission's imposition of preferential affirmative hiring, as a temporary measure to alleviate unlawful discrimination, was necessary and valid?

(Answered in the affirmative by the Court below)

COUNTER-STATEMENT OF THE CASE

This is an appeal from the Order of the Court of Common Pleas of Allegheny County, Pennsylvania dated June 4, 1976, by Judge Watson, denying Appellants' Motion for a Preliminary and Permanent Injunction and dismissing Appellants' statutory appeals from the decisions of the Pittsburgh Civil Service Commission.

In August, 1975, the Pittsburgh Civil Service Commission (hereinafter "Commission") administered a qualifying test to approximately 1500 applicants for the position of Firefighter in the Pittsburgh Bureau of Fire. (R. 82a) The test was a physical performance examination, composed of six different agility events. (R. 83a) The applicants were graded on a scale of 1 to 100 and the minimum passing grade was 75. (R. 84a)

Professional consultants to the Commission had previously determined that the physical performance test accurately measured the minimum level of qualifications for the position of Firefighter. Anyone who passed the test (attained a score of 75 or better in each of the events) possessed the minimum qualifications for the job. The test was therefore "validated" or shown to be job related, however, its validity was limited to a "pass-fail" measurement. (R. 83a, 84a) The test was not validated as regards the numerical ranking of applicants and was not a reliable indicator of the comparative qualifications among those who passed the test. There was no significant dif-

ference between the qualifications of a person who scored 75 and one who scored 95 of the test. (R. 84a, 85a, 93a)

On October 6, 1975, the Commission posted an eligibility list comprised of 1160 persons who passed the test, ranked according to their numerical scores. The list was compiled in numerical order not because the higher scores reflected better qualifications or because it was a good testing practice, but because the Civil Service Law required such a numerical ranking of eligible applicants. (R. 93a)

As a result of this numerical ranking system, Black applicants, who comprised 31% of the total eligibility list, were concentrated at the bottom of the list, while White applicants were concentrated at the top: (R. 83a, 85a) Only three Blacks were among the top twenty persons on the list. (R. 85a)

On March 23, 1976, the Commission met to consider the certification of twenty persons from the eligibility list for appointment to positions as Firefighters. The Commission decided to temporarily establish two eligibility lists, one for White males and one for minorities and females, and to certify candidates in equal proportions from each list. (R. 86a, 87a) This decision was based upon the following factors:

1. Judge Teitelbaum's Opinion in Commonwealth of Pennsylvania v. Glickman, 370 F. Supp. 724 (W.D.Pa. 1974), finding a pattern of discrimination in the hiring practices of the Pittsburgh

Bureau of Fire and ordering test validation and affirmative recruitment to remedy such discrimination; (R. 106a)

2. The Commission's failure to effectively remedy discrimination in the Bureau of Fire, despite extensive recruitment efforts and use of a "validated" test: minority representation had increased barely 1% in the past three years; only 5% of 1047 Firefighters are Black, while the population of Pittsburgh is between 20% and 22% Black. (R. 89a, 100a, 101a)

3. The disparate impact of the numerical ranking system upon Black applicants (only 3 out of twenty would have been certified if the Commission had certified from the top of the competitive list), coupled with the lack of correlation between numerical grade and actual qualifications. (R. 85a, 95a)

4. The necessity of alleviating a pattern of discrimination in the Bureau of Fire, demonstrated in part by the similarities in minority representation between the Bureau of Fire and the Pittsburgh Police Department, less than any other department in the City of Pittsburgh. The Police Department had recently been ordered to impose quota hiring to remedy discrimination. Commonwealth v. Flaherty, 404 F. Supp. 1022 (W.D.Pa. 1975), 11 EPD 10,624. (R. 95a)

On April 1, 1976, after an informal hearing, the Commission reaffirmed its decision to certify candidates for the position of Firefighter according to a temporary preferential affirmative hiring

system, and not from the top of the competitive eligibility list, as required by the Civil Service Law. (R. 87a)

Appellants herein are White male applicants for positions as Firefighters, who took the test administered in August, 1975, and ranked between 15 and 22 on the eligibility list compiled in accordance with the Civil Service Law. Appellants each filed a statutory appeal from the decision of the Commission, establishing a preferential affirmative hiring system, and sought an injunction restraining the Commission from certifying candidates according to its announced quota system. The actions were heard together by Judge Watson, who denied an injunction and dismissed the statutory appeals, resulting in the instant appeal.

SUMMARY OF ARGUMENT

At issue in this case is the propriety of temporary preferential affirmative hiring, undertaken to remedy race discrimination in the hiring of Firefighters in the City of Pittsburgh.

The Court below found that the minority candidates proposed to be hired under the Pittsburgh Civil Service Commission's affirmative hiring plan were qualified for positions as Firefighters; that persons with higher scores on the qualifying test were not necessarily better qualified for the job; and that Blacks were disproportionately excluded from consideration for hire because of the numerical ranking system imposed by the Civil Service Law. These findings are fully supported on the Record.

The Court below held that the Pittsburgh Civil Service Commission did not have to comply with the employee selection procedures provided under the Civil Service Law, if such procedures had a discriminatory effect upon Blacks and operated to impede effective relief from past discrimination. The Court's holding is fully in accord with applicable law.

The Court below held that the imposition of preferential affirmative hiring to alleviate discrimination in the Bureau of Fire was necessary and valid. A substantial body of law has upheld the propriety of such remedial measures, particularly when undertaken voluntarily.

ARGUMENT

A. The Findings of Fact made by the Court below are well supported on the Record.

Appellants have challenged the findings of the Court below pertaining to the comparative qualifications of candidates for the position of Firefighter. Appellants claim that because the physical performance test was "validated," persons ranked at the top of the eligibility list were better qualified for the job. However, the Court below found that within the range of passing scores (between 75 and 95), there is no measurable difference in actual qualifications, and that persons scoring in the lower passing range are not necessarily less qualified to be Firefighters than persons in the upper range. (R. 120a) The Court correctly recognized that the physical performance test, administered in August, 1975, was valid only as a measurement of "qualified or unqualified," and not as a measurement of greater or lesser qualifications among those individuals who attained a passing score. This finding is amply supported on the Record. Melanie Smith, Secretary and Chief Examiner of the Commission, testified that a higher score is not a statistically reliable predictor of better performance as a Firefighter. (R. 84a) She stated that there is no data to indicate that a higher test score reflects any better qualifications than a lower

score. (R. 93a) The Commission ranked people on the eligibility list according to numerical score because of the requirements of the Civil Service Law, and not because the ranking reflected better qualifications or was an acceptable testing procedure. (R. 93a) There was no evidence indicating that higher test scores demonstrated better qualifications. Thus, the Court did not err in finding that the minority candidates to be certified under the preferential affirmative hiring plan were as qualified for the position as Firefighter as those who scored higher on the test.

The Court also found that Blacks were disproportionately excluded from the top of the eligibility list. Although 31% of the persons who passed the test were Black, only 17.6% were among the top twenty (3 out of 20). (R. 82a, 85a) Whites, on the other hand, were disproportionately represented at the top of the list. Two and one-tenth per cent (2.1%) of all Whites who passed were among the top twenty, while only .83% of all Blacks wer passed were among the top twenty. The Court concluded that a criterion which which excluded Black candidates (the numerical rank) could not be utilized unless a "manifest relation" between the numerical rank and actual job performance was established. The evidence of record clearly shows that there was no significant or measurable relationship between higher scores on the test and the expectation of better performance on the job.

The Record fully supports these material findings of fact in the instant case. This Honorable Court should not disturb the findings made by the Court below.

B. The Pittsburgh Civil Service Commission properly disregarded the provisions of the Civil Serivce Law requiring appointment from the top of the competitive list, where adherence to such requirement would result in unlawful discrimination.

Appellants have asserted that the Commission is required to comply with the provision of the Pennsylvania Civil Service Law which provides that appointments to any position in the competitive class in any bureau of fire shall be made only from the top of the competitive list. Act of June 27, 1939, P.L. 1207, as amended, 53 P.S. 23493.1

By certifying candidates from two separate eligibility lists, as a temporary preferential affirmative hiring method, the Commission deviated from this requirement. The Court below held that the Commission was bound by a higher law than the Civil Service Law and was not required to certify from the top of the competitive list where the result would violate state and federal anti-discrimination laws and constitutions. This holding was correct and should be upheld.

The Pittsburgh Bureau of Fire has a long history of discriminatory employment practices. In Commonwealth of Pennsylvania v. Glickman, supra, the Federal District Court found discrimination in hiring from at least 1950 until 1970. Although the Court declined to impose preferential affirmative hiring when it issued its Opinion

on January 15, 1974, it is specifically stated that such a remedy might be appropriate at a later time.

> It must, however, be made clear that the fact that at this stage of the proceedings the Court has rejected the option of imposing a racial hiring quota does not mean that it is foreclosed from instituting such a remedy in the future. 370 F. Supp. 724, 737.

The Court ordered the Bureau of Fire and the Commission to develop and implement a validated test and to undertake affirmative recruitment, in the expectation that good faith efforts, short of preferential hiring, would effectively eliminate discrimination.

The District Court's expectation was not realized. All the remedial techniques undertaken by the Commission, including elimination of the written test and an extensive affirmative recruitment program, were singularly unsuccessful. The number of Black Firefighters increased by only one percent (1%) in three years. (R. 100a, 101a) The certification of candidates in accordance with the numerical ranking system would have resulted in only three Blacks being hired.

After Glickman, the Commission had an obligation to remedy race discrimination in its employee selection procedures. However, compliance with the Civil Service Law would have operated to perpetuate, not remedy, past discrimination. The Commission proposed a preferential affirmative hiring program only after other remedies had proven ineffective. Its action in this regard was not only appropriate, but required.

Courts have repeatedly held that, "the only . . . plan that meets constitutional standards is the one that works." U.S. v. Jefferson County Board of Education, 372 F.2d 836, 847 (5th Cir., 1966).

> /Once hindsight reveals that the lower court's prior remedy failed to eliminate the pervasive effects of past racial discrimination/ the court's failure to impose affirmative hiring itself contravened the Fourteenth Amendment since it operated to perpetuate constitutionally deficient employment practices. NAACP v. Allen, 493 F.2d 614 (5th Cir. 1974)

In Porcelli v. Titus, 431 F.2d 1254 (3d Circ. 1970), cert. denied 402 U.S. 944 (1970), the Third Circuit upheld the action of the Newark Board of Education in adopting preferential hiring practices for Blacks. It found the action not only permissible, but required:

> /T/he Boards of Education have a very definite affirmative duty to integrate school facilities and to permit a great imbalance in facilities . . . would be in negation of the Fourteenth Amendment to the Constitution . . . .

When hindsight revealed that other remedies failed to alleviate the effects of unlawful discrimination in the Bureau of Fire, the Commission was mandated to undertake an effective remedy, in the form of temporary preferential affirmative hiring, notwithstanding inconsistent provisions of the Civil Service Law.

