

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Adams, et al.,)
)
 Plaintiffs,)
)
 -vs-) No. 94 CV 5727
)
 City of Chicago,) (*Judge Nordberg*)
)
 Defendant.)

**PLAINTIFFS' MEMORANDUM IN OPPOSITION
TO MOTION FOR SUMMARY JUDGMENT**

I. Introduction

For many years, "increasing the number of minority sergeants was one of the CPD's operational needs."¹ This is because "sergeants have extensive contact with the community, and . . . having minorities in these command positions accordingly reduces tension, improves communication and cooperation, and builds trust."²

"In a complex and racially charged environment like Chicago, minority confidence in police critically depends on whether officers are understood to be required to answer to minority supervisors — those with badges and guns are all

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1. Brief of City of Chicago at 29, *Petit v. City of Chicago*, 7th Cir., No. 02-4151, Plaintiffs' Exhibit 1.
 2. Brief of City of Chicago at 32, *Petit v. City of Chicago*, 7th Cir., No. 02-4151, Plaintiffs' Exhibit 1.

too likely to be viewed with suspicion in the minority community when they answer only to whites; and white officers themselves may indulge in their worst instances — or simply fail to exercise requisite sensitivity — when they answer only to other whites."³ "[P]olice supervisors should be reasonably representative of the racial composition of the municipal population . . . [because] the presence of minority supervisors helps earn the trust and cooperation of minority communities, facilitating the investigation of crimes and maintenance of order."⁴

The City of Chicago relied on these operational needs when it decided to increase the number of minority police officers promoted to sergeant from the 1987 test. Scores on that examination had been "race normed" so that minorities were selected in exact proportion to their representation in the applicant pool.⁵ The City concluded, however, that parity was not enough and that it was necessary to increase the number of minorities officers promoted to sergeant. As the City recently explained in defending its victory in *Petit v. City of Chicago*, 239 F.Supp.2d 761 (N.D.Ill. 2002):

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3. Brief of City of Chicago at 34-25, *Petit v. City of Chicago*, 7th Cir., No. 02-4151, Plaintiffs' Exhibit 1.
 4. Brief of City of Chicago at 30, *Petit v. City of Chicago*, 7th Cir., No. 02-4151, Exhibit 1.
 5. "Race norming" means "altering scores on tests so that the mean score is the same for each race." *Chicago Firefighters Local 2 v. City of Chicago*, 249 F.3d 649, 655 (7th Cir. 2001).

In a racially tense city, the evidence established a clear need to make the rank of sergeant more racially representative, yet absent affirmative action, the CPD would have moved in the wrong direction.

Brief of City of Chicago at 33-34, *Petit v. City of Chicago*, 7th Cir., No. 02-4151, Plaintiffs' Exhibit 1.

The Seventh Circuit accepted similar arguments in *Reynolds v. City of Chicago*, 296 F.3d 524 (7th Cir. 2002), when it concluded that a racially representative sergeant workforce was especially important "in a period of heightened public concern with the dangers posed by international terrorism." *Id.* at 530.

The City's position in this case is squarely at odds with its frank recognition in *Petit* and *Reynolds* of the need for a representative sergeant workforce.

In 1994 and 1995, the City announced the results of its police promotional tests to the ranks of sergeant and lieutenant in its police department. The tests had been prepared for the City by the same consultant, using identical methodology. Each test (hereinafter "the Barrett sergeants test" or "the Barrett lieutenants test") had a gross disparate impact on minorities: minorities comprised 42% of those who took the 1994 sergeants test; 5 of the first 114 promotions (less than 5%) went to minorities. Minorities comprised 31% of those who took the 1995 lieutenants test; 6 of the first 108 promotions (less than 6%) went to minorities.

Notwithstanding its overwhelming operational need for more minority sergeants, the City did not take any steps to ameliorate the disparate impact of the "Barrett sergeants test" and made promotions to sergeant in rank order from that list.

