

COURT RULES AGAINST ANOTHER JOB ELEMENT TEST

by Lance W. Seberhagen
Seberhagen & Associates

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A federal court has ruled again that a job element examination does not satisfy Title VII requirements for test validity. In *Green v. Washington State Patrol and Department of Personnel and State of Washington* (USDC, ED WA, 1997), the court found that a 1990 written test for Commercial Vehicle Enforcement Officer 1 (CVEO-1) was discriminatory. The test had an adverse impact against blacks (during 1988-1991, the black passing rate was only 17% of the white passing rate, with statistical significance), and the State was unable to show that the test was a valid predictor of job performance under the *Uniform Guidelines on Employee Selection Procedures* (EEOC, et al., 1978). The case was similar to *U.S. v. State of New York* (USDC, ND NY, 1979; 473 FSupp 1103) in which the court ruled against a job element exam for State Trooper.

CVEO-1 is an entry-level job whose duties are to inspect and weigh commercial trucks and busses traveling on public highways, and to enforce various laws and regulations related to these vehicles (e.g., size, weight, equipment safety, hazardous materials, licenses, permits).

The CVEO-1 test administered in 1990 was developed in 1978-79 and revised in 1987 by two Personnel Assistants in the Washington State Patrol, under the technical supervision of Dr. Charles Schultz, Manager of Test Development in the Washington State Personnel Department. The test developers followed the general procedures described by Primoff (1975) in *How to prepare and conduct job element examinations*. Under this method, subject matter experts (SMEs) identify knowledges, skills, and abilities (KSAs or "job elements") directly without linking them to observable job duties or behavior. The SMEs identified 202 specific KSAs for CVEO-1 under four major headings:

1. Ability to work independently without immediate supervision.
2. Willingness to accept responsibility or be held accountable.
3. Good judgement.
4. Ability to get along and be cooperative with others.

The test developers then wrote detailed situational questions in a multiple-choice format to measure the 202 KSAs. The 3-hour CVEO-1 exam originally had 72 items but was later reduced to 65 items in 1987. After the lawsuit was filed in 1991, the defendants conducted another content validation study, but the court gave that study little weight.

The court ruled that the State had conducted no acceptable validation study. The court was particularly critical of the test items because they: (1) did not approximate job tasks or job-related KSAs, (2) attempted to measure abstract psychological constructs, (3) did not measure the intended KSAs, (4) had no clear or correct answer, and/or (5) measured KSAs learned on the job.

I/O psychologists who served as expert witnesses included Dr. Donald Schwartz and Dr. Jay Thomas, for the plaintiff, and Dr. James Sharf and Dr. Oscar Spurlin, for the defendants.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JEROME K. GREEN,)
Plaintiff,) NO. CS-94-195-JLQ
)
vs.) MEMORANDUM OPINION AND FINDINGS
) OF FACT AND CONCLUSIONS OF LAW
WASHINGTON STATE PATROL and)
DEPARTMENT OF PERSONNEL and)
STATE OF WASHINGTON,)
)
Defendants)
_____)

This matter came regularly on for trial by the court on June 17-19, 1996. The Plaintiff Jerome Green appeared personally and with his attorneys Meriwether D.(Mike) Williams and Stephen L. Farnell. The Defendants were represented by Assistant Attorneys General Thomas G. Holcomb, Jr. and Spencer W. Daniels. Evidence was introduced and the court heard the argument of counsel. This Opinion is intended to be a Judgment as a matter of law on partial findings pursuant to Fed. R. Civ. P. 52(c). Being fully advised in the premises, the court makes the following:

FINDINGS OF FACT

Plaintiff Jerome K. Green brought the above-entitled action against the Washington State Patrol, Department of Personnel, and the State of Washington alleging race-based discrimination pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000(e), **et seq.** It is plaintiff's contention that a 3-hour written multiple choice test administered as an employment selection instrument for Commercial Vehicle Enforcement Officer I (CVE01) by the Washington Department of Personnel for the Washington State Patrol unlawfully discriminated against African Americans and therefore discriminated against Mr. Green because he is an African American. Mr. Green took and failed the written multiple choice test on at least three separate occasions.

