IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

UNITED STATES OF AMERICA **Plaintiffs,** **v.** **STATE OF MISSISSIPPI, ET AL.,** **(Simpson County School District)** **Defendants.**	**Civil Action No.:** **J-4706(L)**

UNITED STATES' REPLY MEMORANDUM IN SUPPORT OF ITS AMENDED MOTION TO ENFORCE CONSENT DECREE

The District concedes that it is not complying with the express terms of the 1983 Consent Decree. The District also concedes that, instead of advertising vacancies to the general public, as required by the Consent Decree, it first advertises vacancies within the District, seeking to promote its own employees and excluding potential outside applicants from consideration. The District attempts to justify its failure by arguing that the Consent Decree permits modifications to the District's "policies, procedures or forms" upon sixty days notice to the United States and plaintiff-intervenors, see Consent Decree, C.A. J4706(R), at 12, pt. III.D.12 (S.D. Miss. Aug. 22, 1983) (attached as Exhibit 1 to United States' Motion to Enforce Consent Decree), and that, pursuant to this provision, the District modified its policy with the United States' consent. These assertions are wrong.

First, contrary to the District's claim, no provision of the Consent Decree provides that the District can modify its policies in such a manner as to be inconsistent with the requirements of the Decree. Second, despite the District's assertions, the United States never has received notice of the District's internal promotion policy, let alone agreed to such a proposal, and the District has produced no evidence to the contrary. Indeed, the District has never provided any evidence of such a policy, but merely relies on a policy that, by its plain language, is not applicable to the matter before this Court. The proffered policy, entitled "Transfer of Personnel within the District," is completely silent about promoting persons from within the District without following the express terms of the Consent Decree.

Finally, the issues presented in this matter – the Court's interpretation of the modification and notification provisions of its own order – are matters of law, not fact, and as such an evidentiary hearing is not necessary or appropriate. See, e.g., Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 433-34, 440 (1976) (court interpreting its own order).

ARGUMENT

I. The District Cannot Modify the Requirements of the 1983 Consent Decree.

The District concedes that it is not following the employment procedures mandated by the 1983 Consent Decree and asserts that it need not do so because the Consent Decree permits the District to modify its "policies, procedures or forms" upon notice to the United States. This is not so.

The 1983 Consent Decree addressed allegations that the District's employment practices violated previous Court orders in this case and discriminated against black applicants and employees. To resolve those claims, the District agreed "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 . . . ." Consent Decree, at 9, pt. III.D.5. The Court ordered that the District follow explicit procedures to recruit black personnel, including that: (i) the District "not . . . fill any vacancy unless it has been advertised publicly for at least three weeks prior to the final date for submitting applications," id. at 8, pt. III.D.2; (ii) "at least three weeks prior to the final date for any application, each vacancy shall be registered with the State Employment Office and announced in the Jackson Advocate as well as other newspapers," id., pt. III.D.3; and (iii) "a list of current openings shall be posted conspicuously wherever vacancy notices are posted and wherever application forms are provided to the public," id. at 9, pt. III.D.4. In addition to the requirements established for all certified personnel, the Consent Decree specifically addressed the need to recruit black applicants for administrative positions from outside of the District. See id., pt. III.D.5. "In particular, whenever school officials become aware that there is to be a vacancy in a position as administrator . . . the Personnel Director shall send a notice . . . to education school placement officials at each public university in Mississippi." Id. at 9-10, pt. III.D.5.

In direct contravention of these procedures, the District has implemented an employment practice that effectively excludes qualified black applicants from consideration if the District finds any qualified applicant from among its non-minority employees, thereby undermining the Decree's objectives. The District first advertises positions within the District, affording its own employees the opportunity to be promoted. The District only advertises outside the District if it decides not to promote one of its current employees. With regard to the three principal vacancies that will be created in the 2003-04 school year by the retirements of Principals Sidney Lee,

Ernest Jaynes and Maggie Thompson, the District has decided to promote three persons from within the District without advertising any of these positions outside of the District. By so limiting the applicant pool, the District's practice excludes qualified black applicants from the selection process. None of the District's current black employees, with the exception of one current principal and the Personnel Director, has the certification necessary for principal positions, and therefore none of the District's current non-administrative black employees is eligible for principal positions.[1]

To justify their failure to comport with the Consent Decree, the District points to the paragraph in the Consent Decree that provides that the District can "modify its policies, procedures or forms" if it provides the modifications to the United States and plaintiff-intervenors sixty days prior to implementation. Consent Decree, at 12, pt. III.D.12. The District is wrong on two counts.

