

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

UNITED STATES OF AMERICA

PLAINTIFF

VS.

CIVIL ACTION NO. J-4706

STATE OF MISSISSIPPI, ET AL.
(SIMPSON COUNTY SCHOOL DISTRICT)

DEFENDANT

MEMORANDUM OPINION AND ORDER

This cause is before the court on the motion and amended motion of plaintiff United States of America to enforce consent decree.¹ Defendant Simpson County School District has responded in opposition to the motion and the court, following its consideration of the motion and response, along with evidence and argument presented by the parties at a July 11, 2003 hearing on the motion, concludes that the motion should be granted, as set forth herein.

The 1983 consent decree entered in this case and applicable to the Simpson County School District establishes certain "Personnel Procedures" for the district to follow in recruiting, hiring, transferring, promoting, demoting, dismissing and compensating employees. As is pertinent here, the decree provides as follows:

2. The School District agrees not to fill any vacancy unless it has been advertised publicly for at least three weeks prior to the final date for submitting applications. . . .
3. The School District agrees that, at least three weeks prior to the final date for any application, each

¹ The United States is joined in its motion by the plaintiff-intervenors.

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vacancy shall be registered with the State Employment Office and announced in the Jackson Advocate as well as other newspapers.

5. The School District agrees to institute and carry on an active, ongoing program of recruitment directed at increasing substantially the number of qualified black applicants for positions as administrative personnel, counselors, athletic directors, coaches and different types of teachers. Defendants shall take all reasonable steps to recruit qualified black applicants for these positions so that the proportion of qualified black applicants in each category will approximate the availability of such applicants in the State of Mississippi, as measured by the most recent statistics on persons holding certificates issued by the Mississippi State Department of Education. In particular, whenever school officials become aware that there is to be a vacancy in a position as administrator, counselor, athletic director, coach or teacher, the Personnel Director shall send a notice, similar to that described in paragraph III(D)(2) above, to education school placement officials at each public university in Mississippi. Each such notice shall be mailed out not less than five weeks before the final date for submitting applications, shall be accompanied by blank application forms and by a letter from the Personnel Director actively soliciting applications from qualified black candidates. Applications from qualified white candidates may also be solicited, of course.

In its present motion, the United States contends that the District's current employment practices violate these provisions of the 1983 consent decree inasmuch as the District, instead of advertising administrative positions, is filling vacancies by first soliciting applications from current employees of the District and, in direct contravention of the terms of the consent decree, is advertising for applicants outside the District only if there are no qualified applicants among its current employees. The United States complains, in particular, of the District's recent actions in filling the positions left vacant by the retirement of three of the District's principals by promoting existing District personnel without first having sought or

advertised for applicants outside the District, as mandated by the consent decree.

In response to the United States' motion, the District does not deny that it seeks outside applicants for vacancies only when there are no qualified applicants within the District, and it does not deny that this procedure is inconsistent with the procedures originally established and mandated by the 1983 consent decree. The District maintains, though, that the provisions of the consent decree regarding such procedures have been modified, as permitted by the express terms of the consent decree, by notice to and consent of the United States of a transfer policy devised and adopted by the District in March 1984, on the advice of the District's Personnel Director, Lillie Hardy,² which policy states, in toto, as follows:

² The court notes that the 1983 consent decree called for the creation of the administrative position of District Personnel Director, and provided that the personnel director would be responsible for

overseeing implementation of all policies and procedures relating to employment, including advertising, recruitment, receiving application forms, rating the objective qualifications of each applicant, forwarding applications to principals having authority to make employment recommendations, collecting and forwarding all such recommendations to the Superintendent maintaining files on all vacancies, advertising, recruitment efforts, applications, applicant rating forms, recommendations and actions taken on employment matters, as well as preparing reports to the Court and parties on the School District's compliance with the employment provisions of this consent decree.

Ms. Hardy, who is African-American, was selected for the position of personnel director by agreement of all parties in 1983 and, though appointed to the post of Assistant Superintendent of Education in 1988, has continuously served as the personnel director.

Principals and Administrators shall make intra-school transfers and inform the Personnel office of such transfers.

All school personnel who are interested in transfers from one position within the school to another position within the same attendance center or from one attendance center to another attendance center within the district, shall make such request in writing to their immediate supervisor and to the Personnel Director.