Commercial Vehicle Enforcement Officer 1 is a Washington State service classification used by the Washington State Patrol. CVE01 is an entry-level position including the following duties:

Enforces laws and regulations pertaining to weight, size, equipment safety, the transporting of hazardous materials, and licensing permit requirements of commercial vehicles, school and private carrier buses

and their operators by weighing and/or inspecting vehicles traveling on public highways.

CVEO1s weigh, measure, and inspect commercial vehicles and inspect drivers' documents and licenses to ensure compliance with State and Federal laws and rules. They work at locations throughout the State. Some are stationed at permanent weigh stations along major highways and at ports of entry where supervisors are present. Others work alone on secondary highways using portable scales. The Washington State Patrol presently employs approximately 128 CVEO1s.

In order to apply for a CVEO1 positions at the time in question, an applicant was required to meet minimum requirements including having a valid driver's license and 2 years of experience driving, maintaining, or inspecting motor vehicles of 10,000 G.V.W. or over, or 2 years experience as a dispatcher, communications officer, or vehicle identification number inspector in a law enforcement agency, or 1 year of experience as a law enforcement officer. Certification of completion of a vocational training program in heavy equipment maintenance or repair, or one year of college-level course work in police science, business administration, public administration, or equivalent substituted for the above-required experience.

In addition to these requirements, an applicant was required to pass both a written test, and if successful, an additional oral test. Applicants who passed both the written and oral test were listed on a civil service register in order based on their combined written and oral scores. Successful applicants were selected from the top 1/3 test scorers, and were then required to pass a background investigation, including a polygraph examination. After an applicant is hired, a CVEO1 undergoes a training program of approximately 8 weeks and further on-the-job training.

The Plaintiff, Jerome Green, is a 34 year old African American, with a somewhat unstable employment history. In 1989, Mr. Green applied for an entry level CVEO 1 Position, as described in a State Department of Personnel Recruitment Bulletin. It is not disputed that Mr. Green met the minimum pre-test requirements. He took the CVEO 1 selection written examination on at least three occasions between January 11, 1990 and November 27, 1990. On each occasion, Mr. Green scored well below the cut-off point, in the bottom 1/3 of applicants, and, therefore, never progressed any further in the selection process.

The version of the CVEO 1 written test that Mr. Green took in 1990 was based on a test first developed by D.J. Patin, a Personnel Assistant for the Washington State Patrol Department of Personnel in 1978-79. The job analysis performed at the time consisted of Primoff style job' element analysis. The job elements were identified by "Subject Matter Specialiststs", from two weigh stations in Washington State, who identified a list of knowledge, skills and abilities (KSAs). Test questions were then written in an attempt to measure these KSAs. The resulting examination was a 72-question multiple choice test.

In 1987, the CVEO1 Test was reviewed by another Department of Personnel Personnel Assistant, Leta Danielson. The number of questions was reduced from 72 to 65, and minor changes were made to the wording of some test questions. Neither Ms. Patin nor Ms. Danielson had any prior experience or training in test development. According to the. Washington State Patrol records, no African American passed the CVEO 1 written examination in 1990, and only one African American passed the exam in 1991. On January 28, 1991, Mr. Green filed a complaint with the EEOC, alleging racial discrimination in the selection procedures for the CVEO 1 position. The State Department of Personnel and Washington State Patrol attempted to validate the test again using Subject Matter Specialists from several Washington State weigh stations, determined that the CVEO1 written test was "content valid", and submitted a report to the EEOC. EEOC subsequently issued a determination that the written CVEO 1 test caused a disparate impact on the basis of race and was not job related and consistent with business necessity. Attempts to resolve the matter through mediation were unsuccessful, and the matter was referred to the U.~. Justice Department. On March 31, 1994, the Justice Department advised the State that it was not taking any further action on the matter and was issuing Mr. Green a right to sue letter. Mr. Green then timely filed this action.

The challenged test is no longer being used, and vacancies in the CVEO I positions are currently filled by Washington State Patrol troopers

DISCUSSION

Title VII of the Civil Rights Act of 1964, codified at 42 U.S.C. § 2000e-2 generally makes it unlawful for any employer to discriminate against an employee or applicant on the basis of race. The Act permits an employer to act upon the results of any professionally developed ability test, provided

the test is not designed, intended or used to discriminate because of race. 42 U.S.C. § 2000e-2(h). Title VII is "a remedial statute to be liberally construed in favor of the victims of discrimination." Mathroom v. Hook, 563 F.2d 1369, 1375 (9th Cir. 1977), cert. denied, 436 U.S. 904 (1978). As the Supreme Court has noted:

The broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions. In the implementation of such decisions, it is abundantly clear that Title VII tolerates no racial discrimination, subtle or otherwise.

