
J.Y. Interpretation No. 760 (January 26, 2018)*

Disparate Impact Discrimination in Police Recruitment Case

Issue

Does Article 11, Paragraph 2 of the Police Personnel Management Act constitute disparate impact discrimination in the qualification for assignments of regular trainees who have passed the Grade Three Special Examination for Police Personnel?

Holding

[1] Article 11, Paragraph 2 of the Police Personnel Management Act does not specify the institutes responsible for examination and training. In practice it allows the National Police Agency of the Ministry of the Interior to categorically send those qualified examinees of the written exam of the Grade Three Special Examination for Police Personnel, who do not have a degree from the police education system, to the Taiwan Police College for pre-job training so as to complete the whole process of examination. This practice resulted in the inability of persons without a degree from the police education system who qualified before 2011 to fully meet the qualification for assignments to positions ranked Police Inspector Grade Three or above. This has caused them to suffer systematic disparate treatment with regard to their right to take public examinations and hold public offices. Therefore, the practice, as outlined above, does not conform to the sense of Article 7 of the Constitution, which guarantees the right to equality.

[2] The Executive Yuan should collaborate with the Examination Yuan and, within six months of the publication of this Interpretation, according to this

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Interpretation, take appropriate measures to eliminate the disadvantageous disparate treatment suffered by the petitioners.

Reasoning

[1] The Petitioner Ching-Chang LIN et al. (hereinafter “Petitioner No. 1”), represented thirteen persons who were qualified examinees in the written exams of the Grade Three Special Examination for Police Personnel (hereafter “Police Grade-Three Special Exam”) between 2002 and 2004 and, according to the training program for qualified examinees of special examinations for police personnel of the respective years, were sent by the National Police Agency of the Ministry of the Interior (the agency commissioned to provide the training for qualified examinees, hereafter “NPA”) to the Taiwan Police College (originally the Taiwan Police Academy before the institutional upgrade in 1988, hereafter “Police College”) to receive their training. After they completed the program with a qualifying score, they were then assigned by the NPA to serve as police officers in different police departments. Petitioner No. 1 alleged that, according to Article 11, Paragraph 2 of the Police Personnel Management Act (hereafter “provision at issue,”) the qualification for assignments to a position as sub-lieutenants included not only a qualification in the police personnel exam, but also a degree from a police university or the completion of training therein. As they were only trained in the Police College after they had passed the police personnel exam, they were unable to meet the qualifications for assignments for positions as sub-lieutenants, whereas the other qualified examinees via exactly same exam with a degree from the Central Police University (originally the Central Police College before the renaming in 1995, hereafter “CPU”) were all categorically assigned to the positions as sub-lieutenants. This appears to indicate inequality in assignment and promotion. Petitioner No. 1 further applied to be trained for more than four months at the CPU, invoking the Examination Yuan Administrative Appeal Decision Kao-Tai-Su-Jue-143 of August 17, 2009, as precedent, but the

application was rejected. The petitioner disagreed with the rejection at issue and filed an administrative appeal first and then an action before the administrative court, which was subsequently dismissed as meritless and finalized by the Supreme Administrative Court Judgment 102-Pan-156 (2013) (hereafter “Final Judgment No. 1”).

[2] Petitioner Shih-Feng HUANG et al., represented four persons (hereafter “Petitioner No. 2”) who were qualified examinees on the written exam of the 2005, 2009, and 2010 Police Grade Three Special Exams and, according to the training program for qualified examinees of special examinations for police personnel of the respective year, were also sent by the NPA to the Police College to receive their training. After they completed the program with a qualifying score, they were then assigned by the NPA to serve as police officers in different police departments. After being sent by the Ministry of the Interior in December 2011 to receive four months of special training at the CPU and having obtained a qualifying score, Petitioner No. 2 then applied in the same month to the Ministry of Interior, invoking the aforementioned Administrative Appeal Decision, to be reassigned to positions as sub-lieutenants as Police Inspectors Grade Four or as sub-lieutenants of the Ninth Level or its equivalent, but all were rejected. Petitioner No. 2 disagreed with the rejections and separately requested a review. Their cases were separately dismissed in respective reviews by the Civil Service Protection and Training Commission and were consolidated to one action before the administrative court, which action was subsequently dismissed as meritless and finalized by the Supreme Administrative Court Judgment 102-Pan-38 (2013) (hereafter “Final Judgment No. 2”).