Prior to advertising for a position, the names, qualifications, years of experience and other pertinent information on current employees who are qualified for the position and are interested, will be forwarded to the principal for consideration.

The District contends that notice of this policy was provided to the United States in accordance with paragraph D. 12 of the consent decree, which recites that the District must provide sixty days' written notice to the United States of proposed changes in the District's "policies, procedures or forms," and according to the District, at no time over the past two decades has the United States voiced any objection to this policy. The District submits, therefore, that the procedures it follows in selecting persons to fill vacancies comport with the consent decree, as modified, and that the United States' current motion is therefore due to be denied.³

³ The District contends that based on the evidence, there can be no question but that its transfer policy has, in fact, amended the consent decree's requirement for public advertising of positions outside the District, and it contends that the only dispute is as to the meaning of the transfer policy. The District's position, as expressed by District Superintendent Jack McAlpin, is that the transfer policy allows the District to forego outside advertising in all cases where there are qualified applicants within the District, without regard to those applicants' race; but Ms. Hardy, the District's personnel director, asserts that the transfer policy is applicable, and allows the District to fill vacancies from within, without outside advertising, only when there is a pool of qualified black applicants within the District. The District disputes Hardy's interpretation of the policy, but ultimately argues that,

The parties are in apparent agreement that unless there was an effective modification of the terms of the consent decree, the District has not been following the consent decree in the filling of administrative (and other) vacancies. That raises the questions whether the consent decree by its terms permits modifications such as that claimed by the District, and if so, whether there has been such a modification, and if not, whether any other basis exists which might support a conclusion that the consent decree has otherwise been modified by agreement of the parties.

According to the United States, contrary to the position taken by the District, nothing in the consent decree authorizes the District to modify its personnel policies in such a manner as to be inconsistent with the requirements of the consent decree, and furthermore, while the United States was informed of the District's "transfer" policy, it never received notice of an internal "promotion" policy, and certainly never agreed to any such proposal. As to the former contention, the consent decree recites, in paragraph D. 12, as follows:

Prior to entry of this consent decree, the School District formally adopted new job descriptions, application forms and applicant rating forms, as well as new policies applying to all hiring, promotion, demotion, non-renewal, termination and compensation of School District employees. These changes are recorded in School District minutes for the appropriate dates, and are now in effect. The plaintiff and intervenors do not object to these new policies, procedures and forms,

"[w]hatever the transfer policy means, it is clear that it is a policy which has been approved by the Justice Department." The court is not persuaded that this is so, and therefore, finds it unnecessary to further address or resolve the conflict between Ms. Hardy and Mr. McAlpin as to the meaning of the transfer policy.

but reserve the right to monitor whether they are non-discriminatory in their application and impact. Should the School District decide to modify its policies, procedures or forms, it agrees to furnish the plaintiff and intervenors with a description of the proposed change(s) at least sixty days prior to the formal adoption of the proposed change(s) by the Board of Education.

The United States reasons that this paragraph, upon which the District relies as its sole authorization for modification of the consent decree vis-a-vis the requirement of outside advertising, is clearly intended to refer to procedures other than those expressly dictated by the consent decree itself, and that nothing in the decree permits the parties to themselves modify the terms of the consent decree. In the court's opinion, the structure and explicit language of the consent decree support the United States' argument in this regard, for paragraph D. 12 refers not to the District's personnel policies and practices in general, but rather expressly refers to policies that had already been adopted by the District and were in place "[p]rior to entry of th[e] consent decree." This paragraph authorizes modification of those pre-existing policies but it does not by its terms purport to authorize modification of those policies and procedures established by the consent decree itself.

