

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

CITY OF DAYTON, OHIO,

Defendant.

Civil Action No. 3:08-cv-348 (TMR)
Hon. THOMAS M. ROSE

**JOINT MOTION FOR A PARTIAL EXTENSION
OF THE CONSENT DECREE**

The United States of America (“United States”) and the City of Dayton (“Dayton”) hereby jointly move for a partial extension of the Consent Decree (“Decree”) between the parties for a period of six months. The parties have fulfilled their obligations under the Decree regarding individual relief and the development of a firefighter selection procedure, and ask that the Court terminate those provisions in accordance with the timeline set forth in the Decree. The purpose of the requested extension is to allow for the completion of the parties’ obligations regarding the development of a police officer selection procedure that complies with the requirements of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, as amended (“Title VII”). The parties respectfully request that the Court set a new expiration date of November 23, 2013 for the provisions of the Consent Decree pertaining to the police officer selection procedure development. A proposed Order is attached for the Court’s consideration.

I. BACKGROUND

On September 26, 2008, the United States filed the complaint in this action alleging that Dayton was engaged in a pattern or practice of discrimination against African Americans on the

basis of race in its selection procedures for police officers and firefighters in violation of Section 707 of Title VII. Dkt. No. 1. The parties entered into a Consent Decree to resolve the matter and the Decree was filed with the Court on February 26, 2009 and amended on March 16, 2009. Dkt. Nos. 16, 21. The Court entered the Decree on November 30, 2009, following a Fairness Hearing, and approved the parties' determinations regarding the distribution of individual relief on August 5, 2010, following a second Fairness Hearing. Dkt. Nos. 32, 37.

As an initial matter, the United States and Dayton have worked collaboratively in effectuating the terms of the Consent Decree since it was entered by the Court. The United States shares Dayton's objective in selecting the best qualified applicants to serve in the Dayton Police Department so that it can satisfy its public safety responsibilities. The parties submit that the requested extension of the Consent Decree previously entered in this case is consistent with this objective as it permits the City's development of a lawful written examination for police officer candidates. For the reasons that follow, the parties agree that not all of the original purposes of the Decree can be fulfilled prior to the date that the Decree is set to expire without the extension being requested here. *See* Decree, Dkt. No. 21.3, para. 8.

The first purpose is to ensure that Dayton does not violate Title VII with regard to African American applicants and its selection procedures for police officers and firefighters going forward. *Id.* at para. 8(a). This purpose is addressed by enjoining Dayton from using its previous selection procedures and requiring Dayton to develop new procedures that comply with Title VII. *Id.* at paras. 9-13. The second purpose of the Decree is to provide remedial relief to individuals who were denied employment with Dayton due to the challenged employment practices. *Id.* at para 8(b). This purpose was accomplished by establishing a \$450,000 settlement fund that was paid out to claimants and the hiring of police officer and firefighter

claimants on a priority basis with retroactive seniority. *Id.* at paras. 28-29, 64, 66; Exh. 1, Evans Declaration, paras. 2-3.

Pursuant to Paragraph 73, the Decree expires upon the later of two dates: thirty-six months after the entry of the Decree or the fulfillment of the parties' obligations regarding individual relief. *Id.* Thirty-six months after final entry of the Decree was November 30, 2012. The final individual relief obligations are expected to be fulfilled on May 23, 2013, with the crediting of retroactive seniority to the final priority hire claimants. *See* Ex. 2, Letter from E. Banaszak to the Court dated May 2, 2012; Exh. 1, Evans Declaration, para. 3. Therefore, the Decree is currently set to expire on May 23, 2013. Paragraph 75 of the Decree affirms that the Court retains jurisdiction to enter additional orders as may be necessary to effectuate the purposes of the Decree.

II. PURPOSE OF REQUESTED EXTENSION

Paragraphs 12 through 15 of the Consent Decree set out a process through which Dayton must develop new selection procedures for police officers and firefighters that comply with Title VII and enable Dayton to select qualified officers for these critical public safety positions. *See* Dkt. No. 21.3. The Decree requires that Dayton provide information regarding its development process to the United States, so that the United States may review the information, provide advice, and seek Court intervention if it believes that Dayton's proposed new procedures do not comply with the law. *Id.*

The parties have been engaged in a cooperative dialogue regarding the development of new selection procedures for police officers and firefighters since the entry of the Decree. Dayton developed and administered a selection procedure for firefighters in 2012 that Dayton intends to continue to utilize for future firefighter hiring. *See* Exh. 1, Evans Declaration, para. 4.

Therefore, the parties' obligations regarding the development of a selection procedure for firefighters have been completed. While Dayton successfully administered a police officer exam in 2011, future use of this exam was impractical, and both Dayton and the United States agreed at that time that a different selection process would be developed and used. *Id.* at para. 5. However, this second round of development for the police officer selection process is not yet finished. *Id.*

Dayton has proposed a written examination for police officers that it intends to administer in June 2013, which is after the current expiration date of the Decree. *Id.* A crucial step in exam development is analyzing the data from the exam administration to determine whether the exam functioned as its developers intended it to