McDonnell Douglas Corp. v Green, 411 U.S. 792, 801 (1973).

A "three-step inquiry of Title VII actions is well-established, particularly in cases such as this where preemployment screening devices are used." Contreras v. City of Los Angeles, 656 F.2d 1267, 1270 (9th Cir. 1981)(En Banc), cert. denied, 455 U.S. 1021 (1982). At the outset, a plaintiff bears the burden of establishing a prima facie case that the employer's screening device selects employees in a significantly discriminatory pattern. If the plaintiff succeeds in establishing such a prima facie case, the burden of production shifts to the employer to prove that the screening device is job related, i.e., that it actually measures skills, knowledge, or ability required for successful performance of the job sought by the applicant. Failure in this proof results in a judgment for the plaintiff. If the employer succeeds in showing that the screening device does in fact measure job-related characteristics, the screening device does not violate Title VII unless the plaintiff then proves that the employer has available an alternative nondiscriminatory screening device that would effectively measure the capability of the job applicants. Id. at 1271-72.

The Supreme Court enunciated how the burdens of proof are to be set forth in a disparate impact case such as the present one in Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989). First, the plaintiff must show that facially neutral employment practice has a significant adverse impact on a protected group. Id. Then, the burden of producing evidence of a business justification for his employment practice shifts to the employer. However, the burden of persuasion remains with the disparate-impact Plaintiff. Id.

DISPARATE IMPACT

A plaintiff establishes a **prima facie** case of employment discrimination using a disparate impact theory when he shows that a business practice, neutral on its face, had a substantial adverse impact on some group protected by Title VII. Gay v. Waiters' and Dairy Lunchemen's Union, 694 F.2d 531, 537 (9th Cir. 1982). Mr. Green, as an African American, is clearly protected by Title VII. Proof of a disparate impact is usually accomplished by statistical evidence showing "that an employment practice selects members of a protected class in a proportion smaller than their percentage in the pool of actual applicants." Moore v. Hughes Helicopters, Inc., 708 F.2d 475, 482 (9th Cir. 1983).

The court finds that Plaintiff has established a **prima facie** case of disparate impact by showing that the CVEOL test had a substantial adverse impact on African-Americans. No rigid mathematical formula has been established to the exclusion of any others to measure disparate impact, Watson v. Ft. Worth Bank and Trust, 487 U.S. 977, 996 (1988). However, the EEOC has developed and codified Uniform Guidelines on Employee Selection Procedures, one of which provides in pertinent part:

A selection rate for any race, sex, or ethnic group which is less than four-fifths (or 80%) of the rate for the group with the highest rate will be generally regarded by the federal enforcement agencies as evidence of adverse impact. . .

It is undisputed that during the period of 1988-1991, Caucasian applicants passed the CVEOL written exam at a rate of 30%, while during the same period, 5% of African-Americans applicants passed the test, substantially lower than 80% of the Caucasians who passed. The 80% rule is not dispositive, but it is an instructive measure of disparate impact. Bouman v. Block, 940 F.2d 1211, 1224 (9th Cir. 1991), cert. denied, 502 U.S. 1005. The appropriate inquiry is whether the statistical disparity is substantial or significant in a given case. Id. at 1224. The trier of fact must consider the statistics in light of all the evidence. Id.

Defendants contend that the number of African-Americans applying for a CVEOL position was too small to yield statistically significant results. The Plaintiff bears the burden of demonstrating that the disparate impact results from a statistically probable result, as opposed to chance. See, Contreras v. City of Los Angeles, supra, 656 F.2d 1267. The court finds that Mr. Green has demonstrated that the differences in the performances of African Americans and Caucasians on the CVEOL written test are statistically

significant.