In contrast to its inaction in sergeant promotions, the City took affirmative steps to cure the disparate impact of the "Barrett lieutenants test." As summarized by the Seventh Circuit:

When the scores from the 1994 examination resulted in promotions in a racial pattern significantly different from the racial make-up of the applicant pool, the City attempted to rectify the situation by combining merit promotions with the rank-order promotions. Under this approach, twenty percent of the promotions would be based on a merit selection system rather than the examination results. The Superintendent of Police ordered highly-placed police officials to review the sergeants under their command and to nominate sergeants who met performance-related criteria such as education, seniority, prior assignments, discipline, and productivity. Those nominations were screened by an Academic Selection Board comprised of deputy superintendents and command personnel. As a result, the Superintendent approved merit promotions of thirteen additional sergeants to the rank of lieutenant.

Bryant v. City of Chicago, 200 F.3d 1092, 1095 (7th Cir. 2000)

The City did not attempt to validate the lieutenant merit selection procedure in accordance with the EEOC guidelines or any other standards. (Joyce Deposition 14-15, Exhibit 2.)

The 1995 merit promotions to lieutenant were far less discriminatory than the test score promotions: minorities made up about 62% (eight of the thirteen) of the persons selected for merit promotion, as compared to about 11% of those promoted through test scores.⁶ *Brown v. City of Chicago*, 8 F.Supp.2d 1095, 19

6. Although the state courts prohibited the City from making any merit promotions to lieutenant, *McArdle v. Rodriguez*, 277 Ill.App.3d 365, 659 N.E.2d 1356 (1995), merit promotions were subsequently mandated in *Brown v. City of Chicago*, *supra*.

F.Supp.2d 890, *aff'd sub nom. Bryant v. City of Chicago*, 200 F.3d 1092, 1095 (7th Cir. 2000).

Following its use of merit promotions to lieutenant, the City incorporated that component into the 1998 sergeant selection process and makes 30% of all promotions through merit selection.⁷ The City, however, refused to make any merit promotions to sergeant to ameliorate the disparate impact of the 1994 test. It is this refusal that is at issue in this case.

A. Relevant Procedural History

On March 25, 1996 this Court denied plaintiffs' application for a preliminary injunction. *Adams v. City of Chicago*, 1996 WL 137660 (N.D.Ill. 1996). Plaintiffs' filed a timely notice of appeal; after the Court of Appeals agreed to expedite the appeal, defendant stated that it would not make further promotions to sergeant while it re-evaluated its promotional process. (Pre-Trial Stipulation, paragraphs FI.03-FI.06, Plaintiffs' Exhibit 3) On this representation, plaintiffs asked the Seventh Circuit to vacate its order expediting the appeal and to stay briefing. (Pre-Trial Stipulation, paragraph FI.07, Plaintiffs' Exhibit 3.) The Court of Appeals granted that motion and the appeal was held in abeyance. (Pre-Trial Stipulation, paragraph FI.08, Plaintiffs' Exhibit 3.)

On January 17, 1997, defendant's "Police Promotion Task Force" issued its report, recommending that up to 30% of future promotions be done on merit,

7. This 30% ceiling is challenged by minority police officers in *Allen v. City of Chicago*, appeal pending, 7th Cir., No. 02-3743.

irrespective of test scores.⁸ (Plaintiffs' Exhibit 4.) On the basis of the report, plaintiffs asked the Seventh Circuit to vacate the order denying the preliminary injunction and to remand the case to permit this Court to receive additional evidence on the "equally valid less discriminatory alternative" issue. (Motion, January 21, 1997, Exhibit 5.) The Court of Appeals denied the motion to vacate without prejudice to plaintiffs proceeding under Circuit Rule 57. (Order, February 5, 1997 Exhibit 6.) Plaintiffs filed their "Motion to Modify Order Denying Application for a Preliminary Injunction" on February 3, 1997.

