NEW YORK STATE JUDICIAL COMMISSION ON MINORITIES

INTERIM REPORT

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INTERIM REPORT ON NON-JUDICIAL PERSONNEL TO THE CHIEF JUDGE OF THE STATE OF NEW YORK

> "So far as the individual is concerned a constitutional government is as good as its courts. No better, no worse."
>
> --Woodrow Wilson

FINDINGS

The perception that the New York State Court system discriminates on the basis of race and national origin is pervasive among minorities. This public perception is fueled by the lack of minorities employed by the system. Such absence perpetuates a predominantly white court system meting out "justice" to litigants, who, in significant numbers, are Black, Hispanic, Native American and Asian-American.

RECOMMENDATIONS

The urgent need for the court system to address the negative perception of the courts held by a significant segment of our society compels this Commission to issue and interim report and call for the immediate adoption of an affirmative action plan. This plan encompasses a variety of measures, including flexible goals and timetables for hiring and promoting minority non-judicial personnel.

I. THE PUBLIC PERCEPTION OF DISCRIMINATION

> "Can you imagine how a black single parent feels the first time she goes into that intimidating place [Family Court] and sees white clerks, white guards, white psychologists, white correctional officers, white lawyers, and white court judges? -- she immediately senses that they have all the power, and we have none. The court personnel's attitude is [that an] inner city person is a nobody, and we feel helpless rage as we see them snickering and whispering snide remarks and things to each other as they talk about us. They only give respect in conversation to each other and to the white parents in the court."
>
> Witness, Albany Public Hearing

Witness upon witness echoed the sentiments of this black woman and study after study attests to the negative perceptions of the system. We can therefore well imagine the feelings of this "black single parent," as well as those of many other minority users of the court system when they enter the court.

Evidence for the perception of racial bias among minorities in New York State Courts is pervasive. The Commission heard extensive testimony at its Albany, Buffalo, and New York City hearings regarding public perceptions of bias. Most of the witnesses, at some point, testified to this perception (see Appendix). Recent media surveys in New York State also document the pervasive perceptions of bias among minorities. For example, a New York Times survey of 1,147 New York City residents found that 47% of Blacks and 43% of Hispanics believed that the "courts favor whites."[1] Similarly, a Newsday survey of 759 black New Yorkers found that 40% of respondents believed that the courts mistreat

Blacks "all or most of the time."[2] A New York Law Journal poll found that 71% of Blacks believed that given a conviction for an identical crime, a white offender would get a lighter sentence than a Black.[3] A fair number of white New Yorkers also believe there is racial bias in the courts -- 21% of white respondents in the Times survey believed "courts favor whites," and 31% in the Law Journal poll believed white offenders would be favored in sentencing.[4]

The overwhelmingly white complexion of the Unified Court System (UCS) projects an aura of unfairness to the minority user and an appearance that the system is unjust because minorities seem to be barred from within. While this interim report focuses on non-judicial personnel, judicial staffing patterns have an important impact on the public's perception. Most minority persons will be wary of a system in which over 80% of the people sentenced to New York's prisons are minorities,[5] while more than 92% of judges statewide are Whites[6] as are over 82% of the courts' non-judicial personnel.[7] In New York City and nearby judicial districts (1, 2, 9, 10, 11 and 12), minorities comprise 35% of the total population but comprise only 21.5% of the UCS's non-judicial personnel. The lack of minorities is most striking in these districts, where 90% of the State's minority population resides.

In the New York City Housing Court 81% of the tenant-litigants are Black, Hispanic or Asian-American (usually appearing without legal representation), 55% of the

landlord-litigants are Whites (usually appearing through their attorneys),[8] and 79% of the judges are Whites. Similarly, the racial composition of users of Family Court is heavily minority while the composition of court personnel is predominantly white.[9] Ninety-four percent (94%) of New York State Family Court Judges are Whites,[10] as are 90% of attorneys appearing there.[11] Indeed, the disparities between the race of court users and that of administrators is one of the reasons some refer to these courts as "ghetto courts."

The courts cannot ignore the relationship between the perception of racial bias and the absence of racial diversity in the institution, even if such absence were unintentional. What concerns the Commission here is the chronic inattention to the need for racial and ethnic diversity, and the resulting perpetuation of the perception of bias .

Thus, the Commission pauses in its activities to bring this urgent message to the Chief Judicial Officer of the UCS. The past and present employment patterns of the court system suggest racial and ethnic exclusion, especially in positions of authority within the system. Moreover, because the racial and ethnic composition of the courts' staffs has a strong impact on the extent to which the consumers of the services of the courts will perceive or experience just and fair treatment, the Commission asks that the Chief Judge act

now to prevent further erosion of the public confidence so essential for our courts to function in a free society.[12]

II. HISTORY AND DATA ON PATTERNS OF DISCRIMINATION

The public perception that discrimination is rampant in the courts of New York is cause enough for concern. However, the matter is made more urgent by the fact that our investigation into employment patterns in the Unified Court System gives credence to the perception of racial and ethnic discrimination.