Plaintiff's experts showed by several generally accepted techniques that the adverse impact of the examinations and the bottom-line adverse impact were statistically significant. For example, Plaintiff's expert, Dr. Donald Schwartz, an industrial psychologist, testified that there was less than a 5% or one time in twenty likelihood that the difference in the pass rates of Caucasians and African Americans would occur by chance. The statistical analysis of Dr. Jay Thomas, industrial psychologist and statistician found that the disparate impact from the test scores for the period 1988-1991 had a probability of only 9 in 1.7 1,000 of occurring by chance. Even the industrial psychologist, Dr. Oscar Lee Spurlin, who testified for the Defendant, determined that the challenged test had a high disparate impact on African Americans.

Additionally, the court finds that substantial weight should be given to the EEOC determination that the difference in the CVEOl test pass rates established a disparate impact on African Americans. "An EEOC determination, prepared by professional investigators on behalf of an impartial agency, has been held to be highly probative evaluation of an individual's discrimination complaint." Plummer v. Western Intern. Hotels Co., 656 F.2d 502, 504-505 (9th Cir. 1981).

For the forgoing reasons, the court finds that Plaintiff Jerome Green has met his burden of showing disparate impact. Because the challenged test did cause a disparate impact on African American applicants, the question becomes whether the Defendants have produced sufficient evidence to establish that the test was sufficiently job related to withstand Plaintiff's challenge. The court finds that the State Defendants have not met this burden of production as follows.

JOB RELATEDNESS

In order to satisfy this requirement, tests such as the one used by the State here to hire CVEOl's must be "validated in terms of job performance." Washington v. Davis, 426 U.S. 229 (1976).

The Ninth Circuit has held that "discriminatory tests are impermissible unless shown, by professionally accepted methods, to be predictive of or significantly correlated with important elements of work behavior that

comprise or are relevant to the job or jobs for which candidates are being evaluated. Contreras v. City of Los Angeles, *supra*, 656 F.2d at 1279. (citing Albemarle v. Moody, 422 U.S. 405, 425 (1975)). Title VII requires no single method of examination validation, but only that the method chosen be professionally acceptable. See Albemarle 422 U.S. at 431. To this end, the EEOC has issued guidelines defining minimum standards for professionally acceptable validation studies. See 29 C.F.R. § 1607.14 (1979). These standards are not mandatory, but are "entitled to great deference." Griggs v. Duke Power Co., 401 U.S. 424, 434 (1971).

Professional standards developed by the American Psychological Association in its Standards for Educational and Psychological Tests and Manuals (1966) accept three basic methods of validation: "empirical" or "criterion" validity (demonstrated by identifying criteria that indicate successful job performance and then correlating test scores and the criteria so identified); "construct" validity (demonstrated by examinations structured to measure the degree to which job applicants have identifiable characteristics that have been determined to be important in successful job performance); and "content" validity (demonstrated by tests whose content closely approximates tasks to be performed on the job by the applicant). These standards have been relied upon by the EEOC in fashioning its Guidelines on Employee Selection Procedures.

It is generally recognized that the best method of establishing job relatedness is to establish that the test had predictive validity, by showing "criteria validity". This is done by identifying criteria which indicate successful job performance. Test scores are then matched with job performance ratings for the selected criteria. This establishes realistically whether the applicant who received high scores was actually performing as predicted. No such validation studies have been conducted here either before the exams were given or after.

Here, the State utilized a multiple-choice examination with situational questions, and attempted to establish the validity of the examination through the process known under the Uniform Guidelines as "content validity", by way of a methodology known as the Primoff job element examining approach. Content validity is established if the content of the test closely duplicates the actual duties to be performed by the applicant, such as a typing test given to applicants applying for a typist position.

Plaintiff contends that the CVE01 test was an attempt to measure traits, mental processes, as well as knowledge and skills to be learned on the job, requiring validation by "construct validity". However, the court need not address that issue because the court finds that the CVE01 test was not sufficiently validated as being job related by any test, including "content validity."

A test of knowledge and abilities, such as that used here, may be used if it measures a representative sample of knowledge, skills or abilities (KSAs) that (a) are necessary to performance of the job, and (b) are operationally defined. in Guideline 14C(4). Uniform Guideline 14C(1). 43 Fed. Reg. 38, 302 (1978). If a knowledge is to be measured, it must be defined in terms of behavior and it must be part of a body of learned information that is actually used in and necessary for critical or necessary job behaviors that are observable. Uniform Guideline 14C(4), 43 Fed. Reg. 38, 302 (1978). If an ability is to be measured, the ability must be defined in terms of observable aspects of job behavior and should be an ability actually used in and necessary for the performance of critical or important work behaviors. Id. Any selection procedure measuring an ability should closely approximate an observable work behavior. Id.