> Valid state laws /may be suspended/ where the potential of discriminatory application is present. Erie Human Relations Com. v. Tullio, 357 F. Supp. 422 W.D.Pa. 1973) citing Louisiana v. United States, 380 U.S. 145 (1965)

Federal and state anti-discrimination laws and the federal and state constitutions must take precedence over inconsistent provisions in the Civil Service Law. U.S. Const. Art. VI, §2 (Supremeacy Clause); 43 P.S. 962(a); 42 U.S.C. 2000e-7, 2000h-4; Kober v. Westinghouse Electric Corp., 480 F.2d 240 (3d Cir. 1973). Thus, the Commission was not bound to comply with the Civil Service Law by certifying from the top of the competitive list. On the contrary, the Commission was compelled to take effective remedial measures to correct its prior discriminatory practices.

The preferential hiring plan implemented by the Commission was required not only to remedy past discrimination, but to avoid the direct discriminatory effect of the numerical ranking system. The ranking system operated to disproportionately exclude Blacks from the top of the eligibility list, and therefore to exclude Blacks from consideration for hire as Firefighters, without regard to actual qualifications. This is a classic case of employment discrimination under the "disparate impact" rule enunciated by the United States Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424, (1971). The Record clearly shows that candidates with higher numerical scores were not necessarily better qualified for the position; that Whites were concentrated at the top of the eligibility list; and that Blacks were disproportionately excluded from consideration for hire. (R. 83a - 85a, 93a) This discriminatory

ranking system could not be sustained by reliance upon the provisions of the Civil Service Law.

The Commission, therefore, properly imposed preferential affirmative hiring under the circumstances of this case, without regard for inconsistent provisions of the Civil Service Law. The Court below did not err in refusing to enjoin the Commission's action.

C. The Pittsburgh Civil Service Commission's imposition of preferential affirmative hiring, as a temporary measure to alleviate unlawful discrimination, was necessary and valid.

Both the Third Circuit Court of Appeals and the District Court for the Western District of Pennsylvania have recognized and endorsed the validity of preferential affirmative hiring as a remedy for discrimination. The Third Circuit has upheld such relief on numerous occasions. Erie Human Relations Commission v. Tullio, supra; Commonwealth of Pennsylvania v. O'Neill, supra; Contractors Association of Eastern Pennsylvania v. Secretary of Labor, 442 F.2d 159 (3d Cir., 1971), cert. denied 404 U.S. 854 (1971); and Procelli v. Titus, 431 F.2d 1254 (3d Cir., 1970), cert. denied 402 U.S. 944 (1970). See also Oburn v. Shapp, 10 EPD 10,350 (3d Cir., 1975).

In Oburn, White applicants for the position of Police Officer sought a preliminary injunction to enjoin the State Police from hiring applicants on a preferential basis. The District Court declined to interfere with the State's efforts to remedy discrimination, and refused to grant an injunction. The Third Circuit upheld, stating:

> Defendants claim that they have properly used racial quotas to end the perpetuation of prior employment practices discriminatory in respect to racial minorities . . . . We find that the record to date favors the position taken by defendants.

Recently, the District Court for the Western District of Pennsylvania approved preferential hiring as a remedy for past discrimination in the Pittsburgh Bureau of Police. Commonwealth of Pennsylvania v. Flaherty, supra (decided December 5, 1975).

At issue in Flaherty were testing and employment practices which bore a striking similiarity to those involved in the instant case:

> We view the exigencies of the situation as requiring the imposition of hiring quotas. Despite the valiant efforts of the City to recruit Blacks and women, the effect of its selection procedure is to bar them from appointment to the police force. Reliance upon the /now existing hiring policies/ would not eliminate but would continue the discriminatory effect of past practices.

The Court was persuaded that a particularly appropriate time to institute such a preferential hiring program was when the City had a "unique opportunity" to appoint 44 new Police Officers, for that number of appointments truly "provides a vehicle to expedite the removal of the effects of the discrimination found here." A similar opportunity faced the Bureau of Fire with the proposed hiring of twenty Firefighters

The validity of preferential affirmative hiring is widely recognized. In addition to the Third Circuit (see cases cited supra), at least seven other Circuit Courts of Appeals have upheld the equitable power of the District Courts to require the hiring or promotion

of some percentage of qualified minorities as a remedy for discriminatory practices, or have directed that such relief be granted:

First Circuit: Morgan v. Kerrigan, 509 F.2d 599 (1975); NAACP v. Beecher, 504 F.2d 1017 (1974); Castro v. Beecher, 459 F.2d 725 (1972).

Second Circuit: Patterson v. Newspaper Deliveries' Union, 514 F.2d 767 (1975); Rios v. Enterprise Ass'n Steamfitters, Local 638, 501 F.2d 622 (1974); Bridgeport Guardian v. Civil Service Comm., 482 F.2d 1333 (1973); Vulcan Society v. Civil Serv. Comm., 490 F.2d 387 (1973).

Fifth Circuit: Morrow v. Crisler, 491 F.2d 1053 (1974) (en banc), cert. denied 419 U.S. 895 (1975); NAACP v. Allen, 493 F.2d 614 (1974); Local 53 Asbestos Workers v. Volger, 407 F.2d 1047 (1969).

Sixth Circuit: Arnold v. Ballard, ____ F.2d ____ (6th Cir. 1976) 12 EPD 11000; /BNA/ FEP Cases, 239, 251 (1974); United States v. Masonry Contractors of Memphis, 497 F.2d 871 (1974); United States v. IBEW, Local 212, 428 F.2d 144 (1970).

Seventh Circuit: United States v. Operating Engineers Local 520, 476 F.2d 1201 (1973); United States v. Carpenter Local 169, 457 F.2d 210 cert. denied 409 U.S. 851 (1972).

Eighth Circuit: United States v. N.D. Industries, 479 F.2d 354 (1973); Carter v. Gallagher, 452 F.2d 317 (en banc), cert. denied 406 U.S. 950 (1972).

Ninth Circuit: United States v. Ironworkers Local 86, 443 F.2d 544, cert. denied 404 U.S. 984 (1971).

Substantial legal authority confirms that preferential affirmative hiring to remedy past discrimination need not be judicially imposed, but may be initiated by an administrative or executive body,

See, Mele v. U.S. Department of Justice, 10 EPD 10,258 (D.C. N.J. 1975) aff'd 11 EPD 10,845 (3d Cir., 1976); Barnett v. International Harvester, 11 EPD 10,846 (D.C.Tenn. 1976); Alevy v. Downstate Medical Center of New York, 44 LW 2482 (N.Y. Ct. App. 1976); Associated General Contractors of Massachusetts v. Altshuler, 490 F.2d 9 (1st Cir., 1973) cert. denied 416 U.S. 957 (1974); Southern Illinois Builders Association v. Ogilvie, 471 F.2d 680 (7th Cir., 1972); Contractors Association of Eastern Pennsylvania v. Secretary of Labor, 442 F.2d 159 (3d Cir., 1971), cert. denied 404 U.S. 854 (1971); Lindsay v. City of Seattle, 11 EPD 10,905 (S. Ct. Wash. 1976); Procelli v. Titus, supra

In Lindsay, the Court upheld a selective certification system designed to give preference to minority applicants, despite a conflict with the City Charter which called for hiring of the highest ranking applicant first. The Court recognized the City's obligation under federal law to eradicate the effects of past discrimination in its employee selection procedures.

> The fact that the City voluntarily has sought to achieve equality of employment opportunity in the public sphere rather than by court order does not detract from or lessen the legal validity and necessity of its affirmative action program ... Voluntary compliance, rather than court ordered relief, is the congressionally preferred method of achieving equality of employment opprotunity. 11 EPD 10,905 at 7804.

In Altshuler the First Circuit commented:

> . . . the discretionary power of public authorities to remedy past discrimination, is even broader than that of the judicial branch . . . .

The Court in Flaherty, supra, likewise found voluntarily undertaken preferential hiring more desirable than judicial imposition of the same remedy:

> The ultimate responsibility for eradicating racial discrimination . . . rests upon the officers and agents of the City . . . A judicially imposed racial and sexual hiring quota is justified only when the City fails to take the action necessary to correct the discriminatory imbalance . . . .

In the instant case, the Commission has voluntarily implemented an affirmative hiring plan to alleviate discrimination in the Bureau of Fire. The Commission's action represents substantial progress toward achieving the goal of equal employment opportunity, consistent with the authorities cited above, and with the legislative mandate favoring voluntary compliance whenever possible. Section 9 of the Pennsylvania Human Relations Act, 43 P.S. §959, and Section 706(d) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(d), require that anti-discrimination enforcement agencies endeavor, in the first instance, to eliminate unlawful practices by means of conference, conciliation and persuasion.

The Court below correctly refused to interfere with the Commission's efforts to eradicate discrimination in the hiring of Firefighters. This decision should be affirmed.

CONCLUSION

For all of the foregoing reasons, the Commonwealth of Pennsylvania and Pennsylvania Human Relations Commission, as amicus curiae, respectfully request this Honorable Court to affirm the Order of the Court of Common Pleas of Allegheny County, denying an injunction and dismissing the statutory appeals in the instant case.

Respectfully submitted,

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IN THE SUPREME COURT OF PENNSYLVANIA

WESTERN DISTRICT

CITY OF PITTSBURGH, et al. Appellants	:	
COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA HUMAN RELATIONS COMMISSION, Appellant Intervenor	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF JUSTICE, COMMUNITY ADVOCATE UNIT, Appellant Intervenor	:	No. 56 March Term, 1978
v.	:	
JOHN S. CHMILL, et al. Appellee	:	

Brief of Appellant-Intervenor Commonwealth of Pennsylvania, Pennsylvania Human Relations Commission

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Petition for Allowance of Appeal granted April 21, 1978, at 1429 Allocatur Docket. Appeal from the Order of the Commonwealth Court of Pennsylvania at No. 1047 C.D. 1976 reversing the Order of the Court of Common Pleas of Allegheny County, Pennsylvania at No. GD 76-08187 and S.A. Nos. 614, 615, 661-664 and 750 of 1976.

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

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STATEMENT OF JURISDICTION

Jurisdiction is based upon Section 204(a) of the Appellate Court Jurisdiction Act of 1970, Act of July 31, 1970, P.L. 673 No. 223, Article II, 17 P.S.§211. 204(a) which provides for discretionary allowance of appeals from orders of the Commonwealth Court and upon the Order entered by the Supreme Court of Pennsylvania on Appellant-Intervenor's Petition for Intervention and Petition for Allowance of Appeal; "April 21, 1978. Petitions granted. Per Curiam."

Appellant-Intervenor, the Pennsylvania Human Relations Commission is an administrative agency, established in the Governor's Office by Act of October 27, 1955, P.L.§744, as amended, 43 P.S. §951 et seq., known as the Pennsylvania Human Relations Act, and charged with the enforcement of this Act which prohibits discrimination in employment on the basis of race, color, religious creed, ancestry, age, sex, national origin, or non-job related handicap or disability.

Administrative agencies, such as the Commission, have extensive experience and expertise in the particular areas of their jurisdiction,particularly, discriminatory employment practices and the appropriate remedies for such unlawful practices. Thus, the views of the Commission may provide guidance to this Honorable Court in reaching its decision in the instant case.

The issues raised herein are of vital importance to the Commission and the citizens of the Commonwealth of Pennsylvania. This Honorable Court's determination as to the validity of the acts of the City of Pittsburgh Civil Service Commission will affect the efforts of the Pennsylvania Human Relations Commission to

eliminate unlawful discrimination throughout the Commonwealth, whether by conciliation or by enforcement action.