1. Prior Unified Court System litigation

Public agencies like the UCS have been under a federal mandate to avoid discrimination in employment since 1972 when Congress extended the 1964 Civil Rights Act to cover state and local governments. The guidelines of the United States Equal Employment Opportunity Commission (EEOC) specifically make reliance on test scores unlawful when minorities fail the tests disproportionately to Whites and the tests have not been validated as measures of future job performance.[13]

In the face of that clear message under federal law, the Office of Court Administration (OCA) in 1977 abandoned efforts to prevalidate an examination for the job of court officer, a major entry level non-judicial position. This effort was abandoned despite a $150,000 grant from the Law Enforcement Assistance Administration to undertake the effort. The UCS then proceeded to give an examination which had an "adverse impact," i.e., disproportionately excluded,

minorities and women. The Civil Service Commission warned in a memorandum that the examination would not be lawful because it had not been validated. The matter was only corrected when a lawsuit by black and Hispanic applicants resulted in a consent decree nullifying the unlawful examination.[14]

Subsequent litigation (Cuesta v. Office of Court Administration)[15] shows that the UCS was capable of constructing a validated examination for the court officer position. Unfortunately, the paucity of political will or resources resulted in a delay until the issue was forced by litigation. The matter, however, should not be put to rest solely because of the resolution in Cuesta. The validated test for court officer discussed in that case continues to have the effect of disproportionately excluding minorities from those jobs, although now, technically, not in an unlawful manner. However, federal law permits a search for alternative tests which do not cause a disproportionate exclusion of minorities and which predict job performance equally well. Indeed, if such a test is found, the UCS would be required to utilize it under federal law. There is no evidence before the Commission to indicate that the UCS has sought or plans to seek alternative tests to fill the position of court officer.

2. Failure to implement recommended affirmative action plan

OCA has been aware, at least since 1979, that minorities were underrepresented in various positions in the

UCS work force. In that year OCA retained a consulting firm to develop and draft an affirmative action plan based on a detailed examination of identified job categories. This analysis revealed that "drastic action to increase the numbers of minorities and females should be taken."[16] A host of solutions were recommended, including the adoption of an affirmative action plan with flexible hiring goals. After interviewing 19 persons familiar with the 1979 plan, the Commission has concluded that no affirmative action plan was ever officially approved or adopted, formally or informally, by OCA. It appears that a need was identified and the project was initially commissioned. However there was no follow-up or implementation, and the matter was inexplicably dropped. In fact, one of the participants in the process who sought to explain the mystery said: "It fell through the cracks." No one, to this date, claims that the affirmative action plan was abandoned because of legal obstacles.

3. No exemption from examination for competitive status

In 1980, the year following the aborted affirmative action plan, further events transpired which may have diminished employment prospects for minorities. In that year, legislation was adopted which extended permanent status to all provisional employees without their having to take an examination.[17] The only employees who were ultimately excluded by the legislation were provisional employees of the courts located in the five counties of New

York City where minority employees were most heavily concentrated. A senior staff member advised her superior in UCS that the legislation should be opposed because it would have a discriminatory impact on minorities.[18] OCA completely ignored the advice and wrote to the Governor's counsel that it was not opposed to the legislation, and did not even comment on the problem presented for minority provisionals in New York City.[19]

4. Failure to appoint minorities where discretion existed

Over ten years ago the New York State Division of Human Rights found probable cause to believe that the court system was engaged in unlawful discrimination against Blacks.[20] The complaint of the minority petitioner alleged, among other things, that there were only two Blacks among 37 top level management positions in the "Court Administration," that the two Blacks were among the lowest paid employees, and that the minority petitioner received a lower annual salary than his white counterpart.

Little has changed in the hiring patterns of OCA since then. The data contained in OCA's very own documents supply the strongest evidence of the lack of equal opportunity in the most crucial, non-judicial positions.

The UCS 1987 Report to the Assembly shows that the proportion of minorities among officials/administrators in the UCS in 1986 was 3.4%; in contrast minorities constituted 13.73% in the New York State work force in 1980, the most recent census data. Specifically, in 1986,

out of 244 positions Blacks occupied nine positions; only one Asian held the position of an administrator/official and there were no Hispanics or Native Americans in that job category.[21] Moreover, in the seven years prior to 1986, minorities never occupied as much as 4% of these high-level jobs, and indeed in one year (1982) they fell below the 1% level.

The Commission was given a list in 1989 by the UCS of the 52 highest paid officials/administrators by rank order in terms of salary. Only four Blacks and one East Indian (Asian) are included in this group and the four Blacks are located on the bottom half of the list.

While there have been two Blacks appointed as executive assistants to the Deputy Chief Administrative Judge of the New York City Courts, as far as this Commission can determine, no Black, Hispanic, Asian-American or Native American has <u>ever</u> occupied the position of Deputy Chief Administrator, Counsel or director of any of the administrative units in the OCA, except for the Equal Employment Opportunity (EEO) Office.[22] Indeed, since <u>every</u> director of the EEO Office has been a minority since its creation in 1975, it suggests that OCA can find minorities it deems qualified to fill a managerial position for an administrative unit, but apparently <u>only</u> when it involves the EEO Office, an office which lacks substantial authority.

In addition to these high level positions, minorities are also grossly underrepresented as technicians. In 1986 minorities occupied only 3.8% of technical positions,

despite the fact that minorities comprised 20.12% of persons in the state with the requisite qualifications.[23]

5. Charges of segregated facilities

The apparent insensitivity of court personnel as experienced by many minority users of the courts, as well as minority employees, was made painfully clear to us in the public hearings. The Commission has heard evidence of discriminatory practices unrecognized or ignored by the very individuals empowered to prevent or end those practices. For example, this Commission uncovered during its investigations a practice of white personnel in a court in Bronx County of excluding black fellow employees from using particular locker areas. The present Administrative Judge of that court initially denied the existence of the practice, stating that "I know of no separate locker rooms . . . . I am absolutely positive it does not exist."[24] The Commission then wrote the Chief Judge to request an investigation. That investigation substantiated the charge. Upon receipt of this information the Administrative Judge moved swiftly to correct the situation. The initial insensitivity or lack of awareness can be attributed, in part, to the absence of racial diversity in the higher level positions where the priority to be assigned investigations of bias allegations is determined and the policies, tones, and attitudes concerning the public and subordinate employees are set.