After receiving Rule 57 submissions from the parties, this Court concluded that the Task Force Report would not cause it to change its earlier ruling:

First, as Defendant argues, the argument does not provide a basis for modification of this Court's decision, because it addresses only the likelihood of success on the merits whereas the Court denied the injunction for failure to establish irreparable harm. Second, the new evidence alters only the quantity of evidence on the issue of an equally valid less discriminatory alternative, as the former task force—the Blue Ribbon Panel—also "recommended that performance evaluations play a role in promotions." (Mem. Op. & Ord. or Mar. 25, 1996 at 34-35.) Thus, the Court's alternative holding, that Plaintiffs had not made a sufficient showing of likelihood of success on the merits assuming irreparable harm, was informed by the same type of evidence supporting the present motion. Further, to the extent the Report incorporates "testimony from many witnesses regarding the merit selection process for detectives," some such evidence was presented and any that was not presented was available and, thus, is not "new" evidence. For these reasons, the Court indicates that it is not included to grant the motions to

8. The Task Force recommended that eligibility for a merit promotion should depend on passing a written test.

modify the order denying a preliminary injunction, pursuant to Rule 57.

Order, February 19, 1997

The Court of Appeals affirmed this Court's order denying a preliminary injunction, agreeing that plaintiffs had not shown irreparable harm because this Court had the power to make plaintiffs whole if they prevailed after trial. *Adams v. City of Chicago*, 135 F.3d 1150, 1154 (7th Cir. 1998). The Seventh Circuit noted that the question of likelihood of success on the merits was "a close question" because of "the political volatility of 'merit' promotions." *Id.*

Following the decision by the Court of Appeals in this case, a trial on the merit was held in the companion litigation challenging promotions to lieutenant, *Brown v. City of Chicago*, No. 95 C 1980. In that case, Judge Gettleman concluded that the "Barrett lieutenants test" was job related, but held that supplementing test score promotions with merit promotions was an equally valid, less discriminatory alternative. *Brown v. City of Chicago*, 8 F.Supp.2d 1095 (N.D.Ill. 1998) (decision on the merits); 19 F.Supp.2d 890 (N.D.Ill. 1998) (ruling on remedy). The Court of Appeals affirmed in all respects, *sub. nom. Bryant v. City of Chicago*, 200 F.2d 1092 (7th Cir. 2000).

Plaintiffs in this case view the decision of the Seventh Circuit in *Bryant* as foreclosing any argument that the "Barrett sergeants test" is not job related; plaintiffs have therefore abandoned their challenge to test validity. Instead, plaintiffs have limited this case to the issue on which the plaintiffs prevailed in the lieutenants' litigation — the City's refusal to supplement test score promotions with merit promotions.

II. LEGAL STANDARDS

The burdens of proof in a disparate impact case were set out by the Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) and recently restated by the Seventh Circuit in *Price v. City of Chicago*, 251 F.3d 656 (7th Cir. 2001).⁹ The plaintiff "must make out a prima facie case by showing that the method of promotion she challenges has an adverse impact on minorities." *Id.* at 659. The burden then shifts to the defendant to "demonstrate that its method is job-related and consistent with business necessity." *Id.* If the employer is able to establish job relatedness, the employees may still prevail by showing that "there are less discriminatory alternatives that the employer refused to adopt." *Id.*

The parties in this case agree that the statistical evidence makes out a prima facie case of disparate impact discrimination. Defendant's Motion for Summary Judgment, par. 9. The parties also agree that, under the *Bryant* standard, defendant is able to demonstrate job relatedness. Defendant's Motion for Summary Judgment, par. 10. The sole question in this case is whether "there are less discriminatory alternatives that the employer refused to adopt." *Price v. City of Chicago*, 251 F.3d at 659.

9. The plaintiff in *Price* argued that 42 U.S.C. §2000e-2(k)(ii), adopted as part of the 1991 amendments to Title VII, changed the *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975) standard of "equally valid less discriminatory alternative" and permitted a Title VII plaintiff to prevail without showing a disparate impact; the plaintiff in *Price* argued that she could prevail simply by demonstrating that the defendant had failed to use a less discriminatory alternative employment practice. The Court rejected this argument, holding that the 1991 amendments did not change the "equally valid less discriminatory alternative" standard of *Albemarle Paper Co.*, *supra.* 251 F.3d at 660.