[3] Individually questioning the constitutionality of the provision at issue as applied in the Final Judgments No. 1 and No. 2, Petitioners No. 1 and No. 2 petitioned this court to interpret the Constitution. In the case of the petition of Petitioner No. 1, the provision at issue was indeed applied in Final Judgment No.

1; in the case of the petition of Petitioner No. 2, the provision at issue was cited and commented on in Final Judgment No. 2 and so may be considered as being applied by the Judgment. Therefore, the petitions of both Petitioners No. 1 and No. 2 comply with the requirements set forth in Article 5, Paragraph 1, Subparagraph 2 of the Constitutional Court Procedure Act and should be admitted. We hereby issue this Interpretation based on the following reasons:

[4] Article 18 of the Constitution provides that people have the right to take public examinations and hold public office. This is to guarantee that people may be qualified to hold public office through open and competitive examinations as pursuant to laws and regulations, so as to further secure their right to participate in the governance of the state. The right to take public examinations and hold public office is the right to political participation in a broad sense. People should have the right and opportunity to participate in public offices under equal conditions. In order to realize this constitutional commitment, the state should set in place an objective and fair system of public examinations and guarantee the overall fairness of the results of examinations, which guarantee includes the rights to participate equally in competitive examinations and to receive the training required by the examination, so as to gain the qualifications for specific ranks and for specific positions, and to be promoted based on laws and regulations, and to receive the protected status, salary and pension derived therefrom (see Interpretations Nos. 429, 575, 605, 611, 682, and 715). The police personnel are personnel who have completed the examination and training process lawfully, who have been assigned ranks and positions and who perform policing duties according to the Police Act and other relevant laws and regulations. They are obviously public officials covered by Article 18 of the Constitution. Although the personnel system of the police has adopted a dual-track system of ranks and positions, in which ranks are secured but positions can be reassigned (*see* Article 4 of the Police Personnel Management Act), the qualifications for specific ranks

and for specific positions —gained by people who have participated in the same single written exam of the examination for police personnel and completed the training with a qualifying score— should still conform to the sense of Article 7 of the Constitution, which guarantees the right to equality.

[5] The main purpose of Article 7 of the Constitution, which guarantees the people the right to equality, is to prevent the legislature from arbitrarily imposing unreasonable differential treatment on the people. To judge whether a rule conforms to the requirement of equal protection depends on whether the purpose of the differential treatment is constitutional and on whether between the classification and the achievement of the purpose there is any degree of connection (*see* our Interpretations Nos. 682, 694, and 701). Considering that the right to take public examinations and to hold public office is the right to political participation in a broad sense, which involves the people’s participation in the state’s formation of decisions and performance of public duties and is thus closely related to the shaping of civic life and order, whatever differential treatment is to be imposed on this right should be in principle subject to a more stringent review. Not only is the purpose to pursue important public interests, but also there must be a substantial connection between the adopted differential treatment and the achievement of the purpose, so as to conform to the constitutional guarantee of the right to equality.

[6] According to Article 12, Paragraph 1, Subparagraph 3 of the Police Personnel Management Act, a qualified examinee of the written exam of the Police Grade Three Special Exam, after completing his or her training with a qualifying score, obtains the qualification for the rank of Police Inspector Grade Four. The provision at issue reads: “The assignment of police officers, in addition to the qualifications described in the preceding paragraph, requires that any person to be assigned to a position ranked Police Inspector Grade Three or above shall have graduated from or have completed training at the Central Police