6. Inefficiency and non-responsiveness of the UCS Equal Employment Opportunity (EEO) Office

In September 1987, the Chief Judge and the Chief Administrative Judge signed off on an Equal Employment Opportunity policy, which calls for non-discrimination in hiring. That policy, although lacking in substance and focus, was not disseminated at the direction of the Chief Judge because of his intention to create this Commission. According to Title VII regulations, an EEO or an affirmative action plan should consist of a self-analysis of the court's racial and ethnic employment patterns in order to ascertain whether there is a reasonable basis for action and to identify the reasonable scope of that action. A first step would have been to conduct an analysis of the utilization rate of minorities within occupational categories. This step was never taken. Moreover, the Commission is now unable to state the full extent to which minorities are underrepresented in various job categories precisely because the EEO office has never completed a utilization analysis, despite repeated requests from Commission staff as early as March 1988.[25] That this analysis had not been done prior to our request and that the data necessary to complete it had not been compiled or maintained is a further illustration of the low priority given to racial and ethnic integration of the UCS workforce.

The testimony on the EEO Office of the USC was eloquent in its condemnation. The thrust of the testimony concerns the impotence of that office. It lacks the ability to enforce equal opportunity goals. It has no effective input in policy decisions which impact on minority representation

within the system. Moreover, it has little access to, or influence with, those persons whose actions or inactions can significantly affect court hiring decisions -- the administrative judges. The office merely engages in recruitment efforts and record-keeping and that it does poorly.

Such poor functioning of the EEO office is manifested in a number of ways: the EEO office is required, under federal law, to file with the EEOC annual workforce statistics regarding race and sex for eight specified job categories. It has flagrantly violated these federal regulations, and, indeed, only prepared the 1986 federal EEO forms in January 1989 in response to requests from this Commission. The 1987 EEO forms were promised to the Commission in January of 1989 but have not been received as of the date of this interim report.

The office does receive some claims of discrimination, but there appears to be little confidence in the office's ability to resolve such claims fairly. Judge William Davis, Chair of the Coalition of Blacks in the Courts, testified that the EEO office receives very few complaints because "people feel that they are not trusted, that they are not sympathetic, they disparage any kind of complaints and they do not keep confidences."

As noted above, legislation in 1980 granted provisional employees of the UCS, except those in New York City, permanent status without taking an examination. The EEO Office made no effort to intervene or even measure whether

minorities were losing opportunities disproportionately under the legislation, nor did it advocate equal treatment for New York City employees which included significant numbers of minorities.

In 1987, a new examination was given for promotion to the positions of Associate and Principal Court Officer. All of the persons eligible to apply for the position were incumbent court employees of the UCS. Blacks applied for the position in a smaller proportion (15.8%) of their eligible numbers than did Whites (22.9%) and this difference is statistically significant. One of the primary tasks of the EEO Office, as presently constructed, is informing minorities of job openings and encouraging those who are qualified to apply. The result regarding this examination, however, suggests that the EEO Office did not do its job effectively, especially considering that the targeted persons were incumbent employees of the UCS fully accessible to the EEO Office.

This sub-par functioning of the EEO Office, however, is merely symptomatic of a general and long-standing inattention to the exclusion of minorities from the UCS. That office is treated with neglect and low priority. In 1985 the head of the EEO Office proposed to conduct a utilization study to see if an affirmative action plan for minorities were warranted. An OCA official, in response to written inquiries from the Commission, stated that the Director of EEO had abandoned the effort because she claimed

to have had "insufficient data and resources." All too frequently business establishments and public agencies around the country treat EEO offices as mere appendages to the regular operation, with formal but no real authority. Such is the case here. The low status of the mission of the EEO Office is further reflected in salary: all but one of the other division heads are paid more than the EEO director. The EEO director is also paid less than a number of deputy directors. A difference in salary between minorities and Whites which cannot be justified on the basis of differences in responsibility or expertise is a violation of antidiscrimination laws and sends a signal of the office's marginality.

When all of the factors are considered -- distrust of the UCS's intentions by minority employees and the minority public; underrepresentation of minorities in a number of job categories, but especially higher-level positions; and a weak and ineffective EEO Office -- the resulting total picture is disturbing.

III. LEGAL ASPECTS OF AN AFFIRMATIVE ACTION PLAN

There are no serious legal impediments to instituting an affirmative action plan regarding any job categories in which minorities are underrepresented, if carried out with the proper safeguards. It is also lawful to give high priority to the appointment of minorities to official/administrative positions, to demonstrate visibly a strong commitment to equal employment opportunity.

Employers need not await the outcome of a fully litigated case and a court order before undertaking to rectify discrimination through an affirmative action plan. Resolution of potential discrimination claims short of litigation is the preferred mode under Title VII of the 1964 Civil Rights Act.[26] There is no violation of the 14th Amendment to the United States Constitution or Title VII when public agencies to adopt voluntarily an affirmative action plan to correct past exclusion of minorities.[27]

The only requirements are that the plan have a proper predicate, show a significant underemployment of minorities in the past, and be precisely tailored and limited to correcting prior discrimination without unduly foreclosing employment opportunities for non-minorities.[28] Recent United States Supreme Court decisions during the 1988-1989 term interpreting Title VII or the 14th Amendment do not at all diminish the authority and duty of a public agency to adopt an affirmative action plan under appropriate circumstances.[29] Moreover, an employer need not admit to current discrimination that would subject him/her to a suit before adopting a lawful affirmative action plan.[30]

Furthermore, the United States Supreme Court has recently held that subjective evaluation, which is employed by the UCS as part of the selection process for official/administrators and for other jobs, may be unlawful where it has a disparate impact on minority employment opportunities, even where there is no evidence of active

racial or ethnic prejudice.[21] The Commission has received testimony alleging such disparate impact. For example, twelve Hispanics passed the written examination for the previously discussed positions of Associate and Principal Court Officer, but none survived the subjective evaluation process (the assessment center and personal interviews) to receive an appointment in the newly created Court Security Supervisory Series. Under EEOC guidelines this rejection rate constitutes an adverse impact on Hispanics at a statistically significant level. Four Asian-Americans also passed the examination for this position but just as with Hispanics, none received an appointment after completing the subjective phase.