Because the challenged test herein is a written multiple choice examination purporting to select those applicants who can be expected to perform the best in the CVE01 job, empirical evidence that the examination will actually accomplish that goal is required. None has been presented. See Firefighters Institute for Racial Equality v. City of St Louis, 616 F.2d 350, 356 (8th Cir. 1980 (En Banc), cert. denied, 452 U.S. 938 (1981)). Here, the State attempted to show job relatedness by having "subject matter specialists" identify knowledge, skills, and abilities (KSAs) important to successful performance of duties as a CVE01, and apply them to the challenged test questions.

The CVE01 job duties are to enforces laws and regulations pertaining to weight, size, equipment safety, the transporting of hazardous materials, and licensing permit requirements of commercial vehicles, school and private carrier buses and their operators by weighing and/or inspecting vehicles traveling on public highways. The "subject matter experts" identified as "Major Elements" for the job the (1) ability to work independently without immediate supervision; (2) willingness to accept responsibility or to be held accountable, (3) good judgment, and (4) ability to get along and be

cooperative with others. Under each of the major elements, more particular skills and abilities were identified: For example, Major Element (1) the ability to work independently without immediate supervision includes:

Ability to:

- accept responsibility
- plan and organize work
- keep and maintain adequate records
- check numbers accurately

Willingness to:

- accept change
- keep and maintain adequate records
- make decisions
- abide by departmental rules and regulations
- give day's work for day's pay
- do the same detail over and over
- inspect vehicles for equipment
- support department programs

Other skills:

- judgment as to when to act independently and when to refer situations to higher authority

Personal characteristics:

- adaptability
- dependability
- inquisitive nature
- initiative
- self-motivation
- punctuality

Major Element (3) Good Judgment includes:

Ability to:

- not be prejudiced
- accept court decisions
- keep to one's self information that should be kept private
- be consistent

make on-the-spot decisions
use authority when necessary

Willingness to:

accept court decisions

Other skills:

reasoning ability
judgment to inform higher authority of important happenings, progress,
and requirements when necessary

Personal characteristics:

fair and impartial
emotionally stable

The other two Major Elements likewise include a number of skills, abilities and personal characteristics. Additionally, another 172 specific abilities, skills, and personality traits were identified, including everything from the ability and skill to drive and the ability to accurately weigh trucks to the willingness to get dirty, to the personality traits courage, compassion, and good humor. The court finds that the State has not met its burden of producing evidence that the multiple choice examination used here closely approximated tasks to be performed on the CVE01 job, and that, therefore, the test is not content valid under the Guidelines.

Although the subject matter specialists identified nearly every good quality imaginable, the CVE01 job does not depend on the comprehension of the peculiar logic of multiple choice questions, or excellence in any of the other skills associated with outstanding performance on a written multiple choice test. "Because of the dissimilarity between the work situation and the multiple choice procedure, greater evidence of validity is required." Id. Uniform Guideline 14C(4) provides that "as the setting and manner of the administration of the selection procedure less resembles the work situation. . . the less likely the selection procedure is to be content valid, and the greater (is) the need for other evidence of validity."

The multiple choice test used here consisted of 65 multiple choice questions developed by the Washington State Patrol. The CVE01 candidates were required to choose one correct response for each question, and the tests were graded

exclusively on the basis of the number of "right" answers. These scores were then used to determine whether a candidate would progress to the oral examination.

The CVE01 job is a hands-on job. The subject matter experts identified many complex behaviors, good interpersonal skills, the ability to make decisions under pressure, as well as a host of other abilities, none of which is easily measured by a written multiple choice test. If test questions are poorly drawn, incomplete or simply inappropriate for sampling the knowledge sought, the examination's validity is destroyed to the extent of those deficiencies. See Firefighters Institute for Racial Equality, supra, 616 F.2d 350. Therefore, it is logical and reasonable to require something more to validate an examination which has an adverse impact on African Americans.

