



Selection and Testing Under A Consent Decree

Maury Buster, Ph.D.

State of Alabama Personnel Department

Lisa Borden, J.D.

Baker, Donelson, Bearman, Caldwell
& Berkowitz, PC

Lance Anderson, Ph.D.

Caliber Associates



Reynolds v. ALDOT

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Berkowitz, PC



REYNOLDS v. ALDOT

- Issues involved in underlying case
- Description of consent decree terms
- Process of selection procedure development under decree
- Problems arising under decree and solutions
- Advice for avoiding pitfalls



Issues in Reynolds Case

- Class action race discrimination suit challenging:
 - Recruitment
 - MQs
 - Exams and other selection devices by SPD
 - Register and certificate practices
 - Interviews by the employer
 - Job assignments
 - Training



Consent Decree Terms

- Original proposed consent decree contained both race neutral and race conscious provisions
- Race conscious provisions excised after intervention of non-black employees



Consent Decree Terms (Continued)

- Decree as adopted by court contained 21 articles, all considered to be race neutral
- Consent decree is enforceable, as any other court order or injunction, by contempt
- Consent decree can only be modified by court order after a rigorous showing



Consent Decree Terms (Continued)

- Article One: Recruitment
 - Nationwide recruitment
 - Recruitment based on percentage of black candidates on registers
 - Special incentives and programs for black candidates
 - Alleged failure to recruit often cited as basis for blocking test administration or hiring



Consent Decree Terms (Continued)

- Article Two: Minimum Qualifications
 - New MQs must be content validated
 - No new MQs that are not shown to be BOTH (a) job related and necessary at entry, AND (b) not measured on the subsequent examination
 - No new MQs to be implemented without approval of either the plaintiffs or the court



Consent Decree Terms (Continued)

- Article Three: Scoring and Ranking
 - New examinations to be developed for all ALDOT classifications: 22 “Project Classifications” and 150 other classifications
 - Project class jobs to be completed within 2 years
 - All selection procedures must be validated in accordance with Uniform Guidelines



Consent Decree Terms (Continued)

- Article Six - Registers
 - Must use continuous registers for Project Classes and for others where prospects for hiring black applicants would be enhanced
 - Restrictions on eligibility requirements for promotional registers
 - Restrictions on purging and abolition of registers



Consent Decree Terms (Continued)

- Article Seven: Certificates of Eligibles
 - Deadlines for seeking certificates to fill vacant positions
 - Prohibits prescreening of register
 - Rank order ties must be broken



Consent Decree Terms (Continued)

- Article Eight: Interviews
 - All black candidates on certificate must be interviewed
 - ALDOT must use standard format interview designed to be job related
 - Follow up efforts for those who don't appear to be interviewed
 - Training in interview techniques



Consent Decree Terms (Continued)

- Article Fifteen: Reclassification/Multigrade
 - Employees performing duties of higher classifications to be reclassified
 - Study of jobs in multigrade series to determine if jobs should be combined or restructured
 - Where jobs are combined, pay adjustments for existing employees
 - Monitor to keep employees within classification



Consent Decree Terms (Continued)

- Article Nineteen:
 - Consultation with plaintiffs' counsel and experts on selection procedures
 - Payment of plaintiffs' counsel's attorney fees for monitoring and enforcement



Consent Decree Terms (Continued)

- Other Articles
 - Eleven: MQs based on years of service
 - Fourteen: Job duty rotation
 - Sixteen: Training



Development and Validation of Procedures Under the Decree

- Decree adopted Uniform Guidelines as standard for validation
- In addition to Guidelines, special requirements on MQs and use of registers



Standards for Compliance

- “Plain language” of decree governs
 - Court may not impose requirements not unambiguously mandated by plain language
 - If non-compliance alleged, other party must file a contempt motion and prove failure to comply by clear and convincing evidence



Standards for Compliance (Continued)

- Professional judgment
 - Except where steps to implement decree are expressly provided, method of implementation is left to the reasonable professional judgment of the party implementing it
 - Court and other parties may not substitute their own judgment concerning methods of implementation
 - A “better” method does not trump the method chosen by the implementing party



An Ounce of Prevention

- If a consent decree is contemplated:
 - Ensure that all provisions related to selection are reviewed by appropriate professionals
 - Insist on opportunity to provide feedback on proposed terms before they are adopted
 - Assume that additional time will be needed to complete any project
 - Prevent unrealistic procedures and timetables



An Ounce of Prevention (Continued)

- If a consent decree is being drafted:
 - BE SPECIFIC!! Define terms and provide details
 - Make express provision for discretion and judgment of employer
 - If agreeing to consult with the other party, include express limitations on frequency, level of detail, and how input must be used



An Ounce of Prevention (Continued)

- If a consent decree has been signed:
 - Train all staff on requirements of decree
 - Seek clarification of any ambiguities up front
 - Adopt standard procedures that conform to the decree's requirements and follow them
 - DOCUMENT ALL WORK!! but
 - DON'T correspond with staff in writing if a meeting can serve



An Ounce of Prevention (Continued)