STATEMENT OF THE QUESTION INVOLVED

Was the action of the Pittsburgh Civil Service Commission in establishing temporary preferential hiring of qualified minority candidates in order to overcome the effects of past discrimination and to avoid further discrimination in the Pittsburgh Department of Fire lawful despite Pennsylvania Civil Service Law?

Answered in the negative by the Court below.

STATEMENT OF THE CASE

This is an appeal from the Opinion and Order of the Commonwealth Court of Pennsylvania, entered July 15, 1977. The Commonwealth Court reversed the Order of the Court of Common Pleas of Allegheny County, dated June 4, 1976, denying a preliminary and permanent injunction against the Pittsburgh Civil Service Commission (hereinafter "PCSC"), Appellants herein, and dismissing Plaintiff-Appellees' statutory appeals from the decision of the PCSC to certify two eligibility lists for the position of Firefighter, one composed of white males and the other of minority males and female applicants.

This case finds its origins in a prior federal action. On January 15, 1974, Judge Teitelbaum made a finding of race discrimination against thePCSC and ordered certain affirmative relief, including elimination of unvalidated testing procedures and affirmative recruitment. Commonwealth of Pennsylvania v. Glickman, 370 F. Supp. 724 (W.D. Pa. 1974) The district court declined to impose a racial hiring quota at that time. Significantly, however, the court did not foreclose such a remedy in the future. And one of the Court's stated reasons for refusing quota relief was the Court's confidence that the defendants (Appellants herein) would meet their responsibility to implement adequate affirmative measures to eradicate discrimination. The Court also expressed its belief that the CSC, and not the Court, should oversee its own personnel operations. 370 F. Supp. 724, 736-7 (R. 20a, 21a)

In August, 1975, the PCSC administered a qualifying test to approximately 1500 applicants for the position of Firefighter in the Pittsburgh Bureau of Fire. In accordance with Judge Teitelbaum's Order, the unvalidated written test was eliminated and the test administered was a physical performance test only, composed of

six different agility events. (R. 82a-84a)

Professional consultants to the PCSC previously determined that the physical performance test accurately measured the minimum level of qualifications for the position of Firefighter. All persons who attained a score of 75 or better in each of the events possessed the minimum qualifications for the job. The test was therefore "validated" or shown to be job-related, but only as a "pass-fail" measurement. (R. 83a, 84a) The test was not validated as regards the numerical ranking of applicants on a scale of 1 to 100, and was not a reliable indicator of comparative qualifications among those who attained the minimum passing grade of 75. There was no significant or measurable difference between the qualifications of a person who scored 75 and one who scored 95 on the test. (R. 84a, 85a, 93)

On October 6, 1975, the PCSC posted a single eligibility list comprised of 1160 persons who passed the test, ranked according to their numerical scores on the test. The list was compiled in order of numerical test scores, not because the higher scores reflected better qualifications or because such a ranking was good testing practice, but because the Civil Service Law required a numerical listing of eligible applicants. (R. 93a) Persons on the top of the single eligibility list thus compiled cannot be said, on the basis of numerical test scores alone, to be better qualified for the position of Firefighter than persons on the bottom of the list.

Under this numerical ranking system, Black applicants, who comprised 31% of the total eligibility list, were concentrated at the bottom of the list, while white applicants were concentrated at the top. (R. 83a, 85a) Only three Blacks were among the

top twenty persons on the list. (R. 85a)

On March 23, 1976, the PCSC met to consider the certification of twenty persons from the eligibility list for appointment to positions as Firefighters. The PCSC decided to institute a temporary preferential affirmative hiring plan, in consideration of the following factors:

1) Judge Teitelbaum's previous Order in Commonwealth of Pennsylvania v. Glickman, supra.

2) The PCSC's failure, despite good faith efforts, significantly to alleviate racial discrimination in the Bureau of Fire. In three years, minority representation increased barely 1%. Despite intensive recruitment efforts, Blacks constituted only 9.2% of new hires in 1974, and only 13% in 1975. At the time of trial, only 5% of 1047 Firefighters were Black, as compared to a Black population of between 20% and 22% in the City of Pittsburgh.

3) The discriminatory impact of the unvalidated numerical ranking system upon Black applicants. Only three out of twenty would have been certified if the PCSC has certified from the top of a single competitive list.

4) The necessity of remedying a clear pattern of discrimination, demonstrated in part by the similarities between the Bureau of Fire and the Pittsburgh Police Department, where minority representation was less than any other department in the City of Pittsburgh. The Pittsburgh Police Department had recently been ordered to institute a racial hiring quota to remedy discrimination. Commonwealth of Pennsylvania v. Flaherty, 404 F. Supp. 1022 (W.D. Pa. 1975) (R. 95a)

On April 1, 1976, after an informal hearing, the PCSC reaffirmed its decision to certify candidates for the position of Firefighter in equal proportions from two eligibility lists, one composed of white males and the other composed of minority males and females. (R. 86a, 87a)

The PCSC's decision to certify candidates from two eligibility lists and not from the top of a single competitive list deviated from the apparent requirements of the Pennsylvania Civil Service Law. Plaintiff-Appellees are white male applicants for positions as Firefighters, who took the test administered in August, 1975, and who would have ranked between 15 and 22 on a single eligibility list compiled according to numerical test scores. Appellees each filed statutory appeals from the decision of the PCSC establishing the preferential affirmative hiring system, and sought an injunction restraining the PCSC from certifying candidates according to its announced quota system. The actions were heard together by Judge Watson, who denied an injunction and dismissed the statutory appeals, holding that the PCSC was not bound to adhere to the strict letter of the Civil Service Law where the result would perpetuate past racial discrimination. The Court affirmed the validity and necessity of PCSC's affirmative action program under state and federal law.

Plaintiffs appealed and the Commonwealth Court reversed. In an Opinion by Judge Mencer, the Court ordered the PCSC to certify the names of the Plaintiffs for hire, and held that the PCSC's affirmative action plan violated the Pennsylvania Civil Service Law, violated the Pennsylvania Human Relations Act, was contrary to the provisions of Title VII of the Civil Rights Act of 1964, and that even if such affirmative action were necessary,

it could only come by court decree and not be voluntary action on the part of an employer. Judge Wilkinson filed a Dissenting Opinion, joined in by Judge Rogers.

On April 21, 1978, this Honorable Court granted the Pa. Human Relations Commission's Petition to Intervene and Intervenor's Petition for Allowance of Appeal.

SUMMARY OF ARGUMENT

At issue in this case is the propriety of temporary preferential affirmative hiring, undertaken to remedy race discrimination in the hiring of Firefighters in the City of Pittsburgh.

The Trial Court found that the minority candidates proposed to be hired under the Pittsburgh Civil Service Commission's affirmative hiring plan were qualified for positions as Firefighters; that persons with higher scores on the qualifying test were not necessarily better qualified for the job; and that Blacks were disproportionately excluded from consideration for hire because of the numerical ranking system imposed by the Civil Service Law. These findings are fully supported by the Record.

The Trial Court held that the Pittsburgh Civil Service Commission did not have to comply with the employee selection procedures provided under the Civil Service Law, because such procedures had a discriminatory effect upon Blacks and operated to impede effective relief from past discrimination. The Court's holding is fully in accord with applicable law.

The Trial Court held that the imposition of preferential affirmative hiring to alleviate the continuing effects of past discrimination in the Bureau of Fire was necessary and valid. A substantial body of law has upheld the propriety of such remedial measures, particularly when undertaken in response to a judicial finding of discrimination.

Neither Title VII of the Civil Rights Act of 1964 nor the Pennsylvania Human Relations Act preclude the use of preferential hiring of qualified minority applicants. Applicable case law holds that statutory provisions proscribing the use of quotas by employers does not preclude the use of affirmative action to achieve the objective of remedying past discrimination.

ARGUMENT

I. PREFERENTIAL HIRING OF QUALIFIED MINORITY APPLICANTS AS A REMEDIAL MEASURE DESIGNED TO ELIMINATE THE CONTINUING EFFECTS OF PAST DISCRIMINATION DOES NOT VIOLATE THE PA. CIVIL SERVICE ACT.

The assertion by the Commonwealth Court that the trial court offered no supportable basis for its approval of the Pittsburgh Civil Service Commission's preferential hiring plan is inconsistent with the overwhelming majority of applicable case law. The conclusion of the trial court is consistent with virtually every United States Circuit Court and Supreme Court decision which has confronted circumstances similar to those found in the case at bar.[1]

Since preferential treatment is an acceptable remedy for controversies involving statutory and constitutional claims of racial discrimination, the Commonwealth Court erred in holding that the "Pittsburgh Civil Service Commission's decision to implement a quota system was a violation of the Act of June 27, 1939 and established a clear right to relief for the appellants." 375 A.2d 841, 844. As stated by the trial court;

> "both the Federal and state civil rights acts and the federal and state constitutions take precedence over the civil service acts where the potential of discriminatory application is present." (R. 1229)

The issue is whether or not "reasonable grounds appear

1 As the case at bar involves an issue of first impression in this court, the Commission's analysis is primarily based on "(p)rinciples of fair employment law which have emerged relative to the federal analogue of the PHRA..." General Electric Corporation v. PHRC, ___ Pa. ___, 365 A.2d. 649, at 654 (1976)

for the trial court's granting or refusing of the preliminary injunction." McMullan v. Wohlgemuth, 444 Pa. 563, 281 A.2d 836 (1971). Since the trail court's decision is supported by the overwhelming weight of judicial authority, the Commonwealth Court erred in its reversal.

The decision of the trial court was predicated on the vast body of case law upholding preferential treatment in employment discrimination cases where there is a history of discrimination, whether intentional or de facto[2]. While there is some disagreement on the limits of permissible quota relief, all circuits have confirmed the basic authority of the district courts to impose temporary preferential hiring of qualified minority applicants as a remedy to eliminate the continuing effects of both past discrimination and present discriminatory selection practices.

First Circuit Associated General Contractors of Massachusetts, Inc. v. Altshuler, 490 F. 2d 9 (1st Cir. 1973), cert. denied, 416 U.S. 957 (1974); Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972), modifying, 334 F. Supp. 930 (D.C. Mass. 1971); Boston Chapter, NAACP, Inc. v. Beecher, 504 F.2d 1017 (1st Cir. 1974), cert. denied sub nom, Commissioners and Directors of Civil Service v. Boston Chapter, NAACP Inc., 421 U.S. 910 (1975) (fire department hiring quota); Morgan v. Kerrigan, 409 F.(2d 599 (1st Cir. 1975); Prate v. Freedman, ___F.2d.____, 16 FEP Cases 532 (1st Cir. 1978), cert. denied, ___U.S.___, 46 U.S.L.W. 3720 (May 23, 1978).