Additionally, a large portion of the multiple choice exam, viewed by itself, reveals additional infirmities. Many of the questions test an ability rather than a knowledge. The Uniform Guidelines require such a test to "closely approximate an observable work behavior." Uniform Guideline 14C(4). Some of the questions do not clearly have one "right answer" and have little or no connection to the tasks and skills identified as being measured by the question. For example Question No. 4 asks the following question:

During a severe snow storm, a 14-foot wide trailer house pulls up to the weigh station you are operating. You know that 8½ feet is the maximum legal width for trailer houses under these weather conditions. What action should you take:

- (a) Detain the vehicle at the weigh station.
- (b) Warn the driver to proceed with caution
And allow the driver to leave.
- (c) Issue an arrest citation for the
violation and allow the driver to proceed.
- (d) Require that the driver call for a pilot
car to drive in front of the oversize load.

The tasks identified as being measured with this question are No. 1 read information such as memoranda, bulletins, and notices; No. 2 read written materials such as textbooks, catalogs, journals, manufacturer or company manuals, procedures, training materials, statute books, etc. in order to obtain information; No. 13 explain details of services, methods, policies, regulations, or laws; Mo. 14 explain problems and possible courses of action (e.g. with equipment, service) to concerned parties; and No. 17 work to calm irate citizens, reduce tension and resolve conflict. Nothing about this question and possible answers measures the test-taker's ability to read,

explain details of regulations or laws, explain problems, or work to calm, reduce tension, or resolve conflict.

The skills allegedly tested by this question are: Mo. 9 one-on-one oral communication; No. 11 communicating technical information; No. 26 use of logic; and No. 46 following procedures. Each of the possible answers involves oral communication; none of the answers involve communicating technical information. It is difficult to discern that one answer is any more logical than any other, and the test-taker is not informed of the applicable procedures to be followed.

The answer to Question No. 4 considered to be "right" is (a) detain the vehicle. It is clear that choosing option (a) over the other possibilities does not involve any of the identified knowledge, skills or abilities (KSAs). Illustrative of the fact that the questions and possible answers did not measure the identified KSAs was Defendant's expert Dr. James Sharf's testimony when asked about Question No. 4 by Plaintiff's attorneys:

- Q. Which answer is the one that tells us that the 14-foot wide trailer is wider than the 8-1/2 foot maximum legal limit?
- A. That's not what the question asks.
- Q. The question asks, what action should you take.
- A. Right.
- Q. All right. Did you expect that the answer to the question, what action should be taken, was contained somewhere in the question itself?
- A. Yes.
- Q. Where is it, sir?
- A. 8-1/2 feet is the maximum legal width for a trailer house under these weather conditions.
- Q. All right. Now, how does that tell us which is the correct answer?
- A. The question is, that's what the law -- that's what The legal width is. The next question is, does this particular situation fall within or exceed the statutory, the regulations.
- Q. Would a person answering this question have to know what the statute and the regulations say to answer the question?
- A. No. They have to understand what the question asks. So the

information, as I said, is totally contained in the question itself, without having to go back to these source documents.

- Q. What is the correct answer, sir?
- A. Well, since I'm not the subject matter expert, I would rely on them to tell you what the correct answer is on this and every other question.
- Q. Well, I thought the answer was contained in the statement of the question.
- A. The correct answer is.
- Q. What is it?
- A. Well, I would ask -- A
- Q. Now, how would a test-taker taking the question (sic) know that?
- A. To look and see if any of the other answers are as applicable or as plausible as answer A.
- Q. Did you do that?
- A. I just did.
- Q. All right. What is wrong with answer B?
- A. It is not as good as answer A.
- Q. What's wrong with answer C?
- A. Not as good as answer A.
- Q. And what is wrong with answer D?
- A. Same.
- Q. Well, let's go to task 117, which says, "work to calm irate citizens, reduce tension, and resolve conflict." Where is the person taking this test, answering item four, doing any of those things?
- A. I'm sure that the answer to the -- correct answer would, in fact, not be satisfactory to the person who was breaking the law.
- Q. Does that require the person taking the test to sit there and imagine that if, he chose -- he or she chose answer A, that that would create a situation where he would need to calm an irate citizen and reduce tension?
- A. That's not what the question asks. The question asks can you apply to a rule this fact situation. Does this fact situation fall in within the limits or exceed the limits of what the rule is.