- Maintain consistency and stability
 - Work performed by a small group of highly trained people
 - All work supervised by knowledgeable person who will take ultimate responsibility for products
 - Don't underestimate the importance of testifying skills



An Ounce of Prevention (Continued)

- Work closely with counsel
 - Keep attorneys informed of progress
 - Notify attorneys of problems and questions
 - Read pleadings and orders on a regular basis



A Pound of Cure

- Seek extensions BEFORE deadlines are missed
- Give accurate progress reports - don't let the Court and parties develop unrealistic expectations
- Document all obstacles and efforts to overcome them



A Pound of Cure (Continued)

- If the decree contains a provision that can't be met, **SEEK MODIFICATION**
- Modification can be accomplished with the agreement of all parties
- If no agreement, a motion must be filed with the Court



A Pound of Cure (Continued)

- Modification standards defined by Rufo:
 - Consent decree is a contract between the parties, AND a court order
 - Party seeking modification must show changed circumstances that justify changing the bargain
 - The modification must be “narrowly tailored”



A Pound of Cure (Continued)

- Motion to modify must include:
 - Provisions sought to be modified
 - Changed circumstances that justify the modification
 - Statement of the modification sought
 - Explanation of how the modification is narrowly tailored to address the change in circumstances



A Pound of Cure (Continued)

- Changed Circumstances:
 - Changed factual conditions make compliance with the decree substantially more onerous
 - decree proves to be unworkable because of unforeseen obstacles
 - enforcement of the decree without modification would be detrimental to the public interest
 - party agreed to decree in good faith, made reasonable effort to comply, and should be relieved of the undertaking



Developments

- Court granted modification of Article Two “no overlap” requirement for MQs
- Court approved several MQs and the content validation procedure for their development
- Ambiguities concerning “consultation” requirements resolved by Court



Coming Up

- Court is currently considering challenge to use of unit weighting
- Court will consider further challenges on MQs and weighting
- Appellate court is currently considering appeal of order collapsing multigrade classifications



Managing A Consent Decree

Maury Buster, Ph.D.

State of Alabama Personnel Department



State Personnel Department Responsibilities

- Four primary projects:
 - Validation of minimum qualifications (MQs)
 - Validation of examinations
 - Study of multi-grade series
 - Analysis of reclassification requests
- All of the projects to be conducted on approximately 150 classifications and approximately 4,000-5,000 positions



Issues Involved in Day-to-Day Management

- The Transportation Team within the State Personnel Department (SPD) consists of 15-17 full-time employees and approximately 40-65 contract employees
- SPD has also retained numerous consultants, including many high profile names in the field of I/O Psychology:
 - Caliber Associates
 - Personnel Research Associates (PRA) (Dr. Nancy Tippins)
 - Dr. Philip Bobko
 - Dr. Philip Roth
 - Dr. James Sharf
 - Dr. Michael McDaniel



Issues Involved in Day-to-Day Management (Continued)

The plaintiffs and intervenors have also retained numerous well-known consultants, including:

- Dr. James Outtz (plaintiffs)
- Dr. Joel Lefkowitz (plaintiffs)
- Dr. Ed Bradley (plaintiffs)
- Dr. Craig Russell (intervenors)

The Department of Transportation (ALDOT) has retained a number of consultants and I/O experts as well, including:

- KPMG
- Dr. Shelley Zedeck

- PDRI (Dr. Wally Borman)
- Dr. Harold Goldstein



Issues Involved in Day-to-Day Management (Continued)

- Given the nature of the examinations developed thus far, SPD and ALDOT have contracted with a number of individuals to assist in the administration process
 - Specifically, some of the exams involve 1 to 1.5 day assessment center type formats for each candidate
 - This involves the use of outside test monitors, role-players, scorers, etc. to administer.
 - Additionally, we have leased and developed a 10,000 square foot facility to administer the assessment centers.
 - Thus, the 40-65 contract employees described previously.



Various Consulting Relationships

- Caliber Associates
 - Multi-grade classification studies, 6 studies
 - Job analysis and examination development, 50+ exams and job analyses
- PRA
 - Job analysis and examination development, 7 exams and job analyses



Various Consulting Relationships (Continued)

- Drs. Philip Bobko, Philip Roth, Jim Sharf, Nancy Tippins, and Michael McDaniel
 - Expert testimony regarding a number of issues, including:
 - Training and rotation
 - Exam and minimum qualification development
 - Review of reports



Various Consulting Relationships (Continued)

- PDRI (Dr. Wally Borman), Drs. Shelley Zedeck, and Harold Goldstein
 - Development of a training and rotation program (“Employee Development Program”) for each of the classifications used by ALDOT
- KPMG
 - Decree compliance tracking system
 - Implementation of PeopleSoft® software
 - Data base development for applicant tracking



Positive and Negative Effects of the Decree

- Positive Effects

- Address many issues purportedly occurring at ALDOT
- Development of a number of state of the art programs in employee training and rotation, job development, and examinations

- Negative Effects

- Potential loss of a “generation” of engineers
- Tremendous morale issues
- Possibly most importantly, cost of compliance (and/or lack of compliance)