First, the structure of the Consent Decree makes clear that this paragraph refers to procedures beyond those already detailed in the Consent Decree and does not state that the District can fail to meet the requirements that the Consent Decree otherwise explicitly set out, nor does it provide the United States or the plaintiff-intervenors with the authority to grant

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[1] The District states that the United States has "no complaint" that the District "first considered internal white applicants for a position of assistant principal . . . and then offered the job to an outside black applicant with a lower rating than any of the internal white applicants." Def. Br. at 8. This is simply not true. The United States is concerned with the District's failure to comply with the 1983 Consent Decree. However, as stated in its Amended Motion, the United States now brought to the attention of the Court these three principal vacancies because these positions must be filled prior to the start of the 2003-04 school year. See United States' Amended Mot. at 4, ¶¶ 14-15. The assistant principal position, while advertised outside of the District only as a secondary measure, was nonetheless advertised outside the District as required by the 1983 Consent Decree and as such, the United States determined that it did not need to seek immediate relief with regard to that position.

modifications of the terms of this Court-ordered Decree. After listing the required personnel procedures in paragraphs 1 through 11 of Section III.D, the Consent Decree notes in paragraph 12 that "[p]rior to entry of this consent decree," the District "adopted new job descriptions, application forms and application rating forms, as well as new policies applying to all hiring, promotion, demotion, non-renewal, termination and compensation" of employees, and that the United States did not object to them but reserved the right to monitor them. Paragraph 12 then says that "[s]hould the School District decide to modify its policies, procedures or forms," it must notify the other parties and provide them with sixty days to object. Paragraph 12 refers to policies and procedures not already detailed by the Consent Decree but referenced in this paragraph. It provides the District with the flexibility to implement the Consent Decree in the most efficient and fair manner without returning to the Court for modifications to forms. For instance, the District has, on occasion, modified the rating forms used for different positions and provided the United States with such modifications. See Lillie Hardy Dep. at 369 & Exhibit 12 of Lillie Hardy Dep. (attached hereto as Exhibit 1). The Consent Decree, however, does not contemplate that the District can, by simply stating its intent to do so, ignore the mandatory advertising and hiring provisions of the Decree. Indeed, to conclude otherwise would give the District license to nullify key provisions of the Decree by simply giving "notice" to the United States.

Second, the District's argument ignores the Court's 1993 ruling ordering that "future vacancies [] be filled in accordance with the 1983 Consent Decree." 1993 Consent Order, at 7 (attached as Exhibit 3 to United States' Motion to Enforce Consent Decree). While the District contends that its promotion policy – which is in clear contravention of the explicit advertising

and hiring procedures of the 1983 Consent Decree – was in place since the mid-1980s (see Def. Br. at 3), the District failed to notify the Court and the United States of this promotion policy in 1993. In addition, the District now contends that it continued, after 1993, to fill vacancies without advertising outside the District, even though the 1993 Consent Order explicitly required that the provisions of the 1983 Consent Decree be implemented by the District.

II. Assuming, Arguendo, that the District Can Modify the Explicit Terms of the Consent Decree, the District Did Not Provide the United States with Notice of its Alleged Modification to its Promotion Policy.

Even if the Consent Decree permits the District to modify the express employment terms, the District's current internal promotion policy nevertheless violates the Consent Decree because the District did not notify the United States of the proposed policy and the United States never agreed to it. The District may modify its procedures only if it "furnish[es] the plaintiff and intervenors with a description of the proposed change(s)" so that the plaintiffs can object to the proposals. Consent Decree, at 12, pt. III.D.12. The District never furnished the United States with such a description.

As a threshold matter, the United States does not dispute, for purposes of this motion, that the District provided it with a written description of its policy for "Transfer of Personnel within the District." Attached as Exhibit D to Def. Response to United States' Amended Mot. ("Def. Resp."). Contrary to the District's assertion, however, this document does not describe the District's current policy of allowing internal promotions without advertising vacancies outside the District. Indeed, the word "promotion" appears nowhere in the policy. Instead, the Transfer Policy provides that: (1) "Principals and Administrators shall make intra-school transfers and inform the Personnel office of such transfers;" and (2) "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." Id. The Policy also provides that "[p]rior 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 in transfering, will be forwarded to the principal for consideration." Id.

