



# CITY OF MILWAUKEE

## Fire and Police Commission

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December 15, 2011

TO: The Board of Fire and Police Commissioners

FROM: Victoria Robertson, HR Analyst Senior

SUBJECT: Extension of Fire Lieutenant Eligible List

Several Fire Department Firefighters have requested that the Board extend the Fire Lieutenant eligible list, which is due to expire on December 17, 2011. Over the years, numerous groups have come before the Board with requests to extend a promotional eligible list. The reasons for the requests have varied, but the Board's decisions have remained rather consistent. The staff recommends likewise, that this request be denied in line with the Board's history to deny similar requests to extend promotional eligible lists, and pursuant to a City Attorney's opinion dated October 15, 2003.

Please know that careful consideration was given to this request. Below please find a cursory summary of similar requests presented in the more recent past:

1. In 2003, the Board denied a request from the Milwaukee Organization of Hispanic Firefighters to extend the Fire Lieutenant eligible list from the date of the first appointment made from the list. The reasoning presented at that time included cost effectiveness and to reach certain individuals that would increase Hispanic diversity. The request led to requesting the City Attorney's opinion which advised that "the Board choose not to extend the eligible list ...unless there are legitimate non-discriminatory reasons to do so." The full City Attorney's opinion is enclosed for your review.
2. In 2003, the request of Lieutenant James Hardy that the Fire Captain eligible list be extended was denied. His argument was that the list for Battalion Chief had been exhausted, thus failing to create openings for promotion of current captains and vacancies for new captains.
3. In 1996, a group of African American Firefighters petitioned the Commission to extend the Fire Lieutenant eligible list to reach certain individuals for the purpose of increasing diversity. The eligible list was not extended.

4. In 1993, the request of Frank Alioto that the Fire Lieutenant eligible list be extended by one position to reach him was denied. His argument was based on the agreement negotiated to allow the exemption of the Battalion Chief-EMS position, which involved the extension of the Battalion Chief and Fire Captain eligible lists for one position, each on a one-time basis.

During the Board meeting on December 1, 2011, the requestors have indicated the reasons for their request are to increase diversity and to save the City money by delaying the next testing process. Delaying the testing process in order to save the expense involved in administering the examination is an argument that may be made for the extension of every promotional eligible list. The City has provided the Board with adequate funding to conduct examinations in 2012. In addition, extending a promotional eligible list in order to reach specific members based on their race has been reviewed previously as being discriminatory and subjects the City to liability.

Further, Fire Chief Rohlfing has recently implemented a Professional Development Program that future candidates for Fire Lieutenant must complete in order to receive a recommendation from the Chief for promotion. The Program's goal is to enhance the quality and preparedness of individuals that are promoted into leadership positions. The Program does not apply to the current eligible list. Allowing the current list to expire as originally scheduled will encourage members to begin participating in the new Professional Development Program training.

In conclusion, based upon the totality of this information, the staff recommends that the current Fire Lieutenant eligible list be allowed to expire on its scheduled date of December 17, 2011.

Enclosure: City Attorney Opinion

# CITY OF MILWAUKEE

Form CA-43

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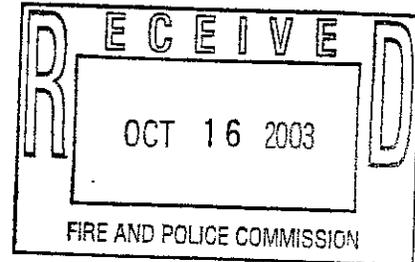
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October 15, 2003

Mr. David L. Heard  
Executive Director  
Fire and Police Commission  
200 East Wells Street, Room 706  
Milwaukee, Wisconsin 53202



Re: Extension of the November 1, 2001 Eligible List for Promotion to Fire Lieutenant

Dear Mr. Heard:

On September 25, 2003 you requested the opinion of this office regarding the legality and advisability of extending the current eligible list for the position of Fire Lieutenant, which was adopted on November 1, 2001 and is scheduled to expire on November 1, 2003.

Your request for this opinion stems from a July 21, 2003 letter you received from the Milwaukee Organization of Hispanic Firefighters (hereinafter referred to as the "Organization") requesting that the Fire Lieutenant eligible list be extended until December 28, 2003, which is two years from the date of the first appointment from the eligible list. The reason for the extension, the Organization argues, is that "by starting the two-year time frame from the date of the first promotion that you would truly have a two-year eligibility list." The Organization expresses concern that "the list will expire and not be truly representative of two-years of eligibility for those individuals on the list, and may adversely effect [sic] qualified Hispanics from promotion to the position of Fire Lieutenant." The Organization opines that the extension would be a cost-effective

Mr. Heard  
October 15, 2003  
Page 2

measure, and would lead to more minorities or Hispanics being promoted to Fire Lieutenant.