The Commission has interviewed minority personnel who believe that discretionary appointments go to non-minority "insiders" with the "right connections." The President of the Tribune Society testified that "there is still an old-boy network within the court system," and a former employee of the UCS testified that she believed it was difficult for minorities to advance because promotion was based on "who you know." It is to be noted that a breakdown of competitive and non-competitive job titles further reveals that while minorities hold 21% of the positions for which an examination is required, they receive a mere 12% of discretionary appointments. All of this strongly suggests an employment process in which subjective bias or cronyism is playing a role.

IV. AFFIRMATIVE ACTION PROPOSAL

The Commission recommends the immediate development and adoption of an affirmative action plan for the Federal Occupational Categories (FOC) of officials, administrators and technicians. The Commission finds that an affirmative action plan with flexible timetables and goals is clearly indicated in those positions as minorities are severely underrepresented.

Upon completion of the utilization analysis by the EEO Office, which should continue to be a top priority with a specific deadline for completion, other positions may be identified for inclusion in such a plan and other remedies may be appropriate, such as increased recruitment efforts or tutorial for applicants taking competitive examinations. The Commission does urge that the utilization analysis be conducted for all minority groups, that is, for Blacks, Hispanics, Asian-Americans and Native Americans.

The Commission further recommends that the UCS reevaluate its hiring criteria to see whether factors which have not previously been relied upon should also be considered. For example, since the Commission has heard testimony of demeaning or disrespectful behavior by court personnel toward minority litigants and professionals, the UCS could make "cross cultural competence" another qualification for employment and develop ways of identifying that characteristic in applicants.[32] Such an approach may also increase the recruitment of those minorities who are

especially attuned to the subtleties inherent in racial and ethnic interaction.

The homogeneity of the present high level staff precludes the introduction into the decision-making process of diverse cultural perspectives. The failure to appoint minorities at the "top" of the system and the resulting missed opportunity for cultural sensitization is reflected throughout the system. Not only would such appointments serve the needs of the court system, but also would serve the goal of integrating the work force by race and national origin.

There is nothing ground-breaking in these proposals. The Chief Judge stated in his 1987 EEO policy that "the Unified Court System will uphold the principles of equal employment opportunity and will take affirmative action to give them life." Similarly, thirteen other states have formally adopted a non-discriminatory policy with regards to the judiciary which they have labeled as "affirmative action plans"; four of these states have explicitly adopted goals and timetables.[33]

The Commission recommends the formulation and adoption of a plan that would comply precisely with the letter and spirit of affirmative action in conformity with the United States Supreme Court cases and State law.[34] There is therefore no proposal here for rigid, fixed "quotas," or for an affirmative action plan where there is no appropriate evidence of prior minority exclusion from employment. The

Commission recommends the adoption of an affirmative action plan that exists only for a period necessary to repair the discriminatory exclusion. Moreover, there is no call for any incumbent to be discharged from a current position or for non-minorities to be foreclosed from promotional opportunities. The Commission does not demand that any unqualified person be hired or promoted, nor that any less qualified person be hired or promoted over a more qualified person. Nor should the affirmative action plan compromise the state constitutional requirement of hiring on the basis of "merit and fitness" because all that is proposed is that where two applicants are equally qualified, the UCS should be enabled to hire the person whose qualifications help to fill a void now existing within the court system -- cultural diversity. The Commission recommends and requests that the Chief Judge mandate the development and implementation of a plan which is lawful, fair and effective in correcting the grievous problems identified herein.

Finally, the Commission also urges that the status and scope of authority of the EEO Office be strengthened, and that additional resources be provided. The EEO Office should be empowered to intervene in personnel decisions with recommendations in order to assure compliance with a more aggressive affirmative action plan once one is adopted.

CONCLUSION

In announcing the formation of the Commission, the Chief Judge stated:

> "We are concerned with a growing perception among lawyers, court employees and the public that minorities are not treated fairly in our courts ... If a significant segment of society loses faith in the fairness of our system of justice, society will be in grave danger."

Few can dispute the critical role played by the courts in a constitutional government. They provide a medium for the resolution of conflict. State courts in particular, as compared to federal courts, have a more pervasive influence because they service a broader spectrum of the populace, exercising jurisdiction over a wider array of legal matters. Citizens and non-citizens alike find that their rights in such vital matters as criminal justice, housing, family relationships, ownership of property and employment are often adjudicated, with no further recourse, in the state courts.

The courts, however, are a delicate institution. The public confidence in the integrity of court processes may be difficult to maintain because in litigation for every "winner," there usually is a "loser" and the latter may feel that his or her rights were not fully protected or worse, were unfairly defeated. There is always the possibility therefore that even a well justified "loss" can turn into resentment of justice's messenger - the courts.

The court is also an insular institution because it is less amenable to normal democratic pressures than the other branches of government: members of city councils, the state legislature and the executive branch run for office more frequently than are judges required to run or seek re-appointment. The quasi-democratic nature of the courts is often underscored when it exercises its power to strike down the action of another branch of government as unconstitutional, even when that action may enjoy the temporal support of a majority of citizens. To be sure, the theory of judicial insulation from the burdens of repeated politicking has a valuable function - it enhances the capacity for a more neutral, impartial, and intellectual process of decision-making. That very strength, however, renders the court dependent for its legitimacy upon an overall public perception of fairness and even-handed treatment.

When a significant segment of the public possesses a negative perception of the courts, and that perception has some empirical basis, then the institution and, indeed, the government is faced with a "crisis of confidence," which, if allowed to persist, will surely taint the overall belief in the fairness of the judicial system.