As is evident from the Transfer Policy's plain language, if an employee desires to transfer within a given school, the principal can effect this transfer and notify the personnel office, and if an employee desires to transfer to a different school either within the same attendance zone or to a different attendance zone, the individual needs to notify the personnel office and his or her supervisor. For instance, if a vacancy occurs in fourth grade math at Magee Elementary School, the principal can transfer a third grade math teacher to fill this vacancy but a math position would still become vacant and would be advertised outside the District. Likewise, if a math position became available at Magee High School, and was filled by a math teacher from Mendenhall High School, there would still be a math teacher position available at Mendenhall High School that would be advertised outside the District. In that circumstance, the policy does not violate the Consent Decree because the same vacancy remains after the transfer is completed and can thus be advertised. If read to incorporate promotions, however, the policy violates both the requirement to advertise positions outside the District and the additional advertising requirements concerning administrative personnel because it permits the District to fill administrative level positions with current employees without first advertising them to the general public.

Furthermore, the District has failed to produce any evidence that it informed the United States that it intended its Transfer Policy to apply to promotions.[2] As such, the Transfer Policy cannot constitute a "description of the proposed change(s)", Consent Decree, at 12, pt. III..12, because it does not adequately inform the United States of the nature of the policy concerning promotions and therefore does not provide the United States an opportunity to object.

Not only does the Transfer Policy fail to mention promotions, the words "transfer" and "promotion," in common usage, statutes, legal opinions and the 1983 Consent Decree, are not synonymous. In this very action, in the 1983 Consent Decree, the parties contemplated transfer and promotions with regard to emergency certifications. The Consent Decree states that "no person shall be hired, transfered or promoted under emergency certification provisions until a vacancy has been fully advertised . . . ." Consent Decree, at 11, pt. III.D.9. As is evident by the usage of both "transfered" and "promoted" in the same sentence of the Decree, both words are included because they have distinct meanings, and they should be construed accordingly. See, e.g., Tennessee Gas Pipeline Co. v. F.E.R.C., 17 F.3d 98,103 (5th Cir. 1994) (applying Texas law) ("Not only must courts give meaning to each provision, courts must also give meaning, effect, and purpose to every word in the contract, if at all possible.") (emphasis in original); Carpenter v. Texas & N. O. R. Co., 89 F.2d 274, 277 (5th Cir. 1937) ("It is a cardinal rule in the construction of contracts that effect should be given, if possible, to every word, phrase, clause,

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[2] The two cases, Lee v. Simpson County Sch. Dist. and Hardy v. Simpson County Sch. Dist., cited by the District in its support of the use of its Transfer Policy are inapposite. See Def. Br. at 8 (citing Def. Resp. Exhibits F & H). They involved claims by District employees of race discrimination. See id. The Transfer Policy was not at issue in these cases, nor was it evaluated under the 1983 Consent Decree. Even if the District had purported to describe the policy as including promotions, the United States was not a party to these cases and would not have been on notice as a result.

and sentence.")

Statutes concerning personnel procedures frequently reference transfers and promotions as distinct actions. For instance, the National Labor Relations Act defines "supervisor" as:

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. § 152(11) (emphasis added). Each term in the definition has its own, independent meaning, including transfer and promote. Likewise, 5 U.S.C. § 2302(a)(2)(A) defines "personnel action" as:

> (i) an appointment;
> (ii) a promotion;
> (iii) an action under chapter 75 of this title or other disciplinary or corrective action;
> (iv) a detail, transfer, or reassignment;
> (v) a reinstatement;
> (vi) a restoration;
> (vii) a reemployment . . .

Again, by stating both transfer and promote as separate "personnel actions" the statute explicitly recognizes that each word has its own, distinct meaning.

Similarly, courts and administrative agencies have treated the words promotion and transfer as distinct. For instance, in National Railroad Passenger Corp. v. Morgan, 536 U.S. 101 (2002), the Supreme Court, when defining discrete acts, held that the separate actions of "failure to promote" and "denial of transfer" constituted discrete acts. Id. at 114. The EEOC, when

hearing an appeal, stated that, in accordance with the agency's personnel handbook:

> vacancies may be filled at the option of the appointing officer by any of the following means: promotion; reassignment; change to lower level; transfer from another federal agency; reinstatement; and selection of persons within reach on the register of eligibles for the position to be filled.

Henning v. Potter, 2002 WL 1999097, *1 (EEOC Aug. 23, 2002) (emphasis added) (attached hereto as Exhibit 2). The inclusion of both transfer and promotion as possible ways to fill vacancies indicates that the EEOC and the agency at issue in the case deemed the terms to have distinct meanings.

