

## **FAQs ON THE AMICUS BRIEF OF IABPFF, ET AL., IN *RICCI v. DeSTEFANO, ET AL.***

### ***How is this case about equal opportunity?***

The case is really about the right of a city to remove unfair barriers to equal opportunity, such as the tests in this case.

What race you are has nothing to do with being a good firefighter. So if a selection process eliminates large numbers of people from a particular race, there probably is something wrong, and it should be investigated. Here, the city simply refused to certify and promote from the examinations. They had the legal right – and really, the obligation – to do so.

Governments and employers have a duty to protect equal opportunity and enforce freedom from discrimination for everyone. The city in this case was trying to follow the law and maintain diversity in the upper ranks.

As we argued in our brief, what's at stake is equal opportunity, as well diversity in fire service, which is a compelling state interest.

### **OUR BRIEF AND OUR BELIEF IN DIVERSITY AS A COMPELLING INTEREST**

#### ***What are you really arguing here?***

As reflected in our amicus brief, there is a national security interest in having a diverse fire service at the core, and also in the commanding ranks. This is fully recognized by the federal government. Fire service is a matter of security. Just last month, Janet Napolitano, declared that fire service was an integral part of Homeland Security and FEMA, and the US fire service also recognizes the need for diversity in fire service.

We go into peoples' homes and businesses in various neighborhoods to educate them; there are sometimes many cultural differences that require a diverse force to be able to adequately do that. This is even more imperative in emergency and rescue situations.

The US Census Bureau has predicted that by 2050, less than 46% of the US population will be white. The rest will be black, Hispanic, and other races and ethnicities. A diverse fire service is needed to protect and serve these individuals.

#### ***Why is Diversity essential to the fire service?***

It has been widely recognized and accepted – especially in military organizations – that diverse organizations make better decisions and actions; they respond better and are more

cohesive. Fire service is a paramilitary structure. Therefore, diversity serves the purpose of improving the overall performance and abilities of the fire service.

Moreover, the strength of the fire service is largely drawn from its relationship to the communities served. This is built upon a relationship of trust and communication. Fire response is a small – albeit critical -- part of the duties of the fire service. Medical responses, education and prevention are a far greater part of the duties of the fire service measured by time used. By definition, these require intimate knowledge of and relationship with people in the communities served.

Our increasingly diverse population, especially in big cities, magnifies things like cultural differences, language and perceptions, and fire service has to deal with it in order to protect and save lives. For example, several years ago in Columbus, Ohio, five Hispanics died in one fire incident. This was almost fully due because none of the firefighters who arrived on scene could speak the language. They were capable firefighters, but could not communicate enough to make a difference to the five who died. There was only one Hispanic firefighter in the entire department at the time.

Remember, many of our urban neighborhoods are comprised of refugees from war-torn countries, and this population is growing. These people's experience with uniformed personnel in their own countries may be been terrifying. As firefighters in uniform arrive at their door to teach about fire prevention or to assist in a medical or fire emergency, it is important that they can communicate and hopefully some will reflect some characteristics of the community itself (e.g., being black or Hispanic), to create an added layer of trust or security.

In short, as our population becomes far more diverse, the fire service must reflect these changes to provide adequate and truly responsive emergency services to the communities. That's why it is homeland security issue. And it also is a fairness issue. It is unfair to keep blacks, Hispanics, women, Asians, and any other groups out of fire service through old testing methods that do not really test for merit.

***Has President Obama's administration taken "sides" with the City or with African-Americans on this issue?***

No. That's a false impression given by many pundits. And it's not a question of "taking sides." The Department of Justice and EEOC filed an amicus brief that was on behalf of neither party.

Rather than take sides, the government said the case was not ripe for review yet, and the Supreme Court should send it back to the lower court for a more fully developed record and further investigation. The government argued in the alternative that meeting federal statutory requirements, like Title VII, was also a compelling state interest. Let's remember, it's part of the federal government's duty to uphold anti-discrimination laws and try to ensure equal opportunity for everybody. Here, the examinations adversely affected minorities and there were other, less-discriminatory alternatives available.

We agree with the government's position. But we also argue that there is a compelling state interest in diversity of races and ethnicity in fire service that permits taking race into account for some decisions as long as there are no individuals selected for intentional discrimination, and as long as the decision is reasonably fair to everyone and a narrow one.

This decision was narrow and not likely to be repeated. Before promoting off the exams, the city held hearings and learned of other testing alternatives that would be not only valid, but would help increase the diversity in the fire department, and give more equal opportunity to *everyone*.