A most important step has been taken by the Chief Judge in initially empanelling this Commission to do a careful study of the possibility of racial and ethnic bias in the courts, much of which had its genesis prior to his assuming

office. Along with the issuance of a statement of a non-discriminatory policy, the Chief Judge's creation of this Commission was a critical and courageous move. Undoubtedly, his demonstrated commitment to equal employment has assisted the Commission in securing needed support from concerned citizens, members of the bar and foundations. The Commission now asks that this initial genuine show of concern be brought to fruition in an affirmative action plan lest the perceived "danger" to our society that the Chief Judge foretold become reality.

NOTES

1. The New York Times/WCBS News Poll: New York City Survey. January 10-12, 1988.

2 Friedman, Robert, "Racism is No.1 concern", New York Newsday, April 12, 1988.

3 New York Law Journal, Public Opinion Poll, May 24, 1988.

4 A national survey also found that 49% of black respondents, 34% of Hispanic respondents, and 15% of white respondents stated that "the courts do not treat Blacks as well as Whites" and perceived disparate treatment as a "serious problem that occurs often." National Center for State Courts, The Public Image of the Courts (1977).

5 New York State Commission on Corrections, racial breakdown of prisoners on May 1, 1989 in prisons located outside New York City. The racial breakdown of prisoners in 1987 in New York City prisons was 90% minority and 10% white.

6 1988 data from The Office of Court Administration and Metropolitan Black Bar Association.

7 Office of Court Administration EEO Form 4's, 1986.

8 The City Wide Task Force on Housing Court, 5-Minute Justice or Ain't Nothing Going on but the Rent!, November, 1986.

9 Supra note 6.

10 Supra note 6.

11 Of the 66 Family Court judges (out of 114) who responded to the Commission's mail survey, 64% claimed that minority attorneys comprised 10% or less of the attorneys appearing before them. An additional 15% estimated that minorities comprised less than 25% of the attorneys in Family Court.

12 There is no simplistic assertion here that the racial and ethnic composition of the personnel in a public agency must correspond to the race and ethnic background of the portion of the public served by the agency. The Commission is aware, for example, of those cases which have barred a public agency from making decisions to retain personnel with a view towards providing a racial "role model" for minority consumers of a public service. See Wygant v. Board of Education, 476 U.S. 267 (1986). The

Commission does suggest, however, that the court is a unique institution in which non-judicial staffing decisions ought to be made which enhance the appearance of the equal administration of justice. This is a question upon which the United States Supreme Court has not rendered a decision.

[13] The Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. §1607.

[14] Underwood v. Office of Court Administration, 78 Civ. 4382, aff'd, 641 F.2d 60 (2nd Cir. 1981).

[15] Cuesta v. Office of Court Administration, 657 F. Supp. 1084 (S.D.N.Y. 1987), appeal docketed, No. 89-7374 (2nd Cir. April 19, 1989).

[16] 1979 Affirmative Action Plan (draft) in Commission's files, at p. 228.

[17] 1980 N.Y. Laws c. 845 and c. 846.

[18] Letter on file with the Commission.

[19] Letter on file with the Commission.

[20] See Determination After Investigation re: Ross v. New York State Supreme Court et. al., New York Division of Human Rights Case No. IA-E-R-4483-77E (March 14, 1978). See also Division of Human Rights Inter-Office Memorandum from Henry E. Del Russo, Appendix J. (February 23, 1978) (copies in Commission files.)

The complainant in Ross was eventually dismissed from his job after an administrative hearing. Judicial appeals failed. See Ross v. Milonas, 78 A.D.2d 777 (App. Div. 1st. Dep't. 1980), cert. denied, 102 S. Ct. 165 (1981); leave to appeal denied, No. 1290, N.Y. Court of Appeals (Dec. 18, 1980). Subsequent federal litigation was also unsuccessful. See Ross v. New York State Office of Court Administration, Slip Op. No. 80 Civ. 5018 (RLC) (S.D.N.Y. Dec. 7, 1983) (Carter, J. granting defendant's motion for summary judgment), aff'd by order of June 21, 1984. (Order of Judges Mansfield, Meskill and Cardamone, 2d Cir. Docket no. 84-7039, in Commission files.)

[21] See NYS, UCS, and Executive Workforces Comparative Analysis, appended to A. Rosenblatt, A Report for the Assembly Sub-Committee on Affirmative Action (1987).

[22] We note however that both persons served under the highest-ranking black judicial officer, the Honorable Milton L. Williams.

[23] Supra note 21.

[24] Testimony at New York State Judicial Commission on Minorities New York City Public Hearing, June 29, 1988. (See transcript, in Commission files, at p. 134.)

[25] Requests were made by the Commission staff on: March 7, 1988; March 22, 1988; August 8, 1988; and January 27, 1989.

[26] Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).

[27] Johnson v. Transportation Agency, Santa Clara County, California, 480 U.S. 616 (1987).

[28] Steelworkers of America v. Weber, 443 U.S. 193 (1979).

[29] Wards Cove Packing Company, Inc. v. Antonio, 57 U.S. L.W. 4583 (U.S. June 5, 1989) holds that the burden of proof under a claim of disparate impact in a litigated case is on the plaintiff under Title VII. It thus does not speak to an affirmative action plan which is voluntarily instituted after an appropriate self-analysis.

Martin v. Wilks 57 U.S.L.W. 4616 (U.S. June 12, 1989) holds that an individual who was not a party to litigation, has the right to challenge an affirmative action plan approved by a court, even though a number of years may have elapsed. It thus seeks to give a fair opportunity to challenge an unlawful plan, but does not disturb the right to adopt a lawful one.