Second Circuit EEOC v. Sheet Metal Local 28, 532 F.2d 821 (2d Cir. 1976); Kirkland v Department of Correctional Services, 520 F.2d 420 (2d Cir. 1975); Patterson v Newspaper Deliverer's Union, 514 F.2d 767 (2d Cir. 1975); Rios v. Steamfitters Local 638, 501 F. 2d 622 2d Cir. 974); Vulcan Society v. Civil Service Commission, 490 F.2d 387 (2d Cir. 1973); Bridgeport Guardians v Civil Service Commission, 482 F.2d 1333 (2d Cir. 1975); U.S. v Lathers Local 46, 471 F. 2d 409 (2d Cir. 1972) cert. denied 412 U.S. 929 (1973).

[2] De Facto discrimination is clearly unlawful under the Pa. Human Relations Act. See P.H.R.C. v. Chester Housing Authority 458 Pa. 67, 327 A.2d 355 (1974), cert. denied, 402 U.S. 974 (1974)

Third Circuit: Contractors Association of Western Pennsylvania v. Kreps, 573 F.2d. 811 (3d Cir. 1978), judgment vacated and remanded as moot, ___ U.S. ___, 46 U.S.L.W. 3800 (June 27, 1978); Communications Workers of America v. EEOC, 556 F.2d 167 (3d Cir. 1977), cert. denied, ___ U.S. ___, 46 U.S.L.W. 3801 (June 27, 1978); U.S. v Elevator Constructors Local 5, 538 F.2d 1012 (3d Cir. 1976); Oburn v. Shapp, 521 F.2d 142 (3d Cir. 1975); Pennsylvania v Sebastian, 480 F.2d 917 (3d Cir. 1973); Pennsylvania v. O'Neil, 373 F.2d 1029 (3d Cir. 1973); Contractors Association of Eastern Pennsylvania v. Secretary of Labor, 442 F.2d 159 (3d Cir. 1971), cert. denied, 404 U.S. 854 (1971). Erie HRC v. Tullio, 463 F.2d 371 (1974)

Fourth Circuit: Patterson v American Tobacco Company, 535 F.2d. 257 (4th Cir. 1976).

Fifth Circuit: Morrow v Crisler, 501 F.2d. 1053 (5th Cir. 1974); NAACP v Allen, 493 F.2d 614 (5th Cir. 1974); Buckner v Goodyear Tire and Rubber Co., 476 F.2d 1287 (5th Cir. 1973); U.S. v Local 189 United Paper Makers, 416 F.2d (5th Cir. 1969); Local 53, International Association of Heat and Frost Insulators v Vogler, 407 F.2d 1047 (5th Cir. 1969).

Sixth Circuit: Arnold v Ballard, ___ F.2d ___, 12 EPD 11,976 (6th Cir. 1976); EEOC v Detroit Edison Co., 515 F. 2d 301 (6th Cir. 1975); U.S. v Masonry Contractors, 497 F.2d 871 (6th Cir. 1973); U.S. v Local 212, IBEW, 428 F.2d 144 (6th Cir. 1970), cert. denied, 400 U.S. 943 (1970).

Seventh Circuit: U.S. v Chicago, 549 F.2d 415 (7th Cir. 1978), cert. denied sub nom, Isakson v U.S., ___ U.S. ___, 46 U.S.L.W. 3735 (May 30, 1978); Crocket v Green, 534 F.2d. 715 (7th Cir. 1976); Southern Illinois Builders Association v Ogilvie, 471 F.2d 680 (7th Cir. 1972).

Eighth Circuit: U.S. v N.L. Industries, 479 F.2d 354 (8th Cir. 1973); Carter v. Gallagher 405 F. 2d 315 (8th Cir. 1972), cert. denied, 406 U.S. 950, 453 (1972).

Ninth Circuit: Davis v County of Los Angeles, 566 F.2d 1334 (9th Cir. 1977), cert. granted, ___ U.S. ___, 46 U.S.L.W. 3775 (June 20, 1978); U.S. v Ironworkers Local 86, 443 F.2d 544 (9th Cir. 1970), cert. denied, 404 U.S. 984 (1971).

As analysis of the aforementioned cases indicates that preferential remedies are given Court approval when four conditions are met:

1. The purpose is to eliminate the effects of past discrimination;
2. where no alternative means exist to accomplish the goals of eliminating the vestiges of discrimination,
3. the affirmative action program is only temporary in nature and will expire when discrimination ceases; and
4. the person given the preference is a qualified applicant for the position.

The opinion of the trial court is correct in its contention that all four conditions for implementing an affirmative action program were clearly met in the instant case. As Judge Watson stated:

> "In Commonwealth of Pa. v. Glickman, 370 F. Supp. 724 (W.D. Pa. 1974), Judge Teitelbaum found that a pattern of discrimination existed in the hiring practices of the Pittsburgh Bureau of Fire and ordered that any competitive examination administered by the City must be properly validated. The vestiges of past discrimination are perfectly apparent from the low percentage of minority representation in the firefighters. No other alternative than a preferential hiring quota will relieve the situation. The affirmative action program is likewise only temporary in nature, and declared to be so by the defendents. And the minority applicants who would be given preference are as qualified for the position of firefighter as those who scored higher on the examination. Higher scores on tests do not automatically establish higher qualifications and do not control unless the "manifest relation" between the standard and the job is established. The applicants presently in question are not ranked with precision, statistical validity or predictive significance." (R. 125a)

In justifying the quota implemented by the Civil Service Commission the trial court noted that the Pittsburgh Bureau of Fire has a long history of discriminatory employment practices. In Commonwealth of Pennsylvania v. Glickman, supra, the federal District Court found discrimination in hiring from at least 1950 until 1970. Although the Court declined to impose preferential

affirmative hiring when it issued its Opinion on January 15, 1974, it specifically stated that such a remedy might be appropriate at a later time.

> " It must, however, be made clear that the fact that at this stage of the proceedings the Court has rejected the option of imposing a racial hiring quota does not mean that it is foreclosed from instituting such a remedy in the future." 370 F. Supp. 724, 737

The Court ordered the Bureau of Fire and the Commission to develop and implement a validated test and to undertake affirmative recruitment, in the expectation that good faith efforts, short of preferential hiring, would effectively eliminate discrimination.

The District Court's expectation was not realized. All the remedial techniques undertaken by the Commission, including elimination of the written test and an extensive affirmative recruitment program, were singularly unsuccessful. The number of black Firefighters increased by only one percent (1%) in three years. (R. 100a, 101a) The certification of candidates in accordance with the numerical ranking system would have resulted in only three Blacks being hired.

The decisional law cited by the trial court in support of its position emanates from the landmark Supreme Court decision in Albemarle Paper Co.v. Moody , 422 U. S. 405, 418 (1975) where the Court declared:

> "the Court may render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future."

In addition, both the Third Circuit Court of Appeals and the District Court for the Western District of Pennsylvania have recognized and endorsed the validity of preferential affirmative hiring as a remedy for discrimination. The Third Circuit

has upheld such relief on numerous occasions. Erie Human Relations Commission v. Tullio, supra; Commonwealth of Pennsylvania v. O'Neil, supra; Contractors Association of Eastern Pennsylvania v. Secretary of Labor, 442 F.2d 159 (3d Cir., 1971), cert. denied 402 U.S. 944 (1970). See also Oburn v. Shapp, 521 F. 2d 142 (3d Cir., 1975).

In Oburn, white applicants for the position of Police Officer sought a preliminary injunction to enjoin the State Police from hiring applicants on a preferential basis. The District Court declined to interfere with the State's efforts to remedy discrimination, and refused to grant an injunction. The Third Circuit upheld, stating:

> Defendants claim that they have properly used racial quotas to end the perpetuation of prior employment practices discriminatory in respect to racial minorities...We find that the record to date favors the position taken by defendants.

The trial court also correctly observed that the preferential hiring plan implemented by the Civil Service Commission was required not only to remedy past discrimination, but to avoid the direct discriminatory effect of the numerical ranking system mandated by the Civil Service Law. This ranking system operated to disproportionately exclude Blacks from consideration for hire as Firefighters, without regard to actual qualifications. Accordingly, the trial court acknowledged that the facts of record indicated a classic case of employment discrimination under the "disparate impact" rule enumciated by the U.S. Supreme Court in Griggs v. Duke Power Co. 401 U.S. 424 (1971). In reaching this conclusion the court correctly recognized that the physical performance test administered in August, 1975, was valid only as a measurement of

"qualified or unqualified," and not as a measurement of greater or lesser qualifications among those individuals who attained a passing score. This finding is amply supported on the Record. Melanie Smith, Secretary and Chief Examiner of the Commission, testified that a higher score is not a statistically reliable predictor of better performance as a Firefighter. (R.84a) She stated that there is no data to indicate that a higher score reflects any better qualifications than a lower score.(R.93a) The Commission ranked people on the eligibility list according to numerical score because of the requirements of the Civil Service Law, and not because the ranking reflected better qualifications or was an acceptable testing procedure. (R. 93a) There was no evidence indicating that higher test scores demonstrated better qualifications. Thus, the Court did not err in finding that the minority candidates to be certified under the preferential affirmative hiring plan were as qualified for the position of Firefighter as those who scored higher on the test.

The Court's finding that blacks were disproportionately excluded from the top of the eligibility list is well supported by the evidence adduced at trial. Although 31% of the persons who passed the test were Black, only 17.6% were among the top twenty (3 out of 20). (R. 82a, 85a) Whites, on the other hand, were disproportionately represented at the top of the list. Two and one-tenth per cent (2.1%) of all Whites who passed were among the top twenty, while only .0083% [1] of all Blacks passed were among the top twenty. The Court concluded that a criterion (the numerical ranking) which excluded Black candidates could not be utilized unless a "manifest relationship" between the numerical rank and actual job performance was established. The

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[1] Eighty three hundreds of one percent.

evidence of record clearly shows that there was no significant or measurable relationship between higher scores on the test and the expectation of better performance on the job.

Consequently, when the trial court ascertained that the Civil Service Act would operate to disproportionately exclude qualified minority applicants, the court was compelled to approve the Civil Service Commission's temporary preferential hiring, notwithstanding inconsistent provisions of the Civil Service Law:

> Valid state laws (may be suspended) where the potential of discriminatory application is present. Erie Human Relations Comm. v. Tullio, 357 F. Supp. 422 (W.D. Pa. 1973), citing, Louisana v. United States, 380 U.S. 145 (1965).

Federal and state anti-discrimination laws and the federal and state constitutions must take precedence over inconsistent provisions in the Civil Service Law. U.S. Const. Art. VI, §2 (Supremacy Clause); 43 P.S. 962(a); 42 U.S.C. 2000e-7, 2000h-4; Kober v. Westinghouse Electric Corporation, 480 F.2d 240 (3d Cir. 1973).

The finding by the Commonwealth Court that the rating procedure mandated by the Civil Service Act was not discriminatory is clearly unsupported by the facts of record. Since the test was not validated as regards the numerical ranking of applicants and was not a reliable indicator of the comparative qualifications among those who passed the test, the numerical ranking of eligible applicants as mandated by the Civil Service Law operated as an "artifical arbitrary and unnecessary barrier to employment" with the City of Pittsburgh Fire Department. See Griggs, supra.

While the foregoing analysis indicates that all of the conditions precedent in order to justify preferential hiring are

found in the case at bar, the Commonwealth Court expressed additional objections to the use of remedial quotas.