The Second Circuit explained in *Guardians v. Civil Service Commission*, 630 F.2d 79 (2d Cir. 1980), that "[w]hat *Albemarle* contemplates . . . is that a selection procedure proposed by the City may not be used if the plaintiffs can establish the existence of an alternative procedure with an equivalent degree of job relatedness and a lesser disparate racial impact." 630 F.2d at 110. Plaintiffs must come forward with proof that there are "accepted alternative policies or practices which would better accomplish the business purpose." *Robinson v. Lorillard Corp.*, 444 F.2d 791, 798 (4th Cir. 1971). As part of this proof, the "court should consider evidence that the plaintiff might introduce on a variety of factors. Certainly any subsequent practices adopted by the company would be relevant."¹⁰ *Chrisner v. Complete Auto Transit, Inc.*, 645 F.2d 1251, 1263 (6th Cir. 1980). Plaintiffs' burden is to show that the alternative is "feasible . . . comparably effective . . . and must not significantly exceed the cost or burden of the challenged practice." *Hack v. President and Fellows of Yale College*, 237 F.3d 81, 101 (2d Cir. 2000).

III. THE CITY'S MOTION FOR SUMMARY JUDGMENT

The City has filed a motion for summary judgment asserting two grounds: First, the City asserts that plaintiffs are unable to establish an "equally valid, less discriminatory alternative." (Motion for Summary Judgment, pars. 15-16.)

10. This Court adopted a contrary view in its ruling on defendant's motion in limine. Plaintiffs request that the Court reconsider this ruling. In the alternative, plaintiffs submit evidence of subsequent practices as an offer or proof and to avoid any claim of waiver under *Wilson v. Williams*, 182 F.3d 562, 566-67 (7th Cir. 1999) (en banc).

Second, the City argues that plaintiffs cannot "show that the City refused to adopt" the equally valid, less discriminatory alternative. (Motion for Summary Judgment, par. 17.) We set out below the "showing sufficient to establish the existence of an element essential of [plaintiffs'] case," required by *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) to defeat defendant's motion for summary judgment.

IV. SUPPLEMENTING TEST SCORES PROMOTIONS WITH MERIT PROMOTIONS WAS AN "EQUALLY VALID, LESS DISCRIMINATORY" ALTERNATIVE THAT DEFENDANT REFUSED TO ADOPT

In 1995, the City sought to minimize the disparate impact of the lieutenants' test by making 20% of all promotions through a merit selection process. This procedure had equal validity to using the results of the written test. *Brown v. City of Chicago*, 8 F.Supp.2d 1095, 1112 (N.D.Ill. 1998) ("the City recognizes that the use of merit selection in conjunction with the examination was an equally valid, less discriminatory method"). The City could have employed and should have employed the same procedure to minimize the disparate impact of the sergeants' test.

A. Merit Promotions Are Less Discriminatory than Test Score Promotions

In 1989, the City administered a written test for promotion to the "D-2" (detective) rank; "[a]fter reviewing the results of the written exam, the CPD concluded that advancing applicants based solely on ranking in the written test would significantly reduce the number of African-American and Hispanic applicants eligible for promotion to detective." *Majeske v. City of Chicago*, 218 F.3d 816, 818 (7th Cir. 2000). The City decided to supplement strict rank order test results with two alternative selection procedures; one alternative selection

procedure was to make D2 promotions "based solely on merit." *Id.* at 819.

The merit selection procedure that the City adopted for "D-2" promotions was summarized in *Barnhill v. City of Chicago*, 142 F.Supp.2d 948 (N.D.Ill. 2001): "Individual exempt unit commanders were asked to submit names of the employees under their command whom they considered to be superior performers. Once a list of these candidates was compiled, the Superintendent himself selected 26 from that list by considering their performance, absenteeism, disciplinary records, and commendations." *Id.* at 952.

Merit promotions to the "D-2" rank have been made in a race-neutral manner: "[T]he persons who are appointed to detective based on the merit process are relatively representative of the ranks from which promotions could be made in that there is a diversity of ethnicity, race, and gender." (Testimony of Robert Joyce, *Brown v. City of Chicago*, 05 C 1890, Plaintiffs' Exhibit 7.

The 1995 merit promotions to lieutenant were far less discriminatory than the "Barrett lieutenant test" promotions: minorities made up about 62% (eight of the thirteen) of the persons selected for merit promotion, as compared to about 11% of those promoted through test scores. *Brown v. City of Chicago*, 8 F.Supp.2d 1095, 19 F.Supp.2d 890, *aff'd sub nom. Bryant v. City of Chicago*, 200 F.3d 1092, 1095 (7th Cir. 2000).