Current State of Compliance (SPD)

- Validation of minimum qualifications (MQs)
 - We went through a series of attempts in developing MQS:
 - Education/experience MQs
 - Task-based questionnaires
 - Developed a new manual that was recently approved by a Federal judge as being consistent with the Uniform Guidelines directions on content validity
 - Currently developing or completing work of approximately 100-130 MQs
 - Per the Court approval of our process, approval of individual MQs has been moving along fairly well



Current State of Compliance (SPD) (Continued)

- Validation of examinations
 - Development and administration of all of the project class MQs and examinations will be complete by February 2004
 - We have until the end of 2003 to complete the development of all of the non-project MQs and examinations
 - Litigation typically follows several of these stages, including, 1) development of MQs, and 2) administration of the examinations
 - All MQs and examinations are reviewed by defendant, plaintiff, and intervenor experts



Current State of Compliance (SPD) (Continued)

- Study of multi-grade series
 - Multi-grades are all complete
- Analysis of reclassification requests
 - Recommendations have been made, but movement is pending court direction



Closing Remarks

- Consent decrees can be very expensive to implement
 - In this case the direct and indirect costs may actually be many times the of having litigated to verdict
- Provisions that may seem rather innocuous can be arduous to implement
- Consent decrees can be internally inconsistent
 - As will be shown by the Caliber representative, they can also be inconsistent with professional practice and the Uniform Guidelines
- To prepare beforehand, develop legally defensible processes that can be replicated, and then make sure your staff follow them closely

Addressing Consent Decree Challenges



Lance Anderson, Ph.D.
Caliber Associates



Introduction

- Challenges that Caliber faced and how we addressed them
- Goal-- help you deal with contextual issues brought on by a consent decree
- Will aim comments to aid both internal and external consultants



Challenges

- Learning about the situation
- Ensuring that SMEs provide necessary data
- Demonstrating compliance with the Guidelines and the Decree
- Meeting deadlines and maintaining quality



Overview

- Needed to conduct
 - Multi-grade classification studies on six job series
 - job analysis and test development for over 50 jobs
 - Provide other technical assistance
- Needed assessments that are
 - Valid
 - Have minimal subgroup differences
 - Are feasible to administer



Learning About the Situation: Issues

- Long standing consent decree
 - Consent decree a “reticulated” document
 - Litigants had various discussions on procedures
 - SMEs had participated in previous studies
 - Other related cases
- Needed assessments to be seamless with procedures of large personnel department



Learning About the Situation: Solutions

- Transportation Team prepared a binder and two day briefing on:
 - Consent decree
 - Expert agreements
 - Other cases
 - Internal procedures
- Trained all staff on content of binders, provided all staff with copies
- Assigned an internal analyst as a contact for each job
- Regular exchanges of ideas and possible approaches



Ensuring that SMEs Provide Necessary Data: Issues

- Consent decree requires (directly or indirectly) development of
 - Multiple permanent selection procedures
 - MQs
 - Multigrade classification studies
 - Interim selection procedures
- Job incumbents and supervisors have provided input for all of these studies
- SMEs believe that the process will never end
- Must perform work of those not hired



Ensuring that SMEs Provide Necessary Data: Solutions

- Reviewed all relevant written material
- Developed and used structured data collection protocols
- Designed exercises to minimize SME burden
- Considered alternative ways of gathering data
- Updated SMEs on progress



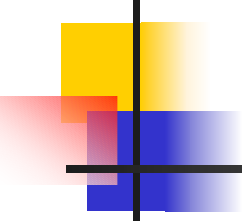
Demonstrating Compliance with the Guidelines and the Decree: Issues

- These documents are the standards used to review our work in court
- Consent Decree requires compliance with the Guidelines and adds a few unique requirements
- Some Consent Decree requirements consistent with the Guidelines
- Some requirements aren't consistent



Demonstrating Compliance with the Guidelines and the Decree: Solutions

- Reviewed documents and identified ways to demonstrate compliance
- Developed and used protocols designed to address the requirements
- Kept procedures simple
- Maintained documentation of procedures
- Designed and wrote reports listing each relevant guideline section followed by our response to that section



Meeting Deadlines and Maintaining Quality: Issues

- Court set tight deadlines
- Many jobs and many types of studies to conduct
- High stakes situation requires unusual attention to detail
- Many stakeholders need to review procedures and documents
- Need for consistency across procedures and reports adds another layer of detail to attend to and to review



Meeting Deadlines and Maintaining Quality: Solutions

- Developed detailed timelines with interim dates for review and feedback
- Communicated progress regularly
- Developed prototype procedures and products and trained staff on their use
- Conducted multipurpose data collections
- Conducted simultaneous quality control reviews



Summary

- The context of consent decrees creates many challenges
- Most challenges met by designing and following procedures that directly address specific points in the Guidelines and the consent decree
- Other challenges met through careful time management and staff training



Who to Contact for More Information

Lance Anderson, Ph.D.

Caliber Associates

10530 Rosehaven Street, Suite 400

Fairfax, VA 22030

Anderson@calib.com

703-219-4448