The Court cited Washington v. Davis, 426 U.S. 248 (1976) for the proposition that preferential hiring is inappropriate in the absence of a finding of intentional discrimination. In that case the United States Supreme Court held that an employment discrimination claim based on the U.S. Constitution would not succeed upon a mere showing of disproportionate impact. Since Glickman did not involve a constitutional violation the Commonwealth Court's reliance on Davis is unwarranted.

More importantly, there is considerable precedent for the proposition that preferential hiring is a valid remedy where discrimination results from the disproportionate impact of an alleged neutral hiring requirement such as is involved in the case at bar.

In Bridgeport Guardians, supra., the Second Circuit stated:

> "We agree of course, that hiring quotas are discriminatory since they deliberately favor minority groups on the basis of color. While we approve such relief gingerly we do not believe Judge Newman abused his discretion in imposing the quotas in hiring here. Although there was no showing of intentional discrimination it is also a fact that defendents were employing an archaic test which was not validated and which as we have found was not job related." 482 F.2d 1333, at 1340.

Furthermore, in Davis v County of Los Angeles, supra, the 9th Circuit held that proof of purposeful racially discriminatory intent is not a prerequisite of quota relief in the absence of an alleged constitutional violation. The contention

of the Commonwealth Court was also explicitly rejected by the U.S. Court of Appeals for the 7th Circuit in U.S. v. City of Chicago, supra. In that case, the court ruled that an intentional discriminatory motive need not be shown before a state or local government employer may be found in violation of Title VII. The court stated that the proper standard in evaluating promotion practices of the City of Chicago's Fire Department is that developed by the Supreme Court for private employers in Griggs v. Duke Power Co., supra. In rejecting the defendents contention that the applicable standards were those set out in Washington v. Davis, supra, the 7th Circuit held that a prima facie case of discrimination may be established merely by evidence that a facially neutral standard has a racially disparate impact and such a finding is sufficient to order quota relief.

Also, the District Court for the Western District of Pennsylvania approved preferential hiring without regard to intent as a remedy for past discrimination in the Pittsburgh Bureau of Police. Commonwealth of Pennsylvania v. Flaherty 404 F. Supp. 1022 (W.D. Pa. 1975).

At issue in Flaherty were testing and employment practices which bore a striking similarity to those involved in the instant case:

> We view the exigencies of the situation as requiring the imposition of hiring quotas. Despite the valiant efforts of the City to recruit Blacks and women, the effect of its selection procedure is to bar them from appointment to the police force. Reliance upon the (now existing hiring policies) would not eliminate but would continue the discriminatory effect of past practices. (emphasis added) 404 F. Supp. 1022, 1027.

The Court was persuaded that a particularly appropriate time to institute such a preferential hiring program was when the City had a "unique opportunity" to appoint 44 new Police Officers, for that number of appointments truly "provides a vehicle to expedite the removal of the effects of the discrimination found here." A similar opportunity faced the Bureau of Fire with the proposed hiring of twenty Firefighters.

Any concern of the Commonwealth Court that the use of racial quotas to remedy past discrimination without a finding of intentional discrimination is also unwarranted given the decision of Bakke v. Board of Regents of University of California ___U.S.___,46 U.S. L.W. 4896 (June 28, 1978), wherein Justice Powell stated:

> "Such preferences have also been upheld where a legislative or administrative body charged with the responsibility made determinations of past discrimination by the industries affected and fashioned remedies deemed appropriate to rectify the discrimination. Example: Contractors Association of Eastern Pennsylvania v. Secretary of Labor, 442 F. 2d 159 (C.A. 3 1975), cert denied, 404 U.S. 954 (1976); Associated General Contractors of Massachusetts, Inc. v. Altshuler, 490 F. 2d 9(C.A. 1 1973), cert denied, 416 U.S. 957 (1974). The courts of appeals have fashioned various types of racial preferences as remedies for constitutional or statutory violations resulting in identified race based injuries to individuals held entitled to the preference. For example, Bridgeport Guardians, Inc. v. Civil Service Commission, 482 F. 2d 1333 (C.A. 2d 1972); Carter v. Gallagher, 452 F. 2d 315 modified on rehearing en banc 452 F. 2d 327 (C.A. 8 1972) ___U.S.__,___,46 U.S.L.W. 4896, 4905.

It is noteworthy that in Bridgeport and Carter, supra, cited by Justice Powell, remedial quota relief was not conditioned on a finding of intentional discrimination. Rather, as in the case at bar, qualified minority candidates were in fact the putative victims of an arbitrary selection device, which disproportionately

excluded them from gaining employment.

Second, the Commonwealth Court's finding that the use of racial quotas to remedy past discrimination violates the constitutional rights of purportedly "more qualified" white candidates is unsupported both by the facts in the instant case and applicable decisional law. As noted earlier, the appellees who instituted this action in the court below were not ranked according to their comparative qualifications for the job. Accordingly, the Commonwealth Court's characterization of this case as involving the hiring of less qualified candidates constitutes a disregard of the facts of record. The invalidity of the Commonwealth Court's assessment was demonstrated by the Fifth Circuit in the case of NAACP v. Allen, supra.

> It is apparent that no applicant can base any claim of right upon an eligibility ranking which results from unvalidated selection procedures that have been shown to disqualify blacks at a disproportionate rate. Until the selection procedures used by the defendents here have been properly validated, it is illogical to argue that quota hiring produces unconstitutional reverse discrimination or a lowering of employment standards or the appointment of less or unqualified persons supra, at 618.

Also, in Carter v. Gallagher, supra., the Eighth Circuit ordered a Fire Department to adopt a 1:2 hiring ratio of black to white notwithstanding the defendent's contention that quotas violated the 14th Amendment to the U.S. Constitution. Moreover, in Communication Workers of America v. EEOC, supra., cert. denied 46 L.W. 3801 (June 27, 1978), the Third Circuit held that the equal protection guarantee of the Fifth Amendment is not violated by a court-approved employment discrimination remedy affecting promotional seniority rights even though the remedy operated to the disadvantage of non-minority employees.

In addition, the Commonwealth Court's analysis is contrary to U.S. Supreme Court precedent involving the use of race to fashion remedies in cases involving racial discrimination. In Swann v. Board of Education, 402 U.S. 1 (1971), the Court approved the use of racial quotas as a remedy to eliminate the present mainfestations of a previously segregated school system. Furthermore, in the seminal case of Franks v. Bowman Transportation Co., 424 U.S. 747 (1975), the Court approved a retroactive award of seniority to a class of black truck drivers who had been victims of discrimination. While this relief imposed some burdens on other employees, the Court held that it was necessary to make the victims whole for injuries suffered due to unlawful discrimination. The majority opinion is firm in its pronouncement that such concerns do not "obviate the necessity of remedial preferences". Also, Justice Brennan wrote that the, "(d)enial of seniority relief to identifiable victims of racial discrimination on the sole grounds that such relief diminishes the expectations of other arguably innocent employees would, if applied generally, frustrate the central 'make whole' objective of Title VII. 424 U.S. 747, 774.

In Bakke, supra., Justice Powell pointed out that after a finding of discrimination is made, "(t)he governmental interest in preferring members of the injured groups at the expense of others is substantial, since the legal rights of the victims must be vindicated." ___U.S.___, ___, 46 U.S.L.W. 4896, 4906.

All of the above-mentioned considerations compel a conclusion that the Civil Service Commission properly imposed preferential hiring under the circumstances of this case, without regard for

inconsistent provisions of the Civil Service Law.

After Glickman, the Commission had an obligation to remedy race discrimination in its employee selection procedures. However, compliance with the Civil Service Law would have operated to perpetuate, not remedy, past discrimination. The Commission proposed a preferential affirmative hiring program only after other remedies had proven ineffective. Its action in this regard was not only appropriate, but required.

Courts have repeatedly held that, "the only . . . plan that meets constitutional standards is the one that works." U.S. v. Jefferson County Board of Education, 372 F.2d 836, 847 (5th Cir., 1966).

> (Once hindsight reveals that the lower court's prior remedy failed to eliminate the pervasive effects of past racial discrimination) the court's failure to impose affirmative hiring itself contravened the Fourteenth Amendment since it operated to perpetuate constitutionally deficient employment practices. NAACP v. Allen, 493 F. 2d 614 (5th Cir. 1974)

Since all of the conditions necessary to validate preferential hiring are fulfilled and because the additional reservations expressed by the Commonwealth Court concerning quota relief are unwarranted under applicable decisional law, the trial court did not err in refusing to enjoin the action of the Pittsburgh Civil Service Commission.

II. NEITHER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 NOR THE PENNSYLVANIA HUMAN RELATIONS ACT PRECLUDE THE USE OF PREFERENTIAL HIRING OF QUALIFIED MINORITY APPLICANTS AS A REMEDY TO ELIMINATE THE CONTINUING EFFECTS OF PAST DISCRIMINATION.

The assertion by the court below that both Title VII of the Civil Rights Act of 1964 and the Pennsylvania Human Relations Act prohibit the use of preferential hiring of qualified minority applicants as a remedy to eliminate the continuing effects of past discrimination is clearly erroneous under applicable decisional law.

Section 703(j) of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(j) provides:

> "(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area."

The Human Relations Act analogue of this provision, Section 5(b)(5) provides in pertinent part:

> "It shall be an unlawful discriminatory practice, unless based upon a bona fide occupational qualification, or in the case of a fraternal corporation or association, unless based upon membership in such association or corporation, or except where based upon applicable security regulations established by the United States or the Commonwealth of

Pennsylvania: "(a) For any employer because of the race, color, religious creed, ancestry, age, sex, national origin or non-job related handicap or disability of any individual to refuse to hire or employ, or to bar or to discharge from employment such individual, or to otherwise discriminate against such individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment, if the individual is the best able and most competent to perform the services required...

"(b) For any employer, employment agency or labor organization, prior to the employment or admission to membership, to

"(3) Deny or limit, through a quota system, employment or membership because of race, color, religious creed, ancestry, age, sex, national origin, non-job related handicap or disability or place of birth."

The Commonwealth Court's interpretation of the above-noted statutory provisions ignores a substantial body of decisional law which has reached a contrary conclusion. The Federal courts have consistently interpreted Section 703(j) so as not to preclude preferential hiring which is necessary to remedy the effects of past discrimination. The rationale which the Commonwealth Court ignored in reaching this decision was explained in the case of Erie Human Relations Commission v. Tullio, supra., where the Third Circuit upheld a quota requiring that 50% of immediate openings be filled by Blacks. The court stated:

"the Constitution is both color blind and color conscious. To avoid conflict with the equal protection clause a classification that denies a benefit, causes harm or imposes a burden must not be based on race. In that sense the Constitution is color blind, but the Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination. The criterion is the relevancy of color to a legitimate governmental purpose." 493 F.2d 371, 374.

Accordingly, Section 703(j) has been uniformly interpreted to bar preferential quota hiring as a means of changing a racial imbalance attributable to causes other than unlawful discriminatory practices. It does not prohibit the use of goals or quotas intended to eradicate the vestiges of past discrimination. Rios v. Steam Fitters, supra., at 630; U.S. v. Elevator Constructors Local 5, supra., at 1019: NAACP v. Beecher, supra, at 1028; U.S. v. Local 38 IBEW, supra, at 149-50.