## **WE NEED TO MAKE SURE BETTER, MORE FAIR TESTS FOR MERIT, THAT ALREADY EXIST, ARE USED IN THE FIRE SERVICE**

***A lot of people have been saying that these tests were fair and the best way to test for "merit."***

Not so. Numerous other measures have been found that test for true merit, and also are less discriminatory (see below). In New Haven, both tests were scored at 60% "job knowledge" (which was a multiple-guess test), and 40% so-called "structured interview," where other firefighters rated the person interviewed.

But what is important – especially in fire promotional tests – is not testing for job knowledge. Rather, it is testing for actual performance. This is what the E.E.O.C. guidelines say and what the law requires.

When firefighters are eligible to take a promotional exam, they have been working for a period of years as firefighters and are presumed to have the requisite job knowledge and skill in order to command other firefighters. Although a review of knowledge may be a small part of testing for promotion, it is not what a city should seek for commanding officers.

Rather, as the New Haven's Civil Service rules required, you should seek command, character, integrity and capability. A multiple-guess test cannot reflect that. Nor can a structured interview. Indeed, in this case, the examiner IO Solutions testified that he had expressed doubt he could construct a meaningful "structured interview" exam that would reflect command skills, integrity, and character in a fire or emergency situation. But he went ahead and used these types of interviews. Again, that doesn't sound very valid, and has not proven to be in this case.

***Everybody keeps saying the tests were valid. Weren't they?***

There's no evidence of that. Petitioners' arguments rely on two faulty premises: 1) that the tests were "legally valid" and 2) that the Petitioners were absolutely entitled to promotion. Neither is true.

There is no evidence the tests were ever proved valid. Under the E.E.O.C. Guidelines, a city can decline to certify a test without proving its validity. Ironically, though the Petitioners or their amici and the pundits keep saying that IO Solutions was “prepared to validate” the tests, and rely on “well-constructed exams” as a mantra, neither is true.

Showing validity in promotional testing involves looking at test construction, linking to performance of the actual job, test administration, scoring – in short, myriad factors, all linked with successful job performance, not shown or available here. Moreover, if the Petitioners were so confident of validity, why not have IO Solutions provide a report to them? They did not.

As the record shows, the exam types and weights were dictated through influence by the firefighter’s union with the city. And the exams resulted in serious adverse impact against blacks and Hispanics, as similar New Haven fire promotional exams have in the past. The city has decided to move away from that method to seek out fairer examination measures. Is it right to prevent them from doing so?

But the real question is, *why not* use more accurate and fair measures of firefighter command capability than one that has a proven adverse impact on blacks and Hispanics and does not predict performance very well?

### ***What other measures are more fair?***

One alternative is an assessment center, which helps ensure that blacks, whites, and Hispanics are more fairly represented in fire service is real assessment centers, where promotional candidates can be observed and rated in simulated fire situations. Many fire departments have successfully implemented this type of testing, and may use it in conjunction with other types of tests. And such tests are cost-effective in the long run.

Anyone can study and pass a written test, even non-firefighters (and scores may vary on the same test at different times for the same person).

Think about it: If you’re flying in a commercial airliner, do you want a commanding pilot who is good at taking written tests, or one who has actually trained and proven himself or herself through flight simulations and actually flying? I know I’d prefer the latter. I want to know that the pilot in command has a lot of experience, has served as a co-pilot and has proved himself or herself – not just that the commanding pilot sharpened a No. 2 pencil, studied, and filled out a question-and answer grid or did well in an interview.

Also, we do know that, in written multiple-guess exams, whites’ scores tend to be artificially inflated over black and Hispanic scores – but that only happens where the test is “high-stakes,” like promotional testing. When you remove that barrier and have a more accurate measure of command, like an assessment center or any one of other measures or combinations, blacks and Hispanics score as well as whites.

That’s why these measures are more fair and provide equal opportunity better than those used by the city of New Haven. Better measures would provide more equal opportunity, and remove the grade inflation that currently tends to benefit white promotional candidates.

***Why do whites tend to have score inflation on written tests?***

Researchers are not sure, but there are recent theories. Some test creators may have “implicit attitude” bias in creating questions. Also, these tests are the most easy to compromise; a person gets a hold of a test ahead of time, or testers are known to use the same or similar questions.

Also, dominant groups may have more advantage in forming “study” groups, sharing questions from previous exams, and getting feedback from former test-takers that may inflate grades over firefighters who are just as smart, capable and work just as hard, but are not part of the privileged group. Other, newer, and validated testing methods can help compensate for this.

***Wasn't this decision unfair to the whites who studied and scored high on the exam?***

No. And, if you think about it, they have no legal right to rights to promotion, especially since the city uses the “rule of 3” promotion. Because there was evidence of better measures of merit in fire service, it was the right move for the city to not certify the exams, and to try to explore other alternatives that would be more fair and give equal opportunity to everyone, including the white firefighters who did not score as highly as the guys now suing the city.