Lorance v. AT&T Technologies, Inc., 57 U.S.L.W. 4654 (U.S. June 12, 1989) requires persons who claim that a seniority plan discriminates against them to challenge it when it is adopted, not when it is implemented. This does not govern the adoption of an affirmative action plan, which is not constrained by the timeliness of a suit under Title VII.

In Price Waterhouse v. Hopkins, 57 U.S.L. W. 4469 (U.S. May 1, 1989) the Court held that once a plaintiff in a Title VII case shows that gender played a motivating factor in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that the employer would have made the same decision without permitting gender to play such a role. Price Waterhouse obviously does not affect the adoption of a voluntary affirmative action plan.

City of Richmond v. J. A. Croson, ___U.S.___, 109 S. Ct. 706 (1989) addressed directly the terms governing the adoption of an affirmative action plan. It merely holds, however, that under the Fourteenth Amendment, a public agency must show that the group which it intended to include in its AAP was previously excluded from a public benefit.

This interim report calls for an affirmative action plan where there is proper factual predicate, as required by Croson.

30 See Johnson, supra note 27.

31 Watson v. Fort Worth Bank Trust Co., 487 U.S. 108 (1988).

32 Indeed, in a Commission poll of all New York State judges, with 645 responses, 92.4% of minority judges and 47.5% of white judges responded that it was "important" or "very important" to have cross-cultural sensitivity training for non-judicial personnel.

33 The Commission's efforts to learn more about the activities of other state courts regarding the issue of bias have resulted in the establishment of a national organization (the National Consortium of Commissions and Task Forces in Race/Ethnic Bias in the Courts) to coordinate the activities of our individual and collective programs and to inspire the adoption of such programs in other states. To this end the Commission has opened a dialogue with the National Conference of Chief Judges to share with the justices the Consortium's experiences, concerns and insights on the question of bias in employment as in other areas of judicial activity.

34 We find persuasive the Attorney General's view that the adoption of an affirmative action plan need not run afoul of the "merit and fitness" provisions of the State Constitution:

> There is certainly nothing in the concept of "affirmative action" to suggest that the merit and fitness requirement is not observed. Even race- or gender-conscious hiring from among candidates deemed qualified under state law does not offend the merit and fitness requirement. Cf. Johnson, 107 S, Ct. 1442, 94 L Ed 2d 615 (1987) (gender-conscious hiring among qualified candidates does not offend Title VII).

Brief for Defendants-Appellants at 43, Hase v. New York State Civil Service Department. (Appellate Division, Third Department, DOL #87071913, brief submitted March 20, 1989.)

APPENDIX A

Excerpts of testimony from

the Commission's Public Hearings

ALBANY PUBLIC HEARING HELD AT THE CONVENTION CENTER, GOVERNOR NELSON A. ROCKEFELLER EMPIRE STATE PLAZA, APRIL 28, 1988

Maria Elana Lanides: A World of Difference Council

"During the time when I was in court I tried, but was unsuccessful, in alocating a court stenographer who was a member of a minority group" (p. 81).

Frank Munoz: Deputy Commissioner for the Office of Tax Enforcement in the New York State Dept. of Taxation and Finance; Former Manhattan Assistant District Attorney

"I think that we need to increase the number of minorities across the board in order to ensure that the environment will become more humane and sensitive" (p.221).

BUFFALO PUBLIC HEARING AT THE WALTER J. MAHONEY STATE OFFICE BUILDING, MAY 26, 1988

Donald Lee: On behalf of Buffalo Common Council, Mr. George K. Arthur

"In Buffalo City court 95% of the clerks, court officials, city marshals, law assistants, and attorneys are members of the majority community. Out of the 13 court reporters assigned to city court only one is an African-American, and there are no Hispanics" (p.125).

"[B]ecome, if you will, the parents of a 16 or 17 year-old, or the youngsters themselves, and walk into City Court, you cannot help but notice that most of those in the courtroom who are of color are seated where you've been told to sit. More often than not, ... the court clerks and the judges will all be non-minority. It is clear that white folks are in charge, and this justice means, 'just us'" (p.127-128).

J. Carl Bland: Citizen

"I have watched the African-American employment in Buffalo City Court dwindle to the few Black workers who are now employed. I have been told that the jobs are sometimes not widely advertised and are most often filled, a few years ago, ... with family members of politicians. This has been done under the ruse of passing or failing some test that has no relevance to the job performed, but has been an excuse for hiring an almost all white staff" (pp.206-207).

Catherine Compito: Former Employee of the Unified Court System

"I worked four years as an office typist . . . [and] my employment was terminated because I was bumped out of the position by someone who didn't pass their civil service test. This individual was permanent and a Grade 4 and I was not, so they came back to their permanent position" (p. 228).

"You have to really know someone to push for you in order to get employment in the court system" (p. 231).

"A lot of incidents happened while I was there. Before we had the big layoff, a couple of the girls were moved to different positions, so their employment was saved, and most of the minorities were laid off except for the ones that were permanent . . ." (p. 230).

NEW YORK CITY PUBLIC HEARINGS HELD AT THE HARLEM STATE OFFICE BUILDING, JUNE 29, 1988

Judge William Davis: Chair of the Coalition of blacks in the Courts

"[I]f you look at the executive branch, 4.9% [of employees] are minority, broken down as follows: Hispanics, 3% and Blacks, 2% . . . it is a woefully inadequate amount of representation in comparison to the real population of minorities in the state (pp. 10-11).

"Not many complaints are made to the present [Equal Opportunity Office] because people feel that they are not to be trusted, that they are not sympathetic, they disparage any kind of complaints, and they do not keep confidences. They feel that once they make a report, before they can get to their respective offices, the Supervisor who they are complaining about already knows the problem, and they fear retaliation and a lot of people have declined to appear here today because of that concern" (p.12).

"Most of the people feel that the machinery to grieve is too cumbersome. Of course, after you go through the administrative process, then you're free to go and take an Article 78, but that requires money and time" (p. 16).