Furthermore, there is substantial evidence in the legislative history of the 1972 amendments to Title VII which indicate that Congress itself endorsed this construction of the statute. See, U.S. v. Elevator Constructor's Local 5, supra, at 1019-20.

More importantly, this construction of 703(j) is clearly supported by the opinion of the U.S. Supreme Court in Franks v. Bowman Transportation Co., supra. In rejecting the argument that the remedy of constructive seniority was barred by a literal reading of 703(h), the Court stated that this provision does not "expressly purport to qualify or proscribe relief otherwise appropriate under remedial provisions of Title VII, Section 706(g), 42 U.S.C.A. 2000e-(5)(g) in circumstances where an illegal discriminatory act (emphasis supplied) or practice is found." 96 S. Ct. at 1261.

While 703(h) involved a prohibition against interference with bona finde senority systems, the rationale utilized by the Court is equally applicable to the prohibition contained in Sec. 703(j). Consequently, the prohibitions contained in Title VII do not apply to remedies grounded in findings of unlawful discrimination. This point was also expressed by Justices Brennan, White, Marshall and Blackman of

the U.S. Supreme Court in Bakke, supra:

> "...there is no indication that Congress intended to bar the voluntary use of racial preference to assist minorities to surmount the obstacles imposed by the remnants of past discrimination. Even assuming that Title VII prohibits employers from deliberately maintaining a particular racial composition in their work force as an end in itself, this does not imply, in the absence of any consideration of the question, that Congress intended to bar the use of racial preferences as a tool for achieving the objective for remedying past discrimination or other compelling ends." ___U.S.____,____,46 U.S.L.W. 4896, 4915 n. 17

Accordingly, neither Section 703(j) of Title VII nor Section 5(b)(3) of the Pa. Human Relations Act limit the use of preferential hiring as a remedial measure to correct unlawful discrimination.

III. THE INITIATION OF PREFERENTIAL HIRING OF QUALIFIED MINORITY APPLICANTS BY AN EMPLOYER SUBSEQUENT TO A JUDICIAL FINDING OF DISCRIMINATION IS A VALID AND NECESSARY MEASURE TO CORRECT THE CONTINUING EFFECTS OF PAST DISCRIMINATION

While the Pennsylvania Human Relations Commission contends that the affirmative action plan initiated by the Pittsburgh Civil Service Commission was not in fact "voluntary", substantial legal authority supports the proposition that employers may voluntarily implement affirmative action in order to eliminate the effects of past discrimination.

The Commonwealth Court's characterization of the Civil Service Commission's preferential hiring plan as "voluntary" is contradicted by the facts of record, and was properly rejected by the trial court which held:

> "Even in the case of Commonwealth of Pa. v. Glickman, supra, a case relied upon heavily by the plaintiffs, wherein preferential affirmative hiring of City of Pittsburgh firefighters was declined to be ordered by the District Court, the Court specifically stated that such a remedy may be appropriate at a later time. It is the opinion of the Court that now is the appropriate time to acknowledge the validity and necessity of the City of Pittsburgh's affirmative action program. The City has taken the lead and the Court will not disturb what it perceives to be a giant step in the right direction. The long-run objective of the law is a society more open to individual opportunity. (See 27 Rutgers L.R. 672 1974). (R. 126a)

The remedial plan developed by the City was implemented only when substantial evidence indicated that strict compliance with the Civil Service Law would perpetuate the effects of past discrimination without providing candidates "more" qualified for the position of Firefighters.

As noted earlier, the District Court's expectation that the implementation of a validated test and extensive minority recruiting efforts, would eliminate discrimination was not realized. All the remedial techniques undertaken by the Commission, including elimination of the written test and an extensive affirmative recruitment program, were singularly unsuccessful. The number of Black Firefighters increased by only one percent (1%) in three years. (R. 100a, 101a) The certification of candidates in accordance with the numerical ranking system would have resulted in only three Blacks being hired.

Therefore, the Civil Service Commission's action was predicated solely on the failure of other remedial measures intended to correct earlier discriminatory practices, and heed the admonition of Judge Teitlebaum:

> "It must, however, be made clear that the fact that at this stage of the proceedings the Court has rejected the option of imposing a racial hiring quota does not mean that it is foreclosed from instituting such a remedy in the future." 370 F. Supp. 724, 737.

Assuming, however, that the actions of the Civil Service Commission can be correctly characterized as "voluntary ", substantial legal authority supports as the initiation of affirmative action by employers whether subsequent to a judicial finding of past discrimination, as in this case, or otherwise. Indeed, it is well established that volunatary compliance with civil rights statures is necessary in order to secure the goals of equal opportunity.[5] In Alexander v. Gardner-Denver, 415 U.S. 36 ,44

5. Section 9 of the PHRA, 43 P.S. 959, provides, inter alia, that "(i)f it shall be determined after such investigation that probable cause exists for crediting the allegations of the complaint, the Commission shall immediately endeavor to eliminate the unlawful discriminatory practice complained of by conference, conciliation and persuasion.

the U.S. Supreme Court stated that Congress "had chosen cooperation and voluntary compliance as the preferred means for achieving the goals of Title VII." Moreover, this fundamental principle was recently reaffirmed by Justices Brennan, White, Marshall and Blackman.

> "Indeed, the requirement of a judicial determination of a constitutional or statutory violation as a precedent for race conscious remedial actions would be self defeating. Such a requirement would severely undermine efforts 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. The judicial intervention is the last resort to achieve cessation of illegal conduct or remedying of its effects rather than a prerequisite of action." ___U.S.___,___,___ 46 U.S.L.W. 4896, 4921.

The contention of the Commonwealth Court was also explicitly rejected by the Third Circuit in EEOC v. American Telephone and Telegraph Co. 536 F. 2d 167 (3d Cir. 1977), cert. denied, ___ U.S.___, 46 U.S.L.W. 3801(1978) and Weber v. Kaiser Aluminum Co. 563 F.2d 216 (5th Cir. 1977). In approving the preferential treatment of minority individuals incorporated in a consent decree the 3rd Circuit believed that since quotas are a remedial device of the courts they are obviously an available remedy in the conciliation process. Furthermore, the court justified preferential treatment even though discrimination had not been proven or admitted although the evidence strongly suggested discrimination. In a case at bar affirmative action was preceded by a judicial finding of discrimination and the validity of the city's use of a remedial quota is apparent.

The lawfulness of employer-initiated affirmative action is not limited to the aforementioned situations. Voluntary affirmative action has repeatedly been sanctioned by the Federal Circuit Courts in cases involving Executive Order 11246: e.g.

Contractors Association of Eastern Pennsylvania v. Secretary of Labor, supra.[4]

The consequences of limiting compliance with civil rights laws to that directly pursuant to a court's order was recognized in German v. Kipp, 429 F. Supp. 1323 (W.D. Mos. 1977) where the court stated:

> "The requirement of a finding of past discrimination before a court in the exercise of its broad equitable power may compel implementation of an affirmative action plan including quota relief does not necessarily mandate the conclusion that an employer may not voluntarily implement a reasonable short term affirmation action plan to remedy the effects of historical discrimination. That conclusion which would in effect require employers to admit past discrimination or wait until they were sued by a minority individual and compelled to implement affirmative action would fly in the very face of the conciliatory efforts intended to be made under Executive Order 11246 and would appear to this court to contradict the spirit of the 14th amendment and its mandate to remove not only the incidence of discrimination but its effects as well." 429 F. Supp 1323, 1334.

The importance of employer-initiated affirmative action plans was also emphasized by the District Court in Contractors Association of Western Pennsylvania v. Kreps, supra., wherein it was stated that, "the discretionary power of public authorities to remedy past discrimination is even broader than that of the Judicial..." 441 F. Supp 926, 949.

The Commonwealth Courts' reliance on the case of Reeves v. Eaves 411 F. Supp. 531 (N.D. Ga. 1976) requires little discussion. In that case, the trial court, during the pendency of a racial discrimination suit, was made aware of allegations that the defendant Police Department had begun to hire less qualified minority applicants and had lowered hiring standards which impaired the Department's function of protecting citizens. Without

4. Associated General Contractors v. Altshuler, supra; Southern Illinois Builders Association v. Oglvie, supra; U.S. v. New Orleans Public Service 553 F.2d 459 (5th Cir. 1977)

making any finding regarding the allegations, the court informed the parties that any such preferential hiring must be pursuant to a court decree. 411 F. Supp. 531, 533.

The record in the case at bar repeatedly indicates that candidates for employment were not ranked according to qualifications. Accordingly, Reeves is inapplicable to the instant case.

The Court in Flaherty , supra, likewise found voluntarily undertaken preferential hiring more desirable than judicial imposition of the same remedy:

> The ultimate responsibility for eradicating racial discrimination . . . rests upon the officers and agents of the City . . . A judicially imposed racial and sexual hiring quota is justified only when the City fails to take the action necessary to correct the discriminatory imbalance . . . . at 1027.

In the instant case, the Commission has voluntarily implemented an affirmative hiring plan to alleviate discrimination in the Bureau of Fire. The Commission's action represents substantial progress toward achieving the goal of equal employment, consistent with the authorities cited above, and with the legislative mandate favoring voluntary compliance whenever possible. As noted earlier, Section 9 of the Pennsylvania Human Relations Act, 43 P.S. § 959, and Section 706(d) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(d), require that anti-discrimination enforcement agencies endeavor, in the first instance, to eliminate unlawful practices by means of conference, conciliation and persuasion.

In addition, it must be observed that the Civil Service Commission determined that the affirmative action taken by the Department of Fire was necessary and appropriate in order to rectify past discrimination. In the absence of disagreement between the City Civil Service Commission and the Pennsylvania Human Relations Commission; or the Pittsburgh Human Relations Commission that determination qualifies as one of an administrative body charged with the responsibility to make such determinations and fashion appropriate remedies and is lawful and proper under the rationale of the Supreme Court's recent Bakke decision.

The trial court below correctly refused to interfere with the Commission's efforts to eradicate discrimination in the hiring of Firefighters. This decision should be affirmed.

CONCLUSION

For all of the foregoing reasons, the Pennsylvania Human Relations Commission, as Appellant-Intervenor respectfully requests this Honorable Court to reverse the Order of the Commonwealth Court and affirm the Order of the Court of Common Pleas of Allegheny County, denying an injunction and dismissing the statutory appeals in the instant case.