University or Central Police College. Any person to be appointed to a position ranked Grade Four of the Police Inspector or below shall have graduated from or have completed training at the Central Police University, the Central Police College, the Taiwan Police College or the Taiwan Police Academy.” This allows a CPU or Central Police College graduate, upon qualifying in the Police Grade Three Special Exam, to immediately obtain the qualification for assignments for some positions ranked Police Inspector Grade Three or above. Qualified examinees of the Police Grade Three Special Exam without such a degree from the CPU or the Central Police College would need to complete their training at the CPU or the Central Police College and obtain a qualifying score (*see* Article 4, Paragraph 2, Subparagraph 2 of the Enforcement Rules of the Police Personnel Management Act) before they may obtain the qualification for assignments to some positions ranked Police Inspector Grade Three or above (such as sub-lieutenant ranked Grade Four of the Police Inspector, *see* the Rank and Position Schedule for Police Officers B: the Rank and Position Schedule for Local Police and Positions in the Fire Department and School-the Ninth, attached). In other words, although all the qualified examinees of the Police Grade Three Special Exam obtain the qualification for the rank of Grade Four of the Police Inspector, and in theory the positions they can be assigned to should include, in the case of Taipei and Kaohsiung City Police Departments for example (*see* B: the Rank and Position Schedule for Local Police and Positions in the Fire Department and Schools-Schedule 9e), police officer, sergeant, sergeant for policing affairs, sub-lieutenant, section assistant, inspector, and division assistant, yet, in reality only those who have graduated from the CPU or the Central Police College can be assigned to any of the aforementioned positions ranked Grade Four of the Police Inspector at their first assignment, while others who have not graduated from the CPU or the Central Police College or received any training therefrom, as they do not meet the qualification specified in the First Sentence of the provision at issue, cannot be assigned as sub-lieutenants, section assistants, inspectors, or division

assistants, which posts are all ranked Police Inspector Grade Four.

[7] First, a literal reading of the provision at issue still allows non-CPU or Central Police College graduates to be assigned as sub-lieutenants after being trained at the CPU or the Central Police College, so the provision at issue may not be simply regarded as permitting differential treatment against non-CPU or Central Police College graduates. Nonetheless, when published on January 17, 1976, the provision at issue was to distinguish the qualification for assignments for lieutenants (exclusively limited to CPU graduates in principle) from that for police officers (exclusively limited to Police College graduates in principle). After the Police Grade Three Special Exam was opened to regular trainees with no degree from the police education system (hereafter “regular trainees”), the provision at issue has not yet been revised accordingly. Second, all the regular trainees who qualified in a Police Grade Three Special Exam before 2011 were categorically sent to the Police College to receive their training, so they were unable to have the opportunity to be sent to the CPU for training. During this period, the Control Yuan proposed corrective measures to the NPA, demanding that the NPA send regular trainees who qualified in a Police Grade Three Special Exam to the CPU receive their training. However, for reasons of administrative consistency, the NPA still continued to send them to the Police College for training. Furthermore, the Administrative Appeal Committee of the Examination Yuan made the aforementioned Administrative Appeal Decision in 2009, ordering the agency of the initial administrative act to send regular trainees who had qualified in a Police Grade Three Special Exam to the CPU, and filed an administrative appeal requesting that this should be for more than four months. However, after they had completed the training with a qualifying score, the NPA still refused to assign them to any position as Police Inspector Grade Three or above (including that of sub-lieutenant), insisting that the special training they received was not the continuing education or advanced education as specified in

the Police Education Act, and also not the training specified in Article 4, Paragraph 2, Subparagraph 2 of the Enforcement Rules of the Police Personnel Management Act. In sum, even though the provision at issue does not expressly differentiate between CPU graduates and regular trainees, its use over several years has created a legal result that is continuously beneficial to CPU or Central Police College graduates and continuously detrimental to regular trainees as regards assignment and subsequent promotion for persons who qualified in the Police Grade Three Special Exam before 2011. Therefore, the provision at issue, which uses the distinction between those with a CPU or Central Police College degree or qualifying training and those without as the classification to decide whether or not the qualification for assignments for a position ranked Police Inspector Grade Three or above has been met, constitutes differential treatment of regular trainees and must be scrutinized under the principle of equality.

