

IN THE UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF OHIO
 EASTERN DIVISION

CLEVELAND FIREFIGHTERS FOR FAIR	)	CASE NO. 1:00 CV 0301
HIRING PRACTICES, <i>et al.</i>)	
	)	JUDGE DONALD C. NUGENT
)	
Plaintiffs,)	
vs.)	
)	
CITY OF CLEVELAND, <i>et al.</i>)	
)	
Defendants.)	

LAMONT C. HEADEN, <i>et al.</i>	)	CASE NO. C73-330
)	
Plaintiffs,	)	JUDGE DONALD C. NUGENT
)	
and)	
)	
VANGUARDS OF CLEVELAND,	)	VANGUARDS' POST-HEARING
	)	MEMORANDUM OF LAW IN
Intervener Plaintiffs,	)	SUPPORT OF THE PARTIES'
	)	MOTION TO EXTEND
vs.	)	PARAGRAPH ONE OF
	)	THE CONSENT DECREE
CITY OF CLEVELAND, <i>et al.</i>)	
)	
Defendants.)	

I. STATEMENT OF THE CASE

The City, joined by the Vanguard, has moved to extend the life of the second amended consent decree -- invoking the authority of paragraph one of Judge Manos' order. An evidentiary hearing was held on May 28, 2009 and the Court requested briefing. The Vanguard have already submitted a comprehensive brief in support of their motion and have also filed a short supplemental brief. They submit this short post-

hearing brief to further address the concerns identified by His Honor at the conclusion of the May 28, 2009 hearing, supplementing the materials previously submitted.

II. THE STIPULATED ORDER OF MODIFICATION

Following the May 28, 2009 hearing the parties continued their pre-hearing discussions and reached a firm consensus on a proposed stipulated order modifying paragraph one of the second amended consent decree. In other words, the parties, for the reasons set forth in the attached stipulation and order, have resolved their differences and they submit the attached proposed order to the Court and request its adoption.¹

III. THE ISSUE BEFORE THIS COURT

This never was a case about another consent decree. Rather, it is a case about the vitality of the language approved and ordered by Judge Manos in paragraph one of the second amended consent decree.

What that paragraph says [in relevant part] is:

[R]ecognizing the lifespan of three lists and the possible need for some additional administrative time, the City will have three lists (including the 1999 Eligible List which expires on September 28, 2002) established and appointments made therefrom before September 29, 2008. The parties understand that there may be legitimate circumstances which may prevent the City from establishing and hiring from the two additional eligible lists anticipated herein within the prescribed time. If the City is unable to establish three lists (including the 1999 Eligible List) and hire therefrom before September 29, 2008, the City may petition the Court for a reasonable extension of time within which to establish the remaining eligible lists and make appointments therefrom during the life of said lists. Such a petition by the City shall be approved for a reasonable time, provided that the City has made a good faith effort to meet the September 29, 2008 deadline.

¹ Mr. Stege has signed the attached copy, with the full consent of the other two parties. An "official" copy is being circulated for signature and will be submitted soon, by cover letter.

IV. THE EVIDENCE OF RECORD

The evidence at the hearing of May 28, 2009 established that (1) the City made a "good faith effort" (albeit unsuccessful) to establish the "second" and the "third" eligible lists prior to the September 29, 2008 deadline [Tr., pp. 3-17]; (2) an eligible list has a life of two years [*id.*, p. 16; see also consent decree]; and (3) an extension until December 31, 2014 (as reflected in the attached stipulation and order), or approximately five and one half years, is reasonable in light of the totality of circumstances; it is not excessive nor is it any longer than necessary.

The reasonableness of the five and one-half year period

The City needs some administrative time between eligible lists to recruit, hire a test constructor, prepare a test, administer the test (to typically over 2,000 people), score the test, conduct the physical abilities test on a large number of people (typically over 1,000), conduct background investigations of candidates, conduct medical examinations of the candidates, and ultimately prepare an eligible list. [See the second amended consent decree and the extensive attachments thereto describing the process; see also the testimony of Chief Stubbs, Chief Rahman and Capt. Szabo, Tr. pp. 3-59].

The parties are intimately familiar with how much time it takes to develop an eligible list based upon their many years of in-depth exposure to the process. For example, the Vanguard members do much of the recruiting for the City -- they understand how much time that takes.² The City knows the time it takes to perform the multiple tasks involved, such as hiring a test consultant; preparing a proper written test; leasing a facility; administering a secure test to two thousand people; confidentially

² Tr., p. 19 (Rahman).

scoring those tests; giving medical examinations to roughly 300 candidates; performing background investigations on roughly 300 candidates; evaluating all the data and presenting it to the Safety Director who must finally make the selections.³ Finally, the CFFHP (not to mention Local 93) knows how this process works -- and the time it takes -- because their 200 members have been through it;⁴ so it is with the Vanguard's members.

This Court is advised that all three parties (plus Local 93) put their heads together for many hours and computed the *minimum* amount of time required to develop the final two eligible lists originally contemplated by Judge Manos.⁵ Likewise the parties factored in the projections by the City of Cleveland and they estimated when vacancies will likely arise [see e.g., testimony of Chief Stubbs]. We explain all of this because Title VII (see the Vanguard's pre-hearing memorandum of law) clearly favors the voluntary resolution of disputes such as this -- and in this manner. Title VII's policy is particularly strong when the parties themselves -- as contrasted with the federal bench -- have an advantage when it comes to understanding the nuances of a complex application and selection apparatus such as this one.⁶

V. LAW AND ARGUMENT

Again, we refer this Court to the pre-hearing briefs (two) of the Vanguard's in this matter (see also the extensive statement of pertinent background facts in said briefs).