Respectfully submitted,

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IN THE SUPREME COURT OF PENNSYLVANIA

WESTERN DISTRICT

CITY OF PITTSBURGH, et al. Appellants	:	
COMMONWEALTH OF PENNSYLVANIA PENNSYLVANIA HUMAN RELATIONS COMMISSION, Appellant Intervenor	:	No. 56 March Term, 1978
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF JUSTICE, COMMUNITY ADVOCATE UNIT, Appellant Intervenor	:	
v.	:	
JOHN S. CHMILL, et al. Appellee	:	

CERTIFICATE OF SERVICE

I hereby certify that on this day of , 1978, I did serve five (5) copies of the foregoing Brief for Appellant Intervenor upon the persons and in manner indicated below, which service satisfies the requirements of Pa. R.A.P. 121:

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IN THE
COMMONWEALTH COURT OF PENNSYLVANIA

JOHN S. CHMILL, DAVID HIROSKY, JOHN G. HOLTZ, THOMAS PFLUM, DAVID J. PUCIATA, LAWRENCE T. YAKICH and PAUL R. MYERS, Appellants :

v. : No. 1047 C. D. 1976

CITY OF PITTSBURGH, PITTSBURGH CIVIL SERVICE COMMISSION and STEPHEN A. GLICKMAN, Appellees :

BEFORE:

HONORABLE JAMES S. BOWMAN, President Judge
HONORABLE JAMES C. CRUMLISH, JR., Judge
HONORABLE HARRY A. KRAMER, Judge
HONORABLE ROY WILKINSON, JR., Judge
HONORABLE GLENN E. MENCER, Judge
HONORABLE THEODORE O. ROGERS, Judge
HONORABLE GENEVIEVE BLATT, Judge

Argued: May 4, 1977

Reported at 31 Pa. Cmwlth 98,
375 A.2d 841 (1977)

Appendix A

OPINION BY JUDGE MENCER Filed: July15, 1977

John S. Chmill, David Hirosky, John G. Holtz, Thomas Pflum, David J. Puciata, Lawrence T. Yakich, and Paul R. Myers (appellants) are individuals who reside in the City of Pittsburgh. In August of 1975, appellants took a physical performance examination to become certified and hired as firefighters for the City of Pittsburgh. Out of approximately 1500 persons who took the test, appellants were ranked between slot No. 15 and slot No. 21 on the competitive list of applicants who have passed the examination for the position of firefighter.

The City of Pittsburgh requested the Civil Service Commission of that city to certify, for purposes of appointment and hiring, the names of 20 individuals for the position of firefighter. In response to this request, the Commission, on March 23, 1976, decided to certify 50 percent white male candidates and 50 percent minority, including female, candidates, rather than to certify the 20 individuals who were at the top of the competitive list, as prescribed by Section 3.1 of the Act of June 27, 1939, P. L. 1207, as amended, added by the Act of July 3, 1963, P. L. 186, §2, 53 P.S. §23493.1, Subsection (a) of Section 3.1 reads as follows:

> "(a) Both original appointments and promotions to any position in the competitive class in any bureau of fire in any city of the second class shall be made only from the top of the competitive list: Provided, however, That the appointing officer may pass over the person on the top of the competitive list for just cause in writing. Any person so passed over shall, upon written request, be granted a public hearing before the Civil Service Commission."

As a result of the Commission's decision to use a quota system, the appellants were not hired as firefighters by the City of Pittsburgh. This appeal has been argued on the premise that, if the Act had been followed, the appellants would have been certified and hired to the firefighter positions.

The appellants filed a complaint in equity, seeking to enjoin the City of Pittsburgh from hiring any firefighters until their status could be ascertained and the Pittsburgh Civil Service Commission from certifying any applicants to the position of firefighter for the City of Pittsburgh until their status could be ascertained and also seeking the issuance of an order requiring the Civil Service Commission to maintain the current eligibility list during the pendency of the litigation and an order directing the Civil Service Commission to certify appellants to the position of firefighter for the City of Pittsburgh. Appellants also filed appeals with the Pittsburgh Civil Service Commission, which were denied, and thereafter filed further appeals with the Court of Common Pleas of Allegheny County. The trial court consolidated the appeals from the decisions of the Pittsburgh Civil Service Commission with the equity suit. On June 4, 1976, the trial court denied the relief sought by appellants in their equity action and further dismissed their statutory appeals, thereby affirming the determination of the Pittsburgh Civil Service Commission to certify 20 individuals for the position of firefighter in the City of Pittsburgh according to a quota system providing for 50 percent of the individuals certified to be members of minority groups. This appeal followed.

The law of this Commonwealth is that appellate courts, when considering appeals from the grant or refusal of a preliminary injunction, will look no further than a determination of whether reasonable grounds appear for the trial court's granting or refusing of the preliminary injunction. McMullan v. Wohlgemuth, 444 Pa. 563, 281 A. 2d 836 (1971). Even with that narrow standard of review in mind, we conclude that the refusal to grant the relief sought by the appellants in this case was inappropriate and the order entered by the trial court must be reversed.

The trial court stated that "[i]t is admitted and apparent that the defendants [appellees] violated the express terms of the Civil Service Act" and continued: "Original [appointments] must be made 'from the top of the competitive list'. The defendants' [appellees'] quota system deviates from this straight down the list approach in the Act. The purpose of the Civil Service Act was to guarantee that appointments would be made solely on the basis of merit, to obtain the best man or woman for the job."

Having so concluded, we believe the trial court should have entered an appropriate order reflecting such conclusions. It is an accepted view in this Commonwealth that no employee in the civil service may be appointed, transferred, reinstated, promoted, or discharged in any manner or by any means other than those specified by statutes regulating civil service. McGrath v. Stalsey, 433 Pa. 8, 249 A. 2d 280 (1968). The Pittsburgh Civil Service Commission's unilateral decision to implement a quota system was a violation of

the Act of June 27, 1939 and established a clear right to relief for the appellants.

However, the trial court reasoned that "the federal and state civil rights acts and the federal and state constitutions take precedence over the civil service acts where the potential of discriminatory application is present." Our examination of that premise, when utilized to justify a quota system, convinces us that the trial court was simply in error in this assertion. Civil service laws, like civil rights laws, were enacted to ameliorate a social evil. In the former case, it was the spoils system; in the latter, discrimination. Kirkland v. New York State Department of Correctional Services, 520 F. 2d 420, reh. en banc denied, 531 F. 2d 5 (2d Cir. 1975).

Our consideration commences with a whole-hearted endorsement of Chief Justice Stone's comment in Hirabayashi v. United States, 320 U.S. 81, 100 (1943): "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."

However, a racial quota is derogatory of and patronizing to the intended beneficiary minority. As was stated in Fraternal Order of Police v. City of Dayton, 35 Ohio App. 2d 196, 301 N.E. 2d 269, 271 (1973), "[n]o doubt all will agree in the abstract that any discrimination in the classified service because of race, color or religious or political faith or conviction is not only legally, but also morally, wrong, and wholly indefensible. But the cure for discrimination is not more discrimination. Such a course would but compound and aggravate the existing evil. The precious, hard-won victory over race

discrimination must not be lightly bartered away for illusory temporary advantage."

Our examination of the Pennsylvania Human Relations Act[1] reveals no provisions that would impose a racial hiring quota system which would exclude qualified persons such as the appellants solely because of their race. On the contrary, Sections 2 and 5 of the Act[2] would prohibit employers from imposing arbitrary and discriminatory hiring quotas. Section 2(b) reads as follows:

> "(b) It is hereby declared to be the public policy of this Commonwealth to foster the employment of all individuals in accordance with their fullest capacities regardless of their race, color, religious creed, ancestry, handicap or disability, use of guide dogs because of blindness of the user, age, sex, or national origin, and to safeguard their right to obtain and hold employment without such discrimination, to assure equal opportunities to all individuals and to safeguard their rights at places of public accommodation and to secure commercial housing regardless of race, color, religious creed, ancestry, sex, handicap or disability, use of guide dogs because of blindness of the user or national origin."

Section 5 provides in pertinent part:

> "It shall be an unlawful discriminatory practice, unless based upon a bona fide occupational qualification, or in the case of a fraternal corporation or association, unless based upon membership in such association or corporation, or except where based upon applicable security regulations established by the United States or the Commonwealth of Pennsylvania:
>
> "(a) For any employer because of the race, color, religious creed, ancestry, age, sex, national origin or non-job related handicap or disability of any individual to refuse to hire or employ, or to bar or to discharge from employment such individual, or to otherwise discriminate against such individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment, if the individual is the best able and most competent to perform the services required. . . .
>
> "(b) For any employer, employment agency or labor organization, prior to the employment or admission to membership, to
>
> . . . .

"(3) Deny or limit, through a quota system, employment or membership because of race, color, religious creed, ancestry, age, sex, national origin, non-job related handicap or disability or place of birth."

A reading of these sections of the Pennsylvania Human Relations Act persuades us that the quota system of hiring as advocated here by the Pittsburgh Civil Service Commission denies appellants positions for which they are qualified, on the sole basis that they are of the white race, and consequently such denial is a violation of the Pennsylvania Human Relations Act.[3] Accordingly, the trial court was in error in its conclusion that, under the facts of this case, the Pennsylvania Human Relations Act transcends the applicable civil service act.

Next we turn to the trial court's assertion that Title VII of the Civil Rights Act of 1964 takes precedence over the civil service act in question here. Again, we find the contrary to be true. Section 703(j) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(j), provides:

"Preferential treatment not to be granted on account of existing number or percentage imbalance

"(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area."

In Griggs v. Duke Power Co., 401 U.S. 424, 430-31 (1971), it was stated:

> "Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."

It seems evident that no minority group member may be hired on the basis of race and that the trial court was in error when it concluded that the provisions of the Federal Civil Rights Act requires a result different from that which would be achieved by adherence to the provisions of the applicable civil service act.

Turning to the constitutional aspects of the trial court's assertion that there is "a higher law than the Civil Service Act," we need consider Washington v. Davis, 426 U.S. 229 (1976). In Washington, it is stated that the Supreme Court has not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact. The applicable civil service act establishes a racially neutral qualification for employment; namely, appointment by merit only. It was designed to prevent political patronage and to curb hiring on the basis of the personal preferences of those entrusted with that prerogative. The guiding principle of the act was that the best qualified man or woman would be appointed to every position. Thus, it is specifically provided that the appointing officer may pass over the person on the top of the competitive list

only for just cause in writing. Accordingly, we have difficulty understanding how such a law establishing a racially neutral qualification for employment could be considered racially discriminatory solely because a greater proportion of blacks failed to qualify than members of other racial or ethnic groups. Washington v. Davis, supra, held that such racially neutral statutes are not in contravention of the Equal Protection Clause of the Fourteenth Amendment.

We cannot place our imprimatur on a quota system of hiring which by necessity must create castes and divide our society. Our view is consonant with that of the Supreme Court of California, which found that a school admissions program which set aside class openings for disadvantaged minorities was invalid because the procedure could result in acceptance of minority students whose qualifications were inferior to those of white applicants, with resulting invidious discrimination. Bakke v. Regents of University of California, 18 Cal. 3d 34, 553 P. 2d 1152, 132 Cal. Rptr. 680 (1976), cert. granted, U.S. , 51 L. Ed. 2d 535 (1977).

Likewise, our decision today comports with the recent holding of the Supreme Court of New Jersey, which held, in Lige v. Town of Montclair, 72 N.J. 5, 367 A. 2d 833 (1973), that the use of racial quotas to remedy past discrimination violates a provision of the New Jersey constitution mandating that no person should be discriminated against because of religious principles, race, color, ancestry, or national origin.

Therefore, we must conclude that the trial court offered no supportable basis for its order denying the relief sought by the appellants.

Two other matters merit brief discussion.