Following its use of merit promotions to lieutenant, the City incorporated that component into promotions in the 1998 sergeant selection process. "This was a result of a challenge to the 1994 Sergeant Exam." *Barnhill v. City of Chicago*, 142 F.Supp.2d at 954.

The City's successful experience with merit selection demonstrates that merit selection has been and continues to be a valid, alternative selection procedure to test scores. We show below that plaintiffs' evidence of an "equally valid, less discriminatory alternative" in this case is as strong as the evidence that was successfully used by plaintiffs in the lieutenant litigation, *Brown v. City of Chicago*, 8 F.Supp.2d 1095 (N.D.Ill. 1998).

B. Merit Selection of Sergeants Would Have Been Equally Valid

The Seventh Circuit reviewed the standards for validation of an employment test in *Bryant v. City of Chicago*, 200 F.3d 1092 (7th Cir. 2000) and *Bew v. City of Chicago*, 252 F.3d 891 (7th Cir. 2001).

The Court of Appeals upheld the "Barrett lieutenants test" in *Bryant*. That test consisted of the same three components as the test in this case: a written job knowledge test, an "in-basket" exercise, and an oral presentation. 200 F.3d at 1096-97. The plaintiffs in *Bryant*, minority police sergeants, argued that to show the job relatedness of each subtest, the City needed to come forward with empirical evidence to show a relationship between test scores and job performance. (*Bryant v. City of Chicago*, No. 99-1272, Brief of Appellant at 31.) The Seventh Circuit rejected this standard, and upheld the test because "[i]t would be unrealistic to require more than a reasonable measure of job performance." *Id.* at 1098.

The Seventh Circuit reaffirmed this validation standard in *Bew v. City of Chicago*, *supra*, when it held that empirical evidence is not required to show a relationship between scores on a written test and job performance. 252 F.3d at 895. This was the standard upon which the "Barrett sergeants test" is valid.

At the preliminary injunction hearing in this case, Dr. Barrett admitted that he had been unable to devise an accurate measure of a police sergeant's job performance (Tr. 219), and conceded that he was unaware of any data that related scores on his test to actual job performance. (Tr. 104; Tr. 211; Tr. 799; Tr. 812; Tr. 846-47; Tr. 875; Tr. 903; Tr. 904.) Dr. Barrett offered similar testimony in the lieutenant's litigation.

Defendant proved that the validity of its "subjective" merit selection procedures are comparable to those found for written tests when it successfully defended merit promotions in *Barnhill v. City of Chicago*, 142 F.Supp.2d 948 (N.D.Ill. 2001), *appeal dismissed sub. nom. Angelo v. City of Chicago*, No. 01-1738, April 27, 2001.

The "subjective" evaluation of job performance, such as that used in the Merit Process, is used frequently to assist in making employment decisions related to promotion, termination, training, and discipline. (citations omitted) Job performance can be characterized by many criteria, but subjective assessments of job performance by supervisors familiar with the employees' work are most common. (citation omitted) One reason for the frequent use of subjective supervisory assessments is that objective performance measures may suffer from criterion deficiency (i.e., be unable to measure some important components of performance (citation omitted) — a point similar to that made by Murphy (1989).

Dr. Cramer [plaintiff's expert in *Barnhill*] provided no evidence that "subjective" measures are less valid than objective measures of performance. Structured interviews that are linked to job analysis results have demonstrated validity coefficients as high as .42, .51, and .61 (citations omitted). A meta-analysis of assessment centers found the validity for such "subjective" processes to be .37 and as high as .53 when used to predict potential. (citation omitted) These validity coefficients of "subjective" procedures are comparable to those found for written tests. (citation omitted)

* * *

The clear implication is that subjective measures are capable of being shown to be as valid as objective measures for various human resource decisions (e.g., selection, promotion, etc.). Therefore, it is perfectly legitimate to rely on informed decisions of highly qualified experts of the Chicago Police Department to select sergeants.

Rebuttal Report in the Matter of Officer Gordon Barnhill v. City of Chicago, 98 C 4807, Exhibit 10, at 7.