³ See the attachments to the second amended consent decree approved by Judge Manos.

⁴ Compare Tr. p. 41-3 (Szabo).

⁵ In deference to the City's request for maximum flexibility (as well as the Court's concerns for flexibility as expressed in chambers) the stipulated order mandates at least one more eligible list. It provides for enough time (barely) for the two originally contemplated eligible lists, but leaves it to the City -- based on manpower needs, retirements and other concerns -- to create the second such list if it is willing and able. This language reflects the compromise necessary to reach a three-way agreement.

⁶ This Court is advised that all three parties understand that the consent decree will be soon brought to a close. We negotiated the minimum amount of time necessary to do that. There is no "fluff" in the attached stipulation and order.

VI. CONCLUSION

We urge this Court to approve the attached Stipulation and Order and thereby put an end to this protracted litigation.

Respectfully submitted,

/s/ E. Richard Stege
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SERVICE

I hereby certify that on this 8th day of June, 2009, a copy of the foregoing Vanguards' Post-Hearing Memorandum of Law in Support of the Parties' Motion to Extend Paragraph One of the Consent Decree was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ E. Richard Stege
E. Richard Stege, Esq.

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Plaintiffs,)	JUDGE DONALD C. NUGENT
)	
and)	
)	
VANGUARDS OF CLEVELAND,)	STIPULATED ORDER
	)	MODIFYING PARAGRAPH
Intervenor Plaintiffs,	)	ONE OF THE CONSENT
	)	DECREE ENTERED ON
vs.	)	SEPTEMBER 29, 2000
)	
CITY OF CLEVELAND, <i>et al.</i>)	
)	
Defendants.)	

WHEREAS, the Second Amended Consent Decree of September 29, 2000 stated that "legitimate circumstances may arise which may prevent the City from establishing and hiring from the two additional eligible lists anticipated herein within the prescribed time"; authorized the City to "petition the Court for a reasonable extension of time to establish the remaining eligible lists and make appointments therefrom during the life of said lists"; and provided that said petition by the City "shall be approved [by

the Court] for a reasonable time provided that the City has made a good faith effort to meet the September 29, 2008 deadline."

WHEREAS, such unanticipated and legitimate circumstances have arisen; and the City has made a good faith effort to meet the September 29, 2008 deadline.

WHEREAS, the City has petitioned the Court for such a reasonable extension; the Vanguard's have filed a similar such motion; and the Cleveland Firefighters for Fair Hiring Practices (CFFHP) has conditionally opposed said motion, in part.

WHEREAS, an evidentiary hearing thereon was held on May 29, 2009.

WHEREAS, before and after said evidentiary hearing the three parties engaged in extensive discussions seeking a compromise to avoid further contentious and expensive litigation, restore harmony among the members of the Cleveland Fire Department, obtain additional manpower/womanpower within the firehouses as soon as reasonably possible, and ensure the safety of the residents of the City of Cleveland.

WHEREAS, the parties negotiated what they unanimously agree is a reasonable, necessary, practical, and fair response to the petition by the City.

WHEREAS, in light of the surrounding circumstances which include, but are not limited to: the dates on which future retirements (and therefore vacancies) are anticipated; the target date for the next entrance examination in the fall of 2009 (followed by the physical abilities test, background tests, medical examinations and the preparation of an eligible list); the target date for the next eligible list in 2010; the life of an eligible list which is two years; and the need for administrative time to take the steps necessary to create any given eligible list. Whereas the parties agree that it is necessary and prudent to provide for sufficient time that the City may (if necessary)

administer the testing needed to create a second eligible list prior to the sunset date of the decree as modified by this stipulation and order.

WHEREAS, the CFFHP hereby withdraws its partial opposition to an extension of the consent decree conditioned upon the approval by the Court of the within stipulation and order.

THEREFORE, the parties (with the participation of Local 93 of the International Association of Firefighters) have consented to a limited modification of the Second Amended Consent Decree.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. Paragraph one of the second amended consent decree shall be modified to read as follows:

The Headen decree shall remain in full force and effect until the City of Cleveland Department of Public Safety, Division of Fire, reaches a 33 1/3% minority makeup or until December 31, 2014, whichever comes first. Pursuant to Civil Service Rules, eligible lists are valid for two years. Pursuant to this Stipulation and Order, the City is required to have no less than one new eligible list established and appointments to any existing Department vacancies made therefrom before December 31, 2014. For these purposes, the percentage makeup of the Division of Fire shall be computed by determining the percentage of minorities (as defined by the decree) within the uniformed ranks of the Division of Fire, regardless of rank.

2. The date of September 29, 2008 in paragraph eight (8) shall be changed to December 31, 2014.

3. All remaining provisions of the second amended consent decree shall remain in full force and effect with the exception of the following:

- a) The option of continuing the recruitment and training programs referenced in paragraph two shall be available to the City without further order of Court; and

- b) The attorneys fees provision of paragraph four is deleted without prejudice to the claims by the CFFHP and/or the Vanguard, should they be tendered, for attorneys fees and expenses.

Judge Donald C. Nugent
United States District Court

APPROVED IN FORM AND SUBSTANCE

Kevin J. Gibbons (by *ERS* -- consent given 6/5/09)

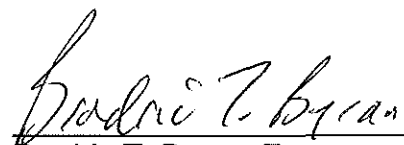
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Counsel for City of Cleveland

APPROVED IN FORM AND SUBSTANCE

A handwritten signature in black ink, appearing to read "E. Richard Stege", written over a horizontal line.

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APPROVED IN FORM AND SUBSTANCE

 (by JRS -- consent given 6/5/09)

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