Even were that not the case and amendments of the requirements of the consent decree were permissible upon notice to the government, the court is of the opinion that such notice was not provided as to the District's putative promotion-from-within policy. In this respect, although it is undisputed that notice of the District's 1984 policy addressing "Transfer of Personnel within the District," quoted supra, was provided to the United

States, it cannot fairly be said that this written transfer policy clearly describes the District's current policy of allowing internal promotions without advertising vacancies outside the District, for by its terms, the policy purports to apply to "transfers," not "promotions." Neither is the court persuaded that the United States was otherwise provided with the kind of clear notice that ought precede any modification/amendment to the consent decree.⁴

Having said this, the court must observe that no credible evidence has been presented that would lead the court to conclude that in the hiring of the three principals at issue or otherwise, the District has acted in a manner which is intentionally discriminatory, nor, in the court's opinion, does the evidence suggest that the District had any awareness over the years that its actions did not comply with the actual requirements of the consent decree. On the contrary, it appears to the court that the District has followed the advice and direction of its personnel

⁴ That is to say, the court does not find that the United States was or should have been aware of this practice and/or policy of the District by virtue of the litigation in the John Hardy. Indeed, the court observes that the March 3, 1993 consent order resulting from the Hardy litigation specifically recited that "[f]or settlement purposes, the School District will not be required to advertise the high school assistant principal position for this opening only," but noted that "[t]he parties recognize the uniqueness of this particular opening and future vacancies will be filled in accordance with the 1983 Consent Decree" (emphasis added). In the Hardy case, in fact, there was a pool of qualified black applicants. And yet no reference was made to the transfer policy, or any amendment to or modification of the consent decree which would have obviated the need for advertising of openings and instead, it was explicitly agreed that future vacancies would be filled in compliance with the consent decree. This tends strongly to suggest that the parties, including the government, considered that the terms of the consent decree, and not the transfer policy, controlled.

director, Ms. Hardy, whom Superintendent McAlpin has reasonably regarded as having the responsibility to oversee and ensure the District's compliance with the consent decree.⁵ And there is certainly nothing to suggest that Ms. Hardy was herself motivated by a discriminatory animus or that her misunderstanding of the District's obligations under the consent decree was anything other than that: a misunderstanding. Of course, the absence of discriminatory intent is not material to the question whether the District's existing policies and practices violate the consent decree, for the consent decree is what governs the District's actions and it is due to be enforced according to its terms. It would thus seem that an order may appropriately be entered directing future compliance with the terms of the consent decree, as written, leaving it to the District to seek approval of any modification thereof.⁶ The question remains, though, as to what,

⁵ Ms. Hardy has taken the position that one of the three principal positions, that of Magee Middle School, was filled in December 2002 before she remembered the requirement that there be a pool of qualified black applicants, but that she brought the proper interpretation of the District's transfer policy (namely, the requirement that there be a pool of qualified black applicants) to the Board's attention before it confirmed the in-district hires of the other two principals at the Simpson County Elementary School and the vocational school. While the court found Ms. Hardy generally credible, the court finds as to this particular issue that Ms. Hardy let the Board know of the United States' concern that there was no pool of qualified black applicants, but that she did not directly advise the Board of her position that the transfer policy was subject to the unwritten (and theretofore unexpressed) qualification that there be a pool of qualified black applicants.

⁶ As Ms. Hardy has contended, and plaintiff-intervenors evidently agree and the United States has not appeared to disagree, a transfer/promotion policy which would give apply only in the event there are minorities in the applicant pool would still give current employees a preference, and address the District's concern for morale, while at the same time protecting

if anything, should now be done to remedy the specific recent violation of which the United States complains; and on that question, the court does consider the absence of discriminatory intent to be relevant.

In the court's opinion, those three persons who have been hired by the District to fill the positions in question should be permitted to keep and hold those positions for this 2003-2004 school year;⁷ the positions should be reopened for consideration for the succeeding school year, at which time the District must undertake to fill the positions in accordance with the terms of the consent decree; and those persons who have been selected to fill the positions for this 2003-2004 school year shall be given credit for their year's service in the positions at issue. Further, the court is of the opinion that in the interest of compliance with the consent decree, the three assistant principal vacancies occasioned by the selection of these three individuals for the disputed principal positions shall be advertised and filled in accordance with the terms of the consent decree for this 2003-2004 consent decree.⁸

IT IS SO ORDERED this th29 day of July, 2003.


UNITED STATES DISTRICT JUDGE

the interest in considering black candidates for vacancies.

⁷ The court notes that the District has moved to join those persons as indispensable parties to this action. The court concludes that the motion is without merit and should be denied.

⁸ A temporary restraining order was entered by the court on July 17, 2003 enjoining the District to fill these positions in accordance with the consent decree.