Plaintiffs wholeheartedly agree that "it is perfectly legitimate to rely on informed decisions of highly qualified experts of the Chicago Police Department to select sergeants." Each member of the Blue Ribbon Panel agreed that job performance should be a factor in promotions:

Shouldn't job performance, not just exam results, count toward promotions? Of course. All of us on the Panel agreed that how good a job a police officer does ought to count towards his or her promotion. This is certainly the way the rest of the work works. We specifically made this point in our report.

Letter, Bessette to Blue Ribbon Panel, February 20, 1995, Exhibit 12.

Plaintiffs cannot be required to produce a "validity coefficient" for merit promotions when there is no "validity coefficient" for the "Barrett sergeants test." When, as here, a written test has been validated on a content valid approach without empirical evidence of predictive validity, the proposed alternative selection procedure of merit selection should be viewed as "equally valid" because, as the City's expert averred in the *Barnhill* litigation, "it is perfectly legitimate to rely on informed decisions of highly qualified experts of the Chicago Police Department to select sergeants." Merit promotions and test score promotions are equally valid under the *Bew-Bryant* standard, which does not require empirical evidence of predictive validity.

C. Merit Promotions to Sergeant Were Available to the City

The "equally valid, less discriminatory alternative" on which the plaintiffs' prevailed in the lieutenant's litigation was available to the City in 1994 when it received the results of the "Barrett sergeants test." Plaintiffs contend that, as it did for the "Barrett lieutenants test," the City should have supplemented test score promotions from the "Barrett sergeants test" =with "merit promotions"

The genesis of the City's decision to use merit promotions in the lieutenants' test shows that merit promotions were available to the City to supplement rank order promotions from the "Barrett sergeants test."

The paper trail of the City's decision to make merit promotions to lieutenant begins with a letter from the Chairman of the "Mayor's Blue Ribbon Panel on Police Testing and Promotion Panel" to his fellow panel members dated February 17, 1995. In that letter, (Exhibit 8), the chairman wrote that while "the results of the sergeants exam were unfortunate . . . the dispute over the sergeants' test was just a flash in the pan, and everything was quiet until last week." (Plaintiff's Exhibit 8 at 1.) The dispute boiled over during the week of February 10th when the results of the lieutenants' examination were analyzed.

The Chairman of the Blue Ribbon Panel wrote in his letter of February 17, 1995 that, after reviewing the "unfortunate" results of the lieutenants' test, the Mayor and his Corporation Counsel "asked for the Blue Ribbon Panel's recommendation on how to handle the lieutenant's exam." (Plaintiff's Exhibit 8 at 2.) The Chairman proposed that the Blue Ribbon Panel recommend that the City make "a substantial proportion of the promotions on a meritorious basis." (Id.) The Panel made this recommendation to the Mayor on February 28, 1995. *McArdle v. Rodriguez*, 277 Ill.App.3d 365, 368 659 N.E.2d 1356, 1359 (1995).

On March 8, 1995, the Superintendent of the Chicago Police Department directed Police Department chiefs, deputy chiefs, and assistant deputy superintendents to nominate sergeants for merit promotions. *McArdle v. Rodriguez*, 277 Ill.App.3d at 368, 659 N.E.2d at 1359.

On March 15, 1995, the Glenn Carr, the Commissioner of the City's Department of Personnel concluded that the City had an obligation to minimize the disparate impact of the "Barrett lieutenants test" and authorized the Superintendent to make merit promotions:

Carr stated in a letter that, after reviewing the scores from the examination, he had determined that promotions based on these scores would have a severe adverse impact on black and Hispanic candidates. Consequently, the Department of Personnel had an obligation to use an alternative selection procedure. He, therefore, approved of Rodriguez' merit promotion plan.

"I understand that you have directed exempt rank personnel to identify outstanding candidates for selection to the rank of police lieutenant, based on their performance as sergeants. These nominations are limited to career service sergeants who applied pursuant of the announcement for examination No. 39400. The resulting names will be submitted to your Department's Academic Selection Board, which will rate such persons as 'recommended' or 'highly recommended,' based on the Board's judgment of each applicant's respective qualifications.