Just last year, three conservative Justices said that the 14<sup>th</sup> Amendment permits neutral laws or acts by public institutions, even if sometimes the results of the decision fall a little more harshly on one protected group like race. That was the 2008 Crawford case, which was a Voting Rights Act case, where African-Americans were negatively impacted by redistricting. The Court said that the decision was not “intentional” enough to trigger the 14<sup>th</sup> Amendment. Similar issues are here. Even though some scored higher on the exam, nobody “lost” promotions, or was singled out for special treatment. If these guys claim to have studied harder, there is no proof of that. All of us studied hard!

More important, the exams didn't really measure what it is to be a fire officer as well as a simulation or other types of measures would, if even in combination.

Here's a case in point: Petitioners have appeared in various public settings, including the “Sean Hannity Show,” wearing their full-dress uniforms. (In one article, they are in their class-A uniforms drinking champagne.) But, according to city regulation, wearing your official uniform means you're on duty, on behalf of the city – and on behalf of the public. So, here are Petitioners using their uniforms to give a false sense of public and official authority -- and also falsely representing the very city they're suing.

Why are they doing it? The answer is easy: for publicity and to lend a sense of authority. But, New Haven regulations expressly forbid such unashamed private use of such public authority.

If these would-be promotees are so deserving of promotion, why do they disobey even the most fundamental and ethical of firefighting regulations and firefighter principles? This only shows Petitioners' willingness to deviate from regulations *and*, most importantly, the difference between *knowing* the regulations, and actually *enforcing* them.

In short, if the testing process is to be fair and also ensure equal opportunity, then it must properly and fully measure integrity, command capabilities, and reach beyond written or interview tests that have been shown to artificially inflate others' scores over those of blacks and Hispanics. What the Petitioners seek is unfair advantages based on their "whiteness" at the expense of Homeland security, diversity, and fairness – and equal opportunity. This is political correctness sure and simple, and designed to keep the dominant group in power. Why are they so afraid of assessment centers or other valid measures that are more fair?

## **FAIRNESS**

### ***Did the city's decision favor blacks over whites?***

No, the decision did not favor anyone. No one was promoted. It would seem that the city just wants to do a better test, to use a better promotional system. That effort should be applauded.

Don't get us wrong...any government must be limited and closely watched. But it makes no sense to punish a government that ostensibly tries to follow the law *and* diversify its safety forces, with the claim that those attempts themselves favor "non-whites" because they look at race. "Race-conscious" is not the same as "racially motivated" as it is meant under the law. Quite the opposite. It seeks a time when race won't matter anymore, but that time is *not* now. Petitioners themselves argue that race matters – their race.

And remember, the laws of disparate impact in testing, and other laws, also protect whites and older professionals from adverse impact, as well as blacks and other minorities.

### ***So, what's your bottom line?***

The real question is whether a city, that protects the public trust and is a part of Homeland Security, has the deference of choosing its own promotional method – as long as it's valid – that has a more fair and diversified result, without that decision being controlled by the dominant group (whites) who cries "reverse racism" any time the city tries to act.

This is particularly imperative when we are talking national security and the increasing need for diversity in the nation's fire service. The need has been proved and also accepted by the federal government. We are a part of FEMA. Our job is to prevent and respond to disasters and save lives, including those who are not white, are not English-only persons.

We want equal opportunity for our citizens – who are diverse -- as well as in our fire service and commanding ranks, who should better reflect the people they serve. We believe it is a matter of national security, and a compelling state interest – and the federal government agrees.

This also is imperative for a cohesive, unified firefighting force. Capable, confident ranking officers are needed at all levels to ensure that the people are protected. (And they wear their Class-A uniforms only when doing so.)

***What do you expect or hope the Court will do?***

We hope that the Court will recognize the vital issues at stake. Cities must be given a limited amount of leeway in order to accomplish what is best for its people. They also must not be forced into the position of promoting from examinations with demonstrated adverse impact against certain races or ethnicities. By the same token, cities must be held responsible for their decisions, and accountable for their actions. Government is ever a balancing act, and one that is checked by the law.

We also hope the Court will recognize that diversity in firefighting is a vital, compelling state interest in our nation's safety and security. That said, it should also be recognized that the city didn't intentionally "discriminate" against whites or in favor of blacks, but did the right thing – and did it with a minimum amount of damage to any person or class of people.

Finally, we hope that the Court will protect laws long in place, and for good reasons -- reasons which still exist today and laws that exist for the protection of everyone.