First: The specific issue of racial discrimination in the recruiting, testing, and hiring of firefighters by the City of Pittsburgh was the subject of a recent federal court case in the Western District of Pennsylvania. Pennsylvania v. Glickman, 370 F. Supp. 724 (W.D. Pa. 1974). In that case, Judge Teitelbaum found that the disparities between the black population in the City of Pittsburgh and black representation in the City's Bureau of Fire and between the passing rates for black applicants and white applicants on the civil service eligibility examination demonstrated a prima facie showing of de facto discrimination.[4] The Court addressed the issue of whether the employment practice which operated to exclude minorities (the written examination) was substantially related to job performance, and, in applying the test established in Griggs v. Duke Power Co., supra, the federal court found that the firefighters' written examination was not constructed or administered so as to test for those factors necessary to job performance. In Glickman, the Court ordered a remedy directed at the development of a nondiscriminatory and job-related examination. The Court further ruled that the Civil Rights Act of 1964 did not require the hiring of minority group members on the basis of race, and the Court specifically rejected the imposition of racially oriented quotas with respect to the hiring of City firefighters.

Subsequent to the Glickman decision, the City of Pittsburgh discontinued the use of written examination in connection with hiring of firefighters and adhered solely to an expanded physical perform-

ance examination which was validated and presided over by impartial examiners. It is interesting to note that the examination was administered after extensive advertising in an effort to insure that minorities would be apprised of the impending examinations. The advertising campaign was so effective that over 1500 persons took the examinations. Of the 1161 persons who passed with a score of 75 or better, 360, or 31 percent were blacks. It is significant, not only that the examination given was a validated one, but that there has been no claim made that the examination was not job related or was discriminatory as was the written test dealt with by the federal court in Glickman.

Further, it should be noted that the appellees in this case filed a petition for removal of the present action from the Court of Common Pleas of Allegheny County to the United States District Court for the Western District of Pennsylvania, and the District Court denied such petition for removal and granted appellants' motion for remand to the Court of Common Pleas of Allegheny County. In its supporting opinion, it made the following observation: "Indeed, in the instant case, it may well be that a racially oriented hiring system is more inconsistent with federal equal rights law than is the civil service system of hiring on the basis of merit." Thus, we can only conclude that the District Court, by this observation and its remand order, was of the view that the instant case should be decided in terms of the provision of our Act of June 27, 1939 rather than federal constitutional and statutory considerations.

Second: The appellees claim that a number of federal courts have upheld the right of minorities to preference in employment under affirmative action programs and cite the following cases to support this position: United States v. Elevator Constructors Local 5, 538 F. 2d 1012 (3d Cir. 1976); Erie Human Relations Commission v. Tullio, 493 F. 2d 371 (3d Cir. 1974); Pennsylvania v. O'Neill, 473 F. 2d 1029 (3d Cir. 1973) (en banc); NAACP v. Allen, 493 F. 2d 614 (5th Cir. 1974); Castro v. Beecher, 459 F. 2d 725 (1st Cir. 1972); Carter v. Gallagher, 452 F. 2d 315 (8th Cir. 1971) (en banc), cert. denied, 406 U.S. 950 (1972). Our reading of those cases discloses a common thread which includes one or more of the following aspects recognized in NAACP v. Allen, supra: (1) clear evidence of a long history of intentional racial discrimination, (2) a paucity, if not a total absence of any positive efforts by the employer to recruit minority personnel, and (3) utilization of unvalidated employment criteria and selection procedures and other discriminatory practices. On this record, as we have noted, no claim is made of the utilization of unvalidated examinations or of a rating procedure that was not job related or was discriminatory. Likewise, there is abundance of evidence of the positive efforts made by the employer to recruit minority persons to participate in the examinations. Also, the record does not reveal a long history of intentional racial discrimination, and the 1974 decision in Glickman only determined a prima facie showing of de facto discrimination resulting from the use of an unacceptable written examination. This testing impediment was promptly overcome by discontinuance of the test. Consequently, based on the record

before us, the authorities cited by the appellees in support of the right of minorities to preference in employment are not persuasive.[5]

We must conclude that reverse discrimination designed to grant a preference to a minority employee is as objectionable and unconstitutional when the preference is voluntarily initiated by the employer as it would be if compelled by a court. The victim of racial discrimination resulting from such reverse-discrimination policies will not be able to discern a different consequence in either case. Further, we would agree with the holding in Reeves v. Eaves, 411 F. Supp. 531 (N.D. Ga. 1976), that if any preferential or discriminatory action is necessary to overcome the effects of any prior discrimination, it must come by court decree and not by a subjective, individualized selection process by the employer where there is no opportunity objectively to ascertain its necessity. Therefore, although we do not believe this record supports any justification for the use of quotas to provide preference in employment to minorities, if such affirmative action were necessary, it would appear to follow that such action would need be by court direction rather than by employer whim. Preferential treatment under the guise of affirmative action is the imposition of one form of racial discrimination in place of another. Anderson v. San Francisco Unified School District, 357 F. Supp. 248 (N.D. Cal. 1972).

Order reversed.

J.

Footnotes

[1]Act of October 27, 1955, P. L. 744, as amended, 43 P.S. § 951 et seq.

[2]43 P.S. §§ 952, 955.

[3]In McDonald v. Santa Fe Trail Transportation Co., U.S. , 49 L. Ed. 2d 493 (1976), the Supreme Court held that Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., was applicable to whites who had been discriminated against in favor of a black. The Court concluded that the Act is not limited to discrimination against members of any particular race. We cannot believe that the provisions of the Pennsylvania Human Relations Act would be construed otherwise.

[4]The Glickman court determined in 1974 that, while 20 percent of the population of the City of Pittsburgh was made up of blacks, only between 3 percent and 4 percent of the Pittsburgh Bureau of Fire was black. The record in this case discloses that, as of May 13, 1976, there were 1047 persons employed by the Pittsburgh Bureau of Fire, of which 992 were white and 55 were members of minority groups. Thus, in May of 1976, 94.75 percent of the Bureau's employes were white and 5.25 percent were minority persons. Since June 4, 1974, 163 persons were hired by the Pittsburgh Bureau of Fire, of which 21, or 13 percent, were members of minority groups.

[5]Although the trial court did not cite or rely upon Pennsylvania v. Flaherty, 404 F. Supp. 1022 (W.D. Pa. 1975), the appellees do advance this case as support for the order appealed from here. Flaherty was filed in the federal court to redress alleged discriminatory employment practices in the hiring of Pittsburgh city police officers. The Flaherty court issued a preliminary injunction imposing, as an interim measure, a minority hiring quota on the immediate appointment of new police officers of the City of Pittsburgh. We note that Flaherty is distinguishable from the instant appeal in the following areas: (1) The quota imposed was by the court, after hearing, rather than by unilateral decision of the employer; (2) although equally desirable, the correction of the racial imbalance in a police force is more urgent than in a fire bureau; (3) the examination in the instant case has not been challenged as being discriminatory or, as in Flaherty, found to be so; and (4) this is not a case dealing with the civil rights of members of a minority but rather with the civil rights of members of a majority under the provisions of a racially neutral civil service act.

JOHN S. CHMILL, DAVID HIROSKY, JOHN G. HOLTZ, THOMAS PFLUM, DAVID J. PUCIATA, LAWRENCE T. YAKICH and PAUL R. MYERS, Appellants	:	IN THE COMMONWEALTH COURT
v.	:	OF PENNSYLVANIA
CITY OF PITTSBURGH, PITTSBURGH CIVIL SERVICE COMMISSION and STEPHEN A. GLICKMAN, Appellees	:	NO. 1047 C. D. 1976

O R D E R

NOW, this 15th day of July, 1977, the Order of the Court of Common Pleas of Allegheny County under date of June 4, 1976, denying plaintiffs-appellants' motion for preliminary and permanent injunction is hereby reversed, and the Pittsburgh Civil Service Commission is hereby ordered to certify the names of John S. Chmill, David Hirosky, John G. Holtz, Thomas Pflum, David J. Puciata, Lawrence T. Yakich and Paul R. Myers to the City of Pittsburgh as persons eligible for purposes of appointment and hiring, relative to existing openings or hereafter occurring openings, for the position of firefighter in the City of Pittsburgh.

CERTIFIED FROM THE RECORD

JUL 15 1977

Frances C. Barbush
CHIEF CLERK

Glenn E. Mencer, J.

JOHN S. CHMILL, DAVID HROSKY, JOHN G. HOLTZ, THOMAS PFLUM, DAVID J. PUCIATA, LAWRENCE T. YANICH and PAUL R. MYERS, Appellants	:	IN THE COMMONWEALTH COURT OF PENNSYLVANIA
v.	:	
CITY OF PITTSBURGH, PITTSBURGH CIVIL SERVICE COMMISSION and STEPHEN A. GLICKMAN, Appellees	:	No. 1047 C.D. 1976

BEFORE:

HONORABLE JAMES S. BOWMAN, President Judge
HONORABLE JAMES C. CRUMLISH, JR., Judge
HONORABLE HARRY A. KRAMER, Judge
HONORABLE ROY WILKINSON, JR., Judge
HONORABLE GLENN E. MENCER, Judge
HONORABLE THEODORE O. ROGERS, Judge
HONORABLE GENEVIEVE BLATT, Judge

ARGUED: May 4, 1977

DISSENTING OPINION

DISSENTING OPINION BY JUDGE WILKINSON, JR.

Filed July 15, 1977

I must respectfully dissent. I cannot agree that a properly motivated affirmative action program, call it reverse discrimination if you will, is objectionable or unconstitutional whether done voluntarily or by court order. Nor can I agree that an individual or commission cannot do voluntarily what can be ordered by a court to be done because it was not done voluntarily.

There is no need to set forth at length the history of the causes and effects of segregation and the legal basis for affirmative action programs to correct it. This has been done very currently and very ably by the late dissenting judge in Lige v. Town of Montclair, 72 N.J. 5, 367 A.2d 833 (1976) and in Bakke v. Regents of University of California, 18 Cal. 3rd 34, 553 P.2d 1152 (1976), cert. granted, U.S. , 51 L. Ed. 2d 555 (1977).

It is most important to keep in mind always that, in my opinion, a properly motivated and administered affirmative action program only gives preference to a member of a minority group after it is determined that an insufficient number have been admitted or employed and that he or she is qualified to do satisfactory work, either as a student or an employee. I would not consider the decision of this Court in this case of such great consequence if it had been based solely on the Act of June 27, 1939, P.L. 1207, as amended, 53 P.S. §23481, et seq., which set up the civil service system for firemen in second class cities. I agree with the lower court that this act is modified by the later Pennsylvania Human Relations Act, Act of

October 27, 1955, P.L. 744, as amended, 43 P.S. §951 et seq., and its amendments. However, the majority opinion is far more sweeping than that. If affirmative action programs are not authorized by the Pennsylvania Human Relations Act and are in fact contrary to it and the constitution, how then has the Pennsylvania Supreme Court and this Court ordered assignments of pupils to schools to correct de facto segregation? At the same time, consideration of color for pupil assignment which creates segregation is obviously illegal under the Pennsylvania Human Relations Act and unconstitutional. It is the motivation of the action which justifies the distinction between one and the other, as it does in so many other areas of the law. It is as incongruous to me to refer to giving a preference by race to qualified candidates who would not make it in competition on their own as being derogatory and patronizing to the intended beneficiary minority, as to say it would be derogatory and patronizing to throw a life preserver to a drowning man who is swimming against the current and could not make it alone.

Roy Wilkinson, Jr., Judge

Judge Rogers joins in this dissent.