

Outstanding Scholar and Bilingual/Bicultural Programs (*Luevano* Consent Decree)

The following information is provided as background information. Except for the actual language from the decree, it does not represent formal guidance from the Department of Justice or from the court.

I. Background Information for both Programs

The Outstanding Scholar and Bilingual/Bicultural programs were established by a consent decree approved by the United States District Court for the District of Columbia on November 19, 1981. The decree resolved a class-action suit that was filed in 1979 and is now known as *Angel G. Luevano, et al., v. Janice R. Lachance, Director, Office of Personnel Management, et al.* The plaintiffs alleged that the Professional and Administrative Career Exam (PACE), which the Government had been using to hire into about 120 occupations at the GS-5 and GS-7 levels, had adverse impact on the employment of African Americans and Hispanics for reasons that were not job-related.

Although the Outstanding Scholar and Bilingual/Bicultural programs are aimed at addressing underrepresentation of African Americans and Hispanics, the programs have never been restricted to those designated minority groups. The history of the programs' use is consistent with that openness.

The merit principle, that "Recruitment should be from qualified individuals from appropriate sources in an endeavor to achieve a work force from all segments of society, and selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills....," still applies. [5 U.S.C. 2301(b)(1)]

To achieve its intent, the *Luevano* consent decree depends on agencies to focus their **recruiting** on sources that would increase the pool of African American and Hispanic candidates for employment. Actual hiring decisions must not be made on the basis of race or national origin except in situations that meet all of the requirements established by the Supreme Court in its 1995 ruling in *Adarand Constructors v. Pena*.

- **Occupations Covered.** The Outstanding Scholar and Bilingual/Bicultural programs may be used to hire into only certain positions at grades GS-5 and GS-7. Only those positions which were subject to the PACE exam are covered by the consent decree. Appendix A lists the covered occupations, updated to reflect changes in occupational classification that were made after the consent decree was issued. Persons may not be selected into covered positions with the intent of moving them later to non-covered positions. (See 5 CFR 330.501 and 330.503.)

- **Relationship to Competitive Examining.** The Outstanding Scholar and Bilingual/Bicultural programs must only be used as supplements to competitive examining. They should not be used unless an agency has an established pattern of competitive selection into the covered jobs or is currently making competitive selections into those jobs. The Outstanding Scholar and Bilingual/Bicultural programs should be used to a lesser degree, as a supplement to reduce adverse impact on African Americans and Hispanics. There is neither a requirement nor an authority to use either program to hire only persons from the designated minority groups. To reduce adverse impact, agencies should focus their **recruiting** in a way that increases the pool of African American and Hispanic candidates for employment in these occupations.
- **Recordkeeping.** Under Section 25 of the consent decree, agencies are to collect race and national origin (RNO) data on all applicants for *Luevano*-covered occupations; similar data is collected through the Government's Central Personnel Data File (CPDF) on those actually appointed. For Outstanding Scholar applicants, agencies collect data on form OPM-1386B. Completing the form is optional for applicants, but it is mandatory that agencies provide copies of the form to applicants. In January of each year, agencies are required to report to OPM the prior calendar year's cumulative RNO data on applicants, using form OPM-1592. In March of each year, agencies must also submit narrative reports on their prior year's efforts to use special programs to eliminate adverse impact on African Americans and Hispanics when hiring into former Professional and Administrative Career Exam (PACE) occupations.
- **Agencies Covered.** Although OPM was the defendant named in the caption, approximately 45 other departments and agencies were listed as representatives of the defendant class, which included all agencies that had ever used the Professional and Administrative Career Exam (PACE). Since most agencies were defendants in the *Luevano* case, whether specifically named or not, each should consult its own legal counsel to ensure compliance with the terms of the decree and with other provisions of law.

II. The Outstanding Scholar Program

- **Eligibility.** The Outstanding Scholar Program may be used to appoint those college graduates from accredited schools who obtained a grade point average of 3.5 or higher on a 4.0 scale for all undergraduate courses completed toward a baccalaureate degree. It can also be used to appoint those who stand in the upper 10% of a baccalaureate graduating class, or of a major university subdivision such as a College of Arts and Sciences. These appointments may be made without going through an examination procedure for jobs at grades GS-5 and GS-7 in covered occupations.
- **Announcing Vacancies.** Prior to making appointments under the program, an agency must advertise positions, including posting them through OPM's job information system. There are three basic reasons why the positions must be announced:

- 1) By law, the principle of merit principle requires fair and open competition, which in turn requires public notice of vacancies so all who are eligible may apply [5 U.S.C. 2301];
 - 2) Another law requires agencies to report to OPM and to the United States Employment Service of the Department of Labor, each vacant position in the agency which is in the competitive service or the Senior Executive Service and for which the agency seeks applications from persons outside the Federal service [5 U.S.C. 3327]; and
 - 3) The regulation establishing the Interagency Career Transition Assistance Plan (ICTAP) for Displaced Employees requires agencies to report all vacancies to OPM when accepting applications from outside the agency (including applications for temporary positions lasting 120 or more days)[5 CFR 330.705]. Applicants who meet the ICTAP requirements must be selected before Outstanding Scholars. [See also, Relationship to Competitive Examining, above.]
- **Timing of Appointments.** Outstanding Scholars cannot be appointed until they have actually become "college graduates." They may, however, be given conditional offers pending graduation. Although Outstanding Scholar candidates do not have to appear on a certificate, their consideration must be concurrent with the priority consideration of displaced employees eligible for ICTAP selection (see above). The Outstanding Scholar selection and offer need to be made within 90 days from the time a certificate is returned to the agency personnel office, based on an announcement open to ICTAP candidates. If a selection has not been made within those 90 days, the agency is required to readvertise the vacancy. After the selection, the candidate should be appointed to the position within a reasonable amount of time. To accommodate special situations, however, such as the completion of education, a geographical move, obligations to current employers, temporary agency hiring restrictions, and the processing of security clearances, an agency may delay appointment up to six months from the date of selection. If an agency exceeds six months, it is required to readvertise the vacancy. Requests for extensions beyond six months will be entertained by OPM on a case by case basis. The decree sets no time limit after graduation for Outstanding Scholar eligibility, nor does it set a limit on the number of times an individual can receive Outstanding Scholar appointments.
 - **Grade point average.** The decree prevents the use of graduate grades in calculating grade point averages (GPAs). It also requires using grades received in all undergraduate courses leading to the degree. This would include courses from all undergraduate schools attended, not just courses taken at the school providing the degree. That requirement also means that the candidate must have the 3.5 GPA at the time of graduation; any conditional offers made prior to graduation must be rescinded if the GPA is not maintained. Since the grade point average must be calculated on a 4.0 scale, agencies also need to adjust GPAs that were based on a scale that allows a 4.5 (A+) grade.

- **Class Standing.** The decree is specific in limiting to the upper 10% of a graduating class, or of a major university subdivision, eligibility based on class standing. A major university subdivision is a college or school and is not merely a department or program of study. For class standing to be used, it must be determined formally by the college, school, or university.
- **Relationship to Qualification Standards.** To be selected through this program, a candidate must meet both the eligibility requirements for the Outstanding Scholar program and the qualification standards for the position. Basic qualifications are described in OPM's Operating Manual, Qualifications Standards for General Schedule Positions. Agencies may add their own job-related requirements. The manual describes such things as the requirement that education be from accredited colleges and universities and the established procedure of rounding GPAs to the nearest tenth of a percent (i.e., 3.45 rounded to 3.5). The manual also describes the requirements for the Superior Academic Achievement (S.A.A.) provision. The S.A.A. designation is solely grade-determining. It establishes eligibility to appoint at the GS-7 level instead of at GS-5, but does not in itself provide an appointment opportunity.
- **Direct Hire.** Although the term "direct hire" is used, the decree essentially provides for a noncompetitive appointment to the competitive service. "Direct hire" means the ability to hire without having to rank candidates, but only when there are less than four candidates and there are no candidates eligible for veterans' preference. The Outstanding Scholar program does not have that restriction. Rating and ranking are not required, so neither the "rule of three" nor veterans' preference are applied. There are requirements, however, that the positions be announced, that displaced employees be given preference, and that the program only be used as a supplement to competitive examining. (See "Announcing Vacancies" and "Legal Context," above.)

III. The Bilingual/Bicultural Program

- **Eligibility.** An agency may appoint applicants who obtain a passing score in an examination, without further regard to rank, provided that:
 - (a) the job is one in which interaction with the public or job performance would be enhanced by having bilingual and/or bicultural skills and is at grade GS-5 or GS-7 in a covered occupation; and
 - (b) the agency has determined through use of a reasonable questionnaire or interview that the applicant to whom appointment is to be offered has the required level of oral Spanish language proficiency and/or the requisite knowledge of Hispanic culture. Agencies must maintain documentation that these requirements have been met.

- **Rating Candidates.** Unlike the Outstanding Scholar program, the Bilingual/Bicultural program requires that applicants receive a passing score through the alternative examining procedure. The examining procedure in current use is OPM's rating schedule used in case examining. A candidate who meets the minimum qualifications for the position will be rated as having "passed" the examination.