"I request that you recommend to the Chief Judge that he create an administrator for equal opportunity and affirmative action . . . responsible directly to the Chief Judge" (p. 17).

"[OCA should] set up an employment review board which would consist of retired federal Judges . . . to get over the perception that there's no sympathy coming from the Judges in the state because they are a part of OCA" (pp. 18-19).

James Morton: Principal Court Clerk, Bronx Supreme Court, Civil Division; Former President of The Tribune Society

"There is only one Black Supervising Court Officer in the Supreme Court Building in Long Island City, the smallest courthouse in Queens, consisting of five trial parts. He has finally been made the supervising court officer in that building, [after being a] deputy to almost every supervising court officer in Queens" (p. 117).

Jay Best: Vice President Guardian Association, New York State Courts.

"I want to call the attention of the Commission to the fact that there is only one black member of the employees' commission, one black coordinator of the employee assistance program, and he is in the process of being pushed out. There are no Hispanic members on it" (p. 793).

"There were 56 black officers who took the [principal court officers'] exam . . . . 12 black officers were rated highly qualified. In addition . . . 14 black officers were rated qualified. As has been stated there were 55 positions available . . .yet only three black officers were appointed" (pp. 794-95).

"Despite the fact that there are several hundred black and Hispanic court officers in the system, only myself and Officer Quinones, who is the president of the Hispanic Society, are . . . testifying here. And the reason for that is [the] great fear that it will mean that they will not get something, or they will get something, whichever the case may be" (pp. 795-96).

Wilfred Trotman: President, Tribune Society

"The positions that blacks and Hispanics come in at are low positions .. secretary or office assistant, that sort and the higher titles are for the majority" (p.123).

"The blacks that are lucky enough to receive a title of some executive stature will not be promoted either at all or as quickly as [their] white counterparts . . . each court is its own kingdom, and is ruled by the -- whatever administrative judge runs that court, perhaps the chief clerks, and just the administrative -- the higher echelon; but we are not represented at those levels, so, in essence, when the job announcements go out, a lot of times the job announcements are just to upgrade someone that's already within the system and they publicly have to publish the fact that they are now looking -- seeking other personnel; but if we are not in those administrative rooms, and if we are not in those chief clerk positions, and if we are not in those administrative judge positions, we cannot push for a minority candidate to be considered" (p.124).

"There is still an old-boy network within the court system" (p.125).

"In 1977 there was a Uniform Court Officer exam given. That exam was found to be racially discriminatory because the ratio of blacks that were failing as opposed to whites was something in the area of three to one" (p. 126).

"Prior to the 1977 exam being given, in 1976 an interoffice memo in the Office of Court Administration . . . said that the exam that they were planning to give in 1977 would not bring in

the amount of minorities needed to meet [the] Title VII standards [of] the Federal Government. They gave the exam anyway" (p.127).

Herbert Jones: Court Reporter, Manhattan Criminal Court. President, Association of Boack Shorthand Reporters

"For future purposes, there should be more minority administrative court reporters. We are for expediency purposes grouped with court officers and interpreters as non-judicial personnel. When we negotiate for corrective measures this hampers us tremendously" (p. 181).

"There is also some concern about the low number of minority reporters appointed to surrogate and civil court over the last few years" (p. 185).

Veronica Singleton: Uniform Court Officer, New York City

"I was promoted to a part captain, but it was taken from me in the way of a petition that was signed by several court officers, several white court officers who felt that I was not entitled to this position.

"I'd like to tell you a little bit about my experiences as a court officer in New York County. While still in the academy in training, I was told, there was approximately a group of 40 people in training, approximately five or six minorities, I was told by my then union president and present union president that they, 'had the last test thrown out', but they won't be able to touch this one" (p.188-189).

"For the part captains there was no testing involved. There was simply an application that was filed. I had three interviews with a screening board of -- I can't remember, approximately five

people. I had as a matter of fact one more interview than anyone else.

"The final interview, the extra one that I had, it centered around my sick leave time and their saying that I had taken quite a bit of sick leave time within the year previous to the interview. I explained that I had -- my father had died. I had problems with my mother because of my father's death and I'm a single parent with two children and I explained that my son had also broken his leg. It seemed to satisfy the committee that was interviewing me.

"I scored -- I placed number ten on the list for part captainship. I was hired as a part captain. I worked in that position all of three-and-a-half weeks. Within one week of being a part captain, I was told that there was a petition that was being circulated questioning the criteria for part captain.

"This was the first time to my knowledge that a black woman had ever been hired as a part captain. This was the first time -- there was also a Hispanic woman that was hired as part captain. And there was also a white who was hired -- a Caucasian woman that was hired as a part captain. This is the first time to my knowledge this has ever taken place in New York County Criminal Court. I was approached by my union president who told me that there was going to be an investigation as to the screening process, because if there had been excess of sick time, that would automatically disqualify anyone.

"Approximately two weeks after the discussion with my union president, I was called down to the bureau chief clerk's office

and I was told that I was no long part captain as of that moment. This was approximately 3 o'clock in the afternoon as though there was some disciplinary action that was being taken upon me.

"I tried to contact my union president. He never returned my calls. So I engaged a very well known civil rights attorney, his services. Upon my union hearing the name of this attorney, I was finally contacted. I was told that what had happened was that they had looked over everyone's sick time and that there's going to be a rescreening of all the people who applied for this position. They -- he didn't -- he didn't understand why I was fired, why I was singly the only person fired, because what had happened was that there were four people that they were actually looking at. And I should have stayed in my position until a new list was compiled after further screening, yet I was fired.

"I was compensated. Okay, a new list was compiled. No one has ever seen this list, but there have been people that have been hired and placed in a position as part captain. Four people were actually fired in the end. Myself, the Hispanic woman I spoke of and two whites were fired. Nine whites who had been promoted at the same time remained in the jobs" (p. 197-199).