Wisconsin Statutes § 62.50(2), *Wis. Stats.*, requires that the Board of Fire and Police Commissioners approve every appointment in the City's Fire Department. Wisconsin Statutes §§ 62.50(2), (3)(b) and (4) *Wis. Stats.*, requires that the Board adopt rules to govern the selection and appointment of persons employed in the Fire Department. As § 62.50(3)(b) states:

The board shall adopt rules to govern the selection and appointment of persons employed in the police and fire departments of the city. The rules shall be designed to secure the best service for the public in each department. The rules shall provide for ascertaining, as far as possible, physical qualifications, standing and experience of all applicants for positions, and may provide for the competitive examination of some or all applicants in such subjects as are deemed proper for the purpose of best determining the applicants' qualifications for the position sought. The rules may provide for the classification of positions in the service and for a special course of inquiry and examination for candidates for each class.

Wisconsin Statutes § 62.50(2), *Wis. Stats.*, requires that the adopted rules and regulations specify the date when they take effect, and thereafter that all selections of persons in the Fire Department for employment, appointment, or promotion - except for the positions of chief engineer and first assistant - be made in accordance with the adopted rules and regulations. You have advised that the Board revised its Rules effective July 26, 2001.

According to Rule X, Section 1.(a) of the Board Rules, "After an examination, an eligible list shall be prepared containing the names of candidates in the order of their relative ranking. Eligible lists remain in effect for two (2) years, unless rescinded, abolished, or extended by the Board . . .". *See also* Rule XI, Section 1.

The Organization's July 21, 2003 letter sets forth no basis to assert that the selection procedure which produced the November 1, 2001 eligible list was invalid. The Organization offers no justification to extend the list in order to address legal insufficiencies in the testing process itself.

To extend the eligible list in accordance with Rule X, therefore, the Board must identify legitimate, non-discriminatory reasons as to why an exception should be made for the

Mr. Heard  
October 15, 2003  
Page 3

extension. Savings in the budget or for the costs of tests may be a legitimate non-discriminatory reason; but promotions of Hispanic employees, as a favored group, in the promotion ranks is not. Any stated justification for a deviation from Board rules and past practice must be consistent with what actually occurs. If, for example, the Board decides to deviate from its rules and past practice, it is advisable that the reason(s) be stated before the deviation occurs. See *Saint Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993); *Courtney v. Biosound, Inc.*, 42 F.3d 414 (7<sup>th</sup> Cir. 1994). Justifications after the fact are suspect as being pretextual for discrimination.

Employment practices that allow for hiring preferences specifically based upon national origin or race are unlawful under Title VII of the Civil Rights Act of 1964, *as amended*, unless the employment practices have been adopted pursuant to a court-mandated affirmative action plan or pursuant to a previously-adopted voluntary affirmative action plan. *Reynolds v. City of Chicago*, 296 F.3d 524, 526 (7<sup>th</sup> Cir.2002); *McNamara v. City of Chicago*, 138 F.3d 1219, 1222 (7<sup>th</sup> Cir.1998) *cert. den.* 525 U.S. 981 (1998); *recon. den.* 867 F.Supp 739 (N.D. Ill. 1994); *Wittmer v. Peters*, 87 F.3d 916, 918-19 (7<sup>th</sup> Cir.1996) *cert. den.* 519 U.S. 111 (1997); *Thompson v. Altheimer & Gray*, 248 F.3d 621 (7<sup>th</sup> Cir. 2001); *Petit v. City of Chicago*, 239 F.Supp.2d 761, 770 (N.D.Ill., 2002). Adopting an affirmative-action plan after-the-fact is not advisable and may lead to claims of reverse discrimination under Title VII.

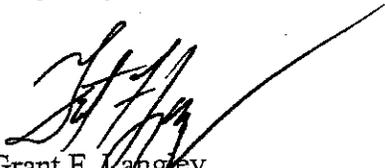
The Board is not currently under a court-mandated affirmative action plan for the promotion of Fire Lieutenants; and there has not been a previously adopted voluntary affirmative action plan. A voluntary affirmative action plan may be undertaken only if it meets constitutional requirements for actions taken on the basis of race or national origin. The affirmative action must be narrowly tailored to further a compelling government interest; and the governmental entity must have a strong factual basis for concluding that the racial classification is necessary. See *Reynolds*, 296 F.3d at 526; *Majeske v. City of Chicago*, 218 F.3d 816, 820 (7<sup>th</sup> Cir. 2000); *Builders Association of Greater Chicago v. County of Cook*, 256 F.3d 642, 645 (7<sup>th</sup> Cir.2001); *Chicago Firefighters Local 2 v. City of Chicago*, 249 F.3d 649, 657 (7<sup>th</sup> Cir.), *cert. den.*, 534 U.S. 995 (2001). A "compelling governmental interest" may be to remedy past discrimination that has been shown to be pervasive and proximate in time. *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Adarand Constructors v. Pena*, 515 U.S. 200 (1995). Evidence of a statistical disparity alone is generally not conclusive on the issue of prior discrimination. See *Id.* In addition to statistical evidence, general factors to consider include "the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the

Mr. Heard  
October 15, 2003  
Page 4

impact of the relief on the rights of third parties." *United States v. Paradise*, 480 U.S. 149 (1987) (plurality opinion) (cited in *Majeske*, 218 F.3d at 824).

Based upon the representations contained in your letter, we advise that the Board choose not to extend the eligible list until December 28, 2003 unless there are legitimate non-discriminatory reasons to do so.

Very truly yours,



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City Attorney



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Assistant City Attorney

1095-2003-3190/73582