[8] After the police personnel examination was made open to regular trainees, the state should have provided to all the qualified examinees of the same examination the training required by the assignable positions so that they could complete the examination, such that they could obtain the same qualifications for rank and assignment. Only this would have satisfied the constitutional guarantee that the people should be able to participate in public office under equal conditions. As regular trainees who had qualified in a pre-2011 Police Grade Three Special Exam obtained the qualification for the rank of Police Inspector Grade Four in exactly the same way as CPU or Central Police College graduates did, so too they should have had the same opportunities for assignment and promotion. Although the provision at issue refers to “training completed with a qualifying score” as the alternative to a CPU or Central Police College degree, it does not specify the institutes responsible for examination and training. Thus, in practice, this allowed the NPA to categorically send regular trainees who qualified in the written exam of the Police Grade Three Special Exam to receive personnel training for qualified

examinees at the Police College, and further not only precluded regular trainees who qualified in the same exam from being assigned to any position ranked Police Inspector Grade Four such as sub-lieutenants at their first assignment, but also compelled them to undergo an additional screening process and qualifying training at the CPU before receiving promotion.

[9] It is found that the NPA maintained the above-mentioned training and measures due to the following three considerations: the preservation of the development and education system of the police, the limited training capacity of the CPU, and the limited number of positions available for sub-lieutenants (*see* p.5 of the attached opinion in the NPA's letter replying to this Yuan: National Police Agency Letter Jing-Shu-Jiao-1050184012 of February 3, 2017). It is considered that the preservation of the development and education system of the police and the establishment of the CPU and the Police College are to cultivate police personnel equipped with the knowledge of the police profession in a modern society. However, graduation from the CPU or the Police College is not the only way to acquire the knowledge and skills necessary for the police profession. As the qualifying training from the CPU or the Central Police College also satisfied the requirement for the qualification for positions ranked Police Inspector Grade Three or above, the aforementioned regular trainees who qualified via the written exam should not be excluded from receiving sufficient training at the CPU so that they may qualify for the position as sub-lieutenants. Second, it is also considered that the limits on training capacity were only a matter of administrative cost, which is hardly an important public interest. The limited number of available positions like that of sub-lieutenant, which determines that only some of the qualified examinees to be assigned to the position as sub-lieutenants, is an inevitable reality and not a blameworthy consideration. However, the rightful solution is to recruit the better candidates among the qualified examinees so as to adhere to the principles of fair competition and hiring for talent.

As such, to categorically send all the regular trainees who qualified via a Police Grade-Three Special Exam to receive their training at the Police College is hardly a means substantially connected to the achievement of the purpose of hiring the best talent.

[10] In sum, the provision at issue fails to clearly specify the institutes responsible for examination and training, so in practice it has allowed the NPA to categorically send regular trainees who qualified via the written exam of the Police Grade Three Special Exam to receive personnel training for qualified examinees all at the Police College, so as to complete their examination (*see* Article 4, Paragraph 2, Subparagraph 2 of the Enforcement Rules of the Police Personnel Management Act for reference). This practice has resulted in the inability of persons without a degree from the police education system who qualified before 2011 in the aforementioned exams to obtain the qualification for assignments for the positions ranked Police Inspector Grade Three or above. This has caused them to suffer systematic disparate treatment with regard to their right to take public examinations and hold public office. Therefore, the practice, as outlined above, does not conform to the spirit of Article 7 of the Constitution, which guarantees the right to equality. The Executive Yuan should collaborate with the Examination Yuan, and within six months of the publication of this Interpretation, according to this Interpretation, take appropriate measures to eliminate the disadvantageous disparate treatment suffered by Petitioners Nos.1 and 2, such as sending them to complete the necessary training at the CPU so as to obtain the qualifications for assignments to all the positions ranked Police Inspector Grade Four after they have completed the training with a qualifying score.