- Q. And what rule is that?
- A. 8-1/2 feet is the maximum legal width for trailer houses under these weather conditions.
- Q. Does -- the question itself does not say anything about an irate citizen or a conflict, does it?
- A. No.
- Q. Now, let's look at the skills. The first skill that your subject matter experts identified that was being measured or sampled by this question is one-on-one oral communication; correct?
- A. Okay.
- Q. Now, where is the test-taker making any one-on-one oral communication in answering the question?
- A. It would, in detaining the vehicle it would require oral skill to comply with what this question asks, the behavior that would be called for by the appropriate response
- Q. All right. And in what way does this question measure the test-taker's ability to do the skill of one-on-one oral communication?
- A. Well, all four answers to the question would require one-on-one communication.
- Q. So it would not matter which one the test-taker chose, all four would involve one-on-one oral communication; correct?
- A. Correct.
- Q. So my question is, by choosing the right answer, how does this question measure one-on-one oral communication?
- A. The subject matter experts said that in order to comply, to effect this fact situation, to enforce it, requires one-on-one communication.
- Q. The next skill is communicating technical information. How does this question measure the skill of communicating technical information?
- A. Well, the technical information that is the bread and butter of enforcement is weights and measures.
- Q. And where is this -- where in this question is the test-taker communicating weights and measures to anyone?
- A. To the explaining to the individual that their rig is nonconforming.

Q. That's answer B, isn't it, sir?

A. You detain the vehicle at the weigh station.

. . .
Answer B is not answer A. Answer A is it's nonconforming,
so you detain the vehicle.

The only bit of relevant information provided by the question is that the limit is 8½ feet width in adverse weather conditions and the trailer house you are dealing with is 14 feet wide and that it is snowing. If the possible answers included one that indicated that the combination of the width of the trailer house at the station and the weather conditions at the time violated the applicable regulation, there might be some relatedness to the ability to read and understand regulations. However, there is no possible way that any of the possible answers measures any of the identified tasks or skills to be measured.

Other questions in the exam are similarly not sufficiently job related.

Question 6 asks:

You normally work at a weigh station with Officer Sanders. Today Officer Sanders is home ill and you are working alone. About an hour after your shift begins, the activity at your scale suddenly increases. There is a long line of trucks backed onto the highway waiting to be weighed. You are issuing a citation to a violator, a lost motorist has stopped for directions, and your telephone has started ringing. What should you do in this situation?

- (a) Immediately radio your supervisor to send additional help.
- (b) Conduct your business on a first-come, first-served basis as quickly as possible.
- (c) Signal the waiting trucks to proceed while you answer the telephone and then take care of the other people.
- (d) Allow the telephone to continue ringing while you quickly take care of the trucks and drivers at the weigh station.

The identified tasks associated with this question are: No. 6 When necessary issue correction notices, warnings, arrest citations for violations; No. 11 Answer questions and give requested directions or provide other information in person or by telephone; No. 18 Determine the steps necessary to accomplish a job (e.g. the order of activities, starting point, appropriate authorization, etc.). The identified skills include: No. 9 One-on-One Communication; No. 10 Group Oral Communication; No. 15 Maintaining a Professional Image; No. 32 Prioritizing Tasks; No. 51 Patience; and No. 52 Diplomacy.

None of the possible answers involve the issuance of any notices, warnings or

citations; answer questions or give directions; involve one-on-one communication; or group oral communication; or have anything more than another answer concerning maintaining a professional image. The ability to prioritize tasks may be involved in finding the appropriate answer, but how is an applicant to know what should take first priority without any on-the-job training? Answers (a) or (d) would suggest patience, while answer (b) would appear to be more diplomatic. Again there is no clear right answer.

Question 9 asks:

While driving on a two-way road to your scale house assignment, you observe a trooper at the scene of an accident. It appears that only one car was involved and that the car left the roadway and hit a pole. The trooper is giving first aid to the injured driver. You should

- (a) stop and offer assistance to the trooper.
- (b) call your radio dispatcher for instructions.
- (c) immediately set out road flares to prevent another incident.
- (d) continue to your assignment since the trooper has the situation under control.