In the due process context, the Supreme Court held that notice in any proceeding which is to be accorded finality "must be of such nature as reasonably to convey the required information" and must be reasonably calculated to "afford [recipients] an opportunity to present their objections." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). "If the notice is unclear, the fact that it was received will not make it adequate." Fogel v. Zell, 221 F.3d 955, 962 (7th Cir. 2000). Here, the District's notice of its proposed change to the Consent Decree's procedures did not reasonably convey the nature of the proposed change and it did not provide the United States with an opportunity to object. It therefore cannot be said that the United States ever agreed to the District's current policy inasmuch as the United States never had notice of it.

Finally, the District admits that it permits its current employees "to first apply for vacancies." Def. Br. at 11. The District first advertises vacancies within the District for three days and then ranks the internal applicants. See Superintendent Jack McAlpin Dep. at 37 (attached hereto as Exhibit 3). This procedure, of first advertising within the District any

vacancies and accepting applications, is nowhere written in the Transfer Policy. Instead, this procedure is similar to an internal promotion system, of which the United States and this Court have never been given notice and which would clearly violate the 1983 Consent Decree.

III. An Evidentiary Hearing Is Not Necessary Because the Interpretation of the Provisions of the Consent Decree Is a Matter of Law.

The interpretations of the modification provision and notice provision of the Consent Decree are a matter of law, not fact. The Court is in the best position to interpret its own 1983 Consent Decree, and the District does not contest this. To the contrary, the District is silent on requesting an evidentiary hearing concerning the Court's interpretation of either the modification provision, (Consent Decree, at 12, pt. III.D.12), or notice provision, id.

Instead, the District requests an evidentiary hearing to determine the appropriate implementation of the Transfer Policy, asserting that the Superintendent and Personnel Director have given inconsistent statements. See Def. Br. at 12-13. This, however, is not at issue in this matter. The District concedes that an evidentiary hearing is only needed "[w]hen there is a conflict in the evidence." Def. Br. at 13. The District, however, does not contend that there is a "conflict in the evidence" concerning the notice it provided the United States of its promotion policy. To the contrary, the District asserts that it gave notice to the United States of the promotion policy when it gave the United States its Transfer Policy and, for the purpose of this motion, the United States does not contest receiving the Transfer Policy. Furthermore, the District does not assert that any additional evidence exists concerning the notice the District gave to the United States about its promotion policy. Because notice of the promotion policy – not implementation of the Transfer Policy – is at issue, and there is no "conflict in the evidence"

concerning the notice given, an evidentiary hearing is unwarranted.[3]

Moreover, the cases cited by the District in support of an evidentiary hearing are inapposite as none of them deals with the interpretation of consent orders or contracts. See Def. Br. at 13-14. Goldberg v. Kelly, 397 U.S. 254 (1970), is a seminal Supreme Court case concerning the fundamental requirements of procedural due process under the Fourteenth Amendment in the context of the termination of public assistance payments to welfare recipients. It does not involve the interpretation of contractual language or consent decrees. In Martin v. Morgan Drive Away, Inc., 665 F.2d 598 (5th Cir. 1982), the Court ordered an evidentiary hearing concerning the plaintiff's standing to prosecute the action. Id. at 602. The Court stated that "standing or its absence is based upon several disputed issues of fact," id., including allegations of fraudulent conveyance, id. at 601. Similarly, United States v. 1998 BMW "I" Convertible, 235 F.3d 397 (8th Cir. 2000), addressed the issue of standing in an action involving vehicular forfeiture when the vehicle was used to traffic drugs, not the interpretation of an unambiguous court order or document. Moreover, in 1998 BMW "I" Convertible, the court stated that "[i]n a typical civil suit, a party's standing to seek redress is most often determined on the pleadings." Id. at 399.

The District has put forth no valid reason for an evidentiary hearing nor have they cited any case law that would support a hearing in this matter. As such, the United States submits that the Court, as a matter of law, should interpret its Consent Decree.

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[3] Similarly, without an evidentiary hearing, summary judgment is appropriate if "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Butler v. Trustmark Ins. Co., 211 F. Supp. 2d 803, 804 n.1 (S.D. Miss. 2002) (Lee, C.J.) (internal quotation marks omitted).

CONCLUSION

For the reasons set forth above the United States respectfully requests that the Court grant its Amended Motion to Enforce Consent Decree. Furthermore, if the Court does seek an evidentiary hearing, the United States respectfully requests that the hearing be conducted on an expedited basis because, if the Court grants the United States' motion, the principal positions at issue will need to be promptly advertised.

Respectfully submitted,

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