[11] Petitioner No.1 in their petition questioned the constitutionality of the training program for qualified examinees of special examinations for police personnel for the respective years between 2002 and 2004. Petitioner No. 2 in

their petition questioned the constitutionality of Article 4 of the Police Personnel Management Act, the Secretary-General of the Examination Yuan Letter Kao-Yi-Zu-Yi-0980009689 of December 7, 2009, and the Rank and Position Schedule for Police Officers. It is found that the aforementioned training program was an administrative act regulating particular individuals who qualified in the aforementioned written exam and that the aforementioned letter is not a regulation. None of these matters are eligible objects to support a petition for interpretation to this Yuan. As Article 4 of the Police Personnel Management Act was not applied in Final Judgment No. 2, it cannot be used to support a petition for interpretation. As to the constitutionality of the Rank and Position Schedule for Police Officers, it is hard to ascertain which part the Petitioners believe to have contradicted the Constitution. Therefore, the abovementioned parts in the petitions of petitioners Nos.1 and 2 do not conform to Article 5, Paragraph 1, Subparagraph 2 of the Constitutional Court Procedure Act and are hereby denied according to Paragraph 3 of the same Article.

Background Note by the Translator

Petitioner Ching-Chang LIN et al., representing thirteen persons (hereinafter “Petitioner No. 1”) were qualified examinees of the 2002 to 2004 Grade Three Special Examination for Police Personnel (hereinafter “Police Grade Three Special Exam.”) Petitioner Shih-Feng HUANG et al. representing four persons (hereinafter “Petitioner No. 2”) were qualified examinees of the 2005, 2009, and 2010 Police Grade-Three Special Exams. According to the training programs designed by the National Police Agency of the Ministry of the Interior (the agency commissioned to provide training for qualified examinees, hereafter “NPA”) in the respective years, Petitioners No. 1 and No. 2, were respectively sent to the Taiwan Police College, rather than the Central Police University (hereafter the “CPU,”), to receive their training. According to Article 11,

Paragraph 2 of the Police Personnel Management Act (“the provision at issue,”), only CPU graduates or CPU trainees were qualified to be assigned as sub-lieutenants. Petitioner No. 1 therefore further applied to be trained for more than four months at the CPU, but their applications were all rejected. Petitioner No. 2 et al., after being sent by the Ministry of the Interior in December 2011 to receive four months of special training at the CPU, applied in the same month to the Ministry of Interior to be reassigned to positions as sub-lieutenants ranked Police Inspector Grade Four or as sub-lieutenant or its equivalent, but all were rejected. After exhausting the remedies provided, on April 9, 2014, Petitioners No. 1 and No. 2 respectively petitioned this Court to interpret the Constitution, questioning the constitutionality of the provision at issue as applied in the final judgment of the court of last resort.

Until a two-track examination and recruitment system was put into place in 2011, there had been only one system of examination designed for the recruitment of police officers of different ranks. Under this system, any examinee passing the Police Grade Three Special Exam became a qualified candidate for the post of sub-lieutenant. However, the NPA, responsible for administering the provision at issue, had for years prevented non-CPU-graduates from receiving the required training at CPU, so non-CPU-graduates were practically deprived of the opportunities to be assigned as sub-lieutenants inasmuch as they never completed the training required by law. With no classification based on educational background, the provision at issue was neutral on its face.

J.Y. Interpretation No. 760 is considered as marking a new direction in the Constitutional Court’s jurisprudence on the issue of equal protection. In the past, the Constitutional Court rarely considered the issue of equal protection with no *de jure* discrimination present. In J.Y. Interpretation No. 760, the Constitutional Court for the first time regards the disparate impact found in an administrative agency’s perpetual administration of a statute as unpermitted systematic

discrimination. While recognizing the competitive nature of sub-lieutenant recruitment and the CPU's limited training capacity, and without further questioning the NPA's true intent in preventing non-CPU-graduates from receiving the required training, the Constitutional Court takes the unfailing rejections of the Petitioners' requests as *de facto* discrimination. In reviewing this *de facto* discrimination, because the Petitioners' constitutional rights to hold public office are negatively affected, the Constitutional Court adopts a heightened scrutiny under which the discrimination is deemed constitutional only if it pursues important public interests and a substantial nexus is found between the discrimination and the important public interests being pursued. However, the Constitutional Court does not clearly express under what circumstances (*e.g.*, the number of instances or the length or frequency of a perpetual practice) individual administrative decisions would be regarded as a pattern of discrimination. It remains to be further noticed how future cases of *de facto* discrimination or disparate impact will be decided by the Constitutional Court in the future.