NEW YORK CITY HEARINGS HELD AT 2 WORLD TRADE CENTER, JUNE 30, 1988

George Miller: Former Court Employee

"[M]inorities . . . work at lower grades and lower pay ranges than all other employees. And I have worked with many who have been employed for 10 or 12 years and have never received a promotion" (pp. 369-70).

"[In] many instances jobs were not put on the bulletin board, and if you heard about it by chance from seeing another bulletin board or knowing someone in another court and you inquired . . . sometimes you were told it was there and it was not there" (p. 371).

Esmeralda Simmons: Attorney and Director of the Center for Law and Social Justice, Medgar Evers College

"The Office of Court Administration does not have an effective affirmative action program . . . . They in fact state that they do not comply with the Governor's Executive Order Number 6 which requires affirmative action in state offices, claiming they are exempt" (p. 490).

"[Among] officials and administrators [in OCA] there is an acute shortage of black males, Hispanic males, black females and Hispanic females, in the professional category for black males and black females, in the service category for black males, and in the para-professional category for black females" (p. 491).

Judge Joseph B. Williams: Appellate term, Kings County

"There is a general belief by minority employees that a minority employee, once hired, is inadequately utilized and

evaluated, and is, therefore, not prepared for advancement" (p.532).

"[I]t might be interesting . . . to plot and follow the assignments, duties and promotion of two employees: one a minority employee and the other a non-minority employee with similar training and background experience at the time of their hire for a period of five to seven years . . . . I'm certain that you'll find that the minority employee will be at least two and as much as three grades behind the non-minority employee in the court system" (pp. 532-33).

"The screening situation is one that concerns the minority employee because while it is designed primarily to eliminate the question of favoritism and use of subjectivity in making [employment and promotion] determinations, many times it tends to foster it . . . . The way that system works, it can be . . . manipulated by the appointing authority" (p. 533).

"I'm particularly reminded of an allegation I heard of of a citywide position which was abolished when a minority became the leading candidate to fill it; another instance of a job description having been changed when it appeared that the net effect of having the description remain as it was would be to increase the promotional opportunities of minorities against the general work force in the particular unit" (pp. 534-35).

"I have some very, very serious questions in my mind with respect to whether or not their hiring policy reflects the same percentages found in this area as the general labor pool" (p.537).

"To my knowledge, there are basically no minorities in budget analysis, the educational training unit, and certain payroll units" (p.538).

"The bulk of minorities are in the manual labor positions of the court, not decision-making positions" (p.538).

David Correa: Associate Court Clerk, Kings County, Supreme Court

"In Kings County, Supreme Court there are 187 court clerks; only 3 are Hispanic. There are 280 court officers; only 3 are Hispanic" (p. 616).

"When OCA created a new court security series there were 54 positions; none went to Hispanics" (p. 619).

David Dinkins: Manhattan Borough President

"The New York City Commission on the Year 2000 anticipates that Blacks, Latinos, and Asians will be a clear and substantial majority of the city's population by the turn of the century. However, if you walk through the courthouses of our five counties and observe ... the court officers, stenographers, law assistants ... you will not see a true reflection of the reality of today's city" (p.702).

Joaquin Quinones, Senior Court Officer, Member of Hispanic Court Officers Association

"[At the] AVU, which is an Application Verification Unit, you are met as a Hispanic or a black or a female, with the impression that this system is not meant for you . . . . [W]hen you come here they want to know if you use drugs, because you're Hispanic . . . and the neighborhood you come from and your background -- your cultural background" (pp. 740-41).

"Even though an officer takes promotional tests in the court system, he still has to be interviewed for that position by what we commonly refer to as the 'old boy system.' If you do not rub elbows with the right people, although you have passed the examination and done well, you cannot get promoted" (p. 742).

"There are no Hispanics screening or interviewing applicants. In the training unit there was one female Hispanic who chose not to use her Hispanic name. In the . . . judicial districts . . . there is not one supervisor. Although we had many who qualified or over-qualified, none were appointed in any of the 54 supervisory jobs within the Unified Courts System" (p. 742).

"The promotions for principal and associate positions for court officers went to officers of the union who had not been in a courtroom for years and also to friends and associates of those who had positions. Most of those selected were under age 40; those with 10-15 years in uniform had no chance" (p. 743).

"If you do not know someone in the Court System, and if they get to the administrative judge, who almost always has the last word on who gets appointed in a particular judicial district, or a command, you cannot get a position" (p.745).

"In the Bronx Supreme Court, there are 2 segregated locker rooms; one is all white, one is basically Black" (p. 749).

Retired Judge William Booth

"The first director of the EEO was a sitting, active trial judge whose judicial responsibilities were not lifted, and was therefore only part-time. The office should be headed by a judge

for purposes of enforcement, but this individual should be relieved of judicial tasks" (p. 873).

Noreen Connel, President National Organization for Women, New York State Chapter

"The commission should recommend that goals and timetables be implemented to ensure that affirmative action programs go beyond good will gestures" (p.908).

NEW YORK STATE PUBLIC HEARING HELD AT 270 BROADWAY, JULY 26, 1988

Salvador Collazo, President, Puerto Rican Bar Association

"There is a lack of opportunities for Hispanics in the court system" (p. 197).

"In Bronx County . . . there is only one Latino I know who is employed in Supreme Court and this includes Civil and Criminal Term . . . as a law assistant" (p. 198-99).

"There are very few Black and Hispanic law assistants in the entire system" (p. 201).

Laura Blackburne, Counsel for New York State NAACP

"We need a serious affirmative action program at all levels of the court system, including hiring and promotion of non-judicial personnel and in the purchase of services from vendors and contractors" (p.147).

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