McArdle v. Rodriguez, 277 Ill.App.3d at 368, 659 N.E.2d at 1359.

This merit selection procedure had not been validated in accordance with the EEOC guidelines or any other standards. (Joyce Deposition 14-15, Exhibit 2.)

At the preliminary injunction hearing in this case, the City offered a variety of insubstantial reasons to attempt to explain why it had not attempted to use a merit selection procedure to lessen the disparate impact of the "Barrett

sergeants test."

Plaintiffs' Attorney: Well, is there any reason of which you're aware why the merit selection board could not be making recommendations for promotion to sergeant?

Robert Joyce: Well, there's a — a recent Illinois Appellate Court decision that has kind of clouded the issue a little bit. But we are working on whether that — that is a possibility.

Q: Well, other than that Illinois Appellate Court decision, is there any practical or psychometric reason why the merit selection board could not be used to make recommendations for promotion to sergeant?

A: Well, actually, I haven't — I have not given that significant enough thought to — to answer you professionally. But I do have some concerns about how it could be done at the rank of sergeant, because the feeder pool for police officer in Chicago is so large that, again, trying to have a reliable nomination and evaluation process would become difficult.

Q: Well, is the feeder pool the same for sergeants as for detectives as police officers?

A: I don't know. There are — I do know that there are fewer people who apply to become detectives than there are who apply to be promoted to sergeant.

Q: Has the City done any investigation to determine whether or not the detectives who have been promoted through the merit selection board process have done as well as or not as well as the detectives who were promoted through the examination process?

A: I don't know.

Transcript of Preliminary Injunction Hearing, 524-25

The size of the "feeder pool" for merit promotions to sergeant has not been a problem in the 1998 merit promotions to sergeant. There, 75 nominators were allowed "to identify and nominate either police officers in their chain of command or at large." (Defendant City of Chicago's Local Rule 56.1(b)(3)(A))

Response to Plaintiff's Local Rule 56.1 Statement of Facts, *Barnhill v. City of Chicago*, No. 98 C 4807, September 29, 2000, Exhibit 11 at 44, par. 75(a.) Each nominator was permitted to designate between one and five police officers; the nominators identified 272 police officers for further consideration for a merit promotion. Id.

The City also seeks to distinguish merit selection of lieutenants from merit selection of sergeants by asserting that it had a "track record" of "supervisory performance" for sergeants who were eligible for a merit promotion to lieutenant. (Defendant's Rule 56 Statement, par. 59.) This assertion, however, is not supported by admissible evidence. William Powers, upon whose affidavit the City relies for this assertion of "track record," admitted at his deposition that he lacked personal knowledge of this "track record."

Plaintiffs' Counsel: And when you said "track record, history," are there any documents that contain the track record, history?

Powers: I don't know.
* * *

Q: So is it correct that as you sit here, you have no personal knowledge of what record, if any, was used to make merit promotions to lieutenant in the 1994 examination process?

Powers: My reference in the affidavit to the word "record" had to do with history, global history of an employee, not per se a specific piece of paper.

Q: Oh, okay. Can you tell us, when you refer to "global history," what were you referring to about the global history that was of supervisory performance?

A: The person's performance out in the [15] field as a supervisor.

Q: And that person's performance out in the field as a supervisor, how is that measured?

A: Now or then?

Q: Back for the 1994 —

A: I couldn't answer that question.

Q: So is it correct you don't know how it was measured?

A: Correct.

Deposition of William Powers, 13-15, Exhibit 9.

The City's claim of "track record" is not supported by admissible evidence and should not be considered by the Court.

V. CONCLUSION

The "equally valid, less discriminatory alternative" on which the plaintiffs' prevailed in the lieutenant's litigation was available to the City in 1994 when it received the results of the "Barrett test." Plaintiffs contend that, as it did for the "Barrett lieutenants test," the City should have supplemented test score promotions with "merit promotions." As set out above, plaintiffs' evidence makes out a "showing sufficient to establish the existence of an element essential of [plaintiffs'] case," and requires that defendant's motion for summary judgment be denied. Defendant's motion for summary judgment should therefore be denied.

Respectfully submitted,

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