The identified tasks are No. 12 Ask appropriate questions to obtain necessary information and determine the need of others -- either answer (a) or (b) could implicate this task; No. 16 Follow oral instructions or directions related to work activities -- none of the possible answers indicate any oral instructions or directions; No. 40 Practice first aid to assist motorists when necessary -- this task would seem to require answer (c). Likewise, the identified skills are: No. 7 Understanding Instructions -- again suggested by answers (a) or (b); No. 47 Stress Tolerance -- it is hard to see how any of the possible answers indicate the ability to tolerate stress; and No. 49 Cooperation -- again could be indicated by answers (a) (b) or (c).

These are merely illustrative examples of how the test questions in the CVEO multiple choice written examination do not relate to or measure one's ability to perform the job duties identified with the CVEO1 position.

Thus, the court finds that the State has not established that the challenged multiple choice written examination has been validated as being job related. by any recognized method, including "content validity."

CONCLUSIONS OP LAW

Plaintiff has established a **prima facie** case of racial discrimination under Title VII of the Civil Rights Act of 1964 by establishing that the written

multiple choice test used by the Washington State Patrol as a selection device in hiring people for CVE01 positions had a disparate impact on African Americans. The Defendant has not met the burden of producing sufficient job relatedness of the challenged test to preclude a finding in favor of the Plaintiff, Mr. Green. The Plaintiff has established his disparate impact claim and the court concludes that Judgment in favor of the Plaintiff is warranted.

However, the possible appropriate remedies are limited by undisputed facts in this case, including that (1) there is no evidence that Mr. Green would or would not have passed a test that did not have a disparate impact on African Americans; (2) the challenged test is only one step in obtaining a CVE01 position, and even if Mr. Green had passed the test, there is no guarantee that he would have also passed the oral examination, polygraph examination, and been selected for a CVE01 position, (3) the challenged test procedure is no longer being used, (4) the CVE01 positions are currently being filled from the ranks of Washington State Troopers, and (5) the hostility between the parties would most likely prevent the State from giving Mr. Green a fair chance to succeed even if he were given the opportunity to reapply for the CVE01 position.

Therefore, the court is not disposed to order any type of injunctive relief or to direct that Mr. Green be hired as a CVE01. Additionally, under the circumstances of this case, it is not clear that any award of back pay and/or future pay, as requested by Mr. Green would be appropriate or required, without ruling on this issue. The court does see similarities between the facts here and those in cases involving "lost opportunity". See Herskovits v. Group Health Co-op. of Puget Sound, 99 Wn.2d 609, 664 P.2d 474 (1983) (En Banc). At issue there was the amount of appropriate damages in a medical malpractice suit where the plaintiff was unable to show that a delay in diagnosis "more likely than not" caused her husband's death.

Causing. . . loss of chance by one's negligence, however, does not necessitate a total recovery against the negligent party for all damages caused by the victim's death. Damages should be awarded to the injured party or his family based only on damages caused directly by premature death.

Id. At 617. Likewise, here Mr. Green has not shown that his loss of chance to become a CVE01 was more likely than not caused by his failure to pass the written disparate impact test.

Therefore, **IT IS HEREBY ORDERED:**

1. On or before April 4, 1997, Plaintiff shall serve and file his additional brief including authorities, concerning appropriate remedies. Plaintiff shall address the fact that there is no evidence that Plaintiff would have passed a valid pre-employment test, or that having passed the written test would have also passed the other pre-selection criteria, and what damages based on a "lost opportunity" or other theory would be the appropriate remedy in this case.
2. On or before April 18, 1997, Defendant shall serve and file its response.
3. Plaintiff shall serve and file his reply, if any, on or before April 25, 1997.
4. The additional briefs shall not exceed 20 pages in length.
5. Following receipt and review of the additional briefing, the court will enter its final Judgment pursuant to Fed. R. Civ. P. 52(a) setting forth the appropriate damages.

IT IS FURTHER ORDERED that Plaintiff's Motion to Compel Production of Expert materials (Ct. Rec. 34) and Plaintiff's Motion to Shorten Time (Ct. Rec. 36) are **DENIED AS MOOT.**

IT IS SO ORDERED. The Clerk is directed to enter this Opinion and forward copies to counsel.

DATED this 6th day of March, 1997.

JUSTIN L. QUACKENBUSH
SENIOR UNITED STATES DISTRICT JUDGE