



April 20, 2010

Mayor Jay Williams  
First Floor, City Hall  
26 South Phelps Street  
Youngstown, OH 44503

City Council Members  
6<sup>th</sup> Floor, City Hall  
26 South Phelps Street  
Youngstown, OH 44503

Re: Racially Bifurcated Test Results in the Police and Fire Departments

Dear Mayor Williams and City Council Members:

The undersigned commissioners of the U.S. Commission on Civil Rights are writing to express our concern regarding recent news that the Youngstown City Council has voted to continue using racially discriminatory methods in the hiring of police officers and firefighters.<sup>1</sup>

Specifically, we are writing about Youngstown's policy of separating white male applicants into one rank-ordered list based on their civil service exam scores, and minorities and women into another rank-ordered list based on their scores. Using vague "diversity criteria," Youngstown officials then select a number of white males from among the highest scorers on the first list, and a number of minorities and women from the highest scorers on the second list. This has resulted in hiring minorities and women with lower test scores than white males.

Ohio Revised Code (R.C.) 124.26 and 124.27 require that a "rule of ten" is to be followed in hiring and promoting from civil service test results. That is, Ohio municipalities are required to make civil service appointments from among the top ten scoring candidates on the applicable exam.

However, prior to administering the exams, the Youngstown council enacted an emergency ordinance which authorized the council to waive the rule of ten and instead select candidates from the minority list who did not score in the top ten. The council cites R.C. 124.90 as its authority to waive the rule of ten—or any other part of chapter 124—by a two-thirds vote *if* the waiver is deemed necessary in order to "comply with any

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<sup>1</sup> At a public meeting of the U.S. Commission on Civil Rights on April 16, 2010 the Commission voted 6-2 to send this letter.

federal law or any rules adopted pursuant to federal law concerning discrimination in employment.” The complete text of R.C. 124.90 is as follows:

Waiver of federal law concerning discrimination in employment.

(A) Any municipal corporation may, by a two-thirds vote of its legislative authority, waive, suspend, or alter any of the provisions of this chapter as they apply to that municipal corporation if such waiver, suspension, or alteration is necessary for the municipal corporation to comply with any federal law or any rules adopted pursuant to federal law concerning discrimination in employment.

(B) Any municipal corporation that has adopted the provisions of this chapter as part of its charter may, by a two-thirds vote of its legislative authority, waive, suspend, or alter any of the provisions of this chapter so adopted if such waiver, suspension, or alteration is necessary for the municipal corporation to comply with any federal law or any rules adopted pursuant to federal law concerning discrimination in employment.

(C) A municipal corporation may not under this section make any waiver, suspension, or alteration of provisions of this chapter that relate to matters of promotions within the municipal civil service.

There is no federal law pertaining to employment discrimination that would require the Youngstown council to waive the rule of ten in favor of a racially bifurcated, dual list hiring scheme. As far as we have been able to ascertain, the only possible “law” that might have required such compliance was a 1986 consent decree which expired four years later.

Since 2005, Youngstown has been involved in expensive and protracted litigation concerning the city’s past use of its racially bifurcated, dual list system. A pending case was filed in the Court of Common Pleas in 2005. The plaintiff, a white male, sued for discrimination because minority and female candidates with lower scores were hired while he was not.

In that lawsuit, the Court of Common Pleas refused to grant former Mayor McKelvey immunity in the event the City is found guilty of discrimination. When the City appealed the decision, the Court of Appeals for the Seventh District upheld that portion of the lower court’s ruling.<sup>2</sup> It is therefore likely that Youngstown officials who continue to use the dual list system will be held personally liable in the event of future discrimination lawsuits.

According to press accounts, Youngstown’s legal staff has recognized that recent court decisions do not support racially bifurcated scoring and ranking systems. Yet the

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<sup>2</sup> *State ex rel. Conroy v. Williams*, 923 N.E.2d 191, 200, ¶ 47 (Ohio Ct. App. 2009) (“In summary, the judgment of the trial court is affirmed with respect to McKelvey, because, in the event that Appellee can prove that McKelvey committed race and sex discrimination, he may not avail himself of sovereign immunity pursuant to R.C. 2744.03(A)(6)(c).”).

Youngstown Council has chosen to ignore the advice of its own legal staff on this matter.<sup>3</sup>

As a further example, in 2006 the United States Court of Appeals for the Fifth Circuit ruled that Shreveport, Louisiana's use of a dual list system very similar to Youngstown's had resulted in illegal discrimination against white males.<sup>4</sup>

While Ohio does not fall within the jurisdiction of the Fifth Circuit, that decision reflects the current interpretation of discrimination law by a number of district and federal courts as well as by the U.S. Supreme Court.

Philadelphia, for example, has for many years used a controversial, racially bifurcated, dual list system for its firefighters which is similar to Youngstown's. This has led to a great deal of disharmony within the Philadelphia fire department, suspicion among firefighters regarding the qualifications of their colleagues and, inevitably, lawsuits.

Last year the City of Philadelphia paid out \$275,000 in a settlement with five white firefighters who had sued the city for discrimination in 2007.<sup>5</sup> In addition to paying the settlement funds to the aggrieved firefighters, as well as its own legal costs, Philadelphia also agreed at that time to address the many issues raised in the suit.

It was predictable that Philadelphia would face more lawsuits before the dual list system could be replaced with a more legally defensible and less divisive system. One of the original plaintiffs in the 2009 settlement filed a new lawsuit in January 2010 alleging that fire department officials retaliated against him for participating in the original discrimination lawsuit.<sup>6</sup> This means more litigation, more legal expenses, lower morale for Philadelphia's firefighters—and it raises the possibility of putting public safety at risk.

Youngstown's own legal staff can, and probably already has, identified dozens of additional, similar examples of expensive, time-consuming litigation against municipalities for maintaining separate scoring or evaluation criteria for white male employees on the one hand and minority and female employees on the other.

In July 2009, the U.S. Supreme Court in *Ricci v. DeStefano*<sup>7</sup> struck down a decision by New Haven, Connecticut, to disregard the results of its firefighter promotion tests merely because the city felt that too few minorities would have been eligible for

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<sup>3</sup> Editorial, *Council is ignoring the law and putting the city at risk*, VINDY.COM, Feb. 5, 2010, available at <http://www.vindy.com/news/2010/feb/05/council-is-ignoring-the-law-and-putting-/>.

<sup>4</sup> *Dean v. City of Shreveport*, 438 F.3d 448, 462-63 (5<sup>th</sup> Cir. 2006) (“Appellants claim that by separating applicants’ Civil Service Exam Scores by race, the City in effect uses different cutoff scores on the basis of race. We agree that the City’s hiring process violates the plain language of section 2000e-2(1) [of Title VII, Civil Rights Act of 1964, as amended].”).

<sup>5</sup> Jeff Shields, *Philadelphia Settled Firefighters’ Discrimination Suit*, PHILADELPHIA INQUIRER, July 1, 2009, available at [http://www.philly.com/inquirer/local/pa/20090701\\_Philadelphia\\_settled\\_firefighters\\_discrimination\\_suit.html](http://www.philly.com/inquirer/local/pa/20090701_Philadelphia_settled_firefighters_discrimination_suit.html).

<sup>6</sup> Robert Moran, *Philadelphia firefighter files 2d racial-bias suit*, PHILADELPHIA INQUIRER, Jan. 13, 2010, available at <http://www.philly.com/philly/news/local/81300697.html>.

<sup>7</sup> 129 S.Ct. 2658 (2009).

promotion and purportedly feared a disparate impact lawsuit. According to the Supreme Court, unless there was strong evidence that the tests discriminated against minorities, a city could not pass over non-minorities who scored high enough on the exam to be entitled to promotion. The issue turns on whether the city has a strong basis in evidence to believe minorities would win a disparate impact lawsuit.<sup>8</sup> If not, the city will face disparate treatment liability from white job candidates and will probably lose.

In writing for the majority in *Ricci*,<sup>9</sup> Justice Kennedy cited the relevant section of the Civil Rights Act of 1991 which expressly prohibits “selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment tests on the basis of race, color, religion, sex, or national origin.”<sup>10</sup> This prohibited practice is widely known as “race norming” and it is precisely the practice in which Youngstown is engaged.

There are better ways than using racially bifurcated hiring lists that Youngstown can use to expand the pool of qualified minority and female applicants which do not invite legal challenge and which are far less divisive. Youngstown has, in fact, taken some initiative in this very direction.

For example, we laud efforts made to increase the pool of applicants and test takers through expanded recruitment and outreach, including special efforts to ensure that minority applicants are not disadvantaged, whether that disadvantage resulted from historical methods of recruitment or otherwise.<sup>11</sup> It has been reported that the police embarked on these initiatives because they recognized that: (1) Historically, a higher proportion of police applicants and test takers have been white, which accounts, at least in part, for the larger proportion of whites with high scores; and (2) Youngstown police have acknowledged that in the past they have had trouble recruiting blacks because of their perception of the police.<sup>12</sup>

Other options Youngstown could consider include offering scholarships and other training opportunities on a race-neutral basis so that all applicants can better prepare for the exam. Youngstown could help potential applicants of all racial and ethnic backgrounds and both sexes win scholarships for criminal justice studies in college, and the city could mentor promising students. All of these efforts would be legitimate means of increasing the pool of qualified applicants.

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<sup>8</sup> *Id.* at 2676 (“If an employer cannot rescore a test based on the candidates’ race, [42 U.S.C.] § 2000e-2(*l*), then it follows *a fortiori* that it may not take the greater step of discarding the test altogether to achieve a more desirable racial distribution of promotion-eligible candidates—absent a strong basis in evidence that the test was deficient and that discarding the results is necessary to avoid violating the disparate-impact provision.”) (citation omitted).

<sup>9</sup> *See* 129 S.Ct. at 2676.

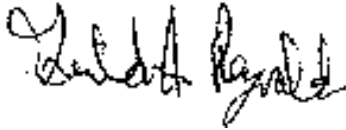
<sup>10</sup> 42 U.S.C. § 2000e-2(*l*).

<sup>11</sup> *See* Patricia Meade, *Youngstown Police Sergeant: Strengthen minority recruitment*, VINDY.COM, Mar. 13, 2006, available at <http://www.vindy.com/news/2006/mar/13/youngstown-police-sergeant-strengthen-minority/>.

<sup>12</sup> We do not have sufficient information to pass on the validity of these reports, but we simply note that such factors might well justify increased efforts to expand the pool and diversity of applicants that compete for the positions at issue.

Youngstown's dual list hiring policy is inherently discriminatory and cannot be justified as necessary to conform with federal law. Indeed, it appears to *violate* federal law, and it is unfair and divisive. As the Ohio courts have recently suggested, city officials could be held personally liable if the city loses a discrimination case resulting from the dual list hiring policy. As the U.S. Supreme Court and many lower courts have ruled, it is not permissible to discriminate against one race in order to benefit another race. Accordingly, we urge you to rescind your dual list policy and instead adopt race-neutral means of ensuring a wide range of applicants who can compete on an equal footing for hiring and promotion.

Sincerely,



Gerald E. Reynolds  
Chairman



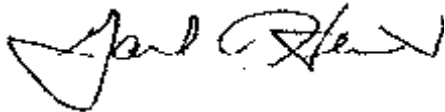
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Commissioner



Gail Heriot  
Commissioner



Todd Gaziano  
Commissioner

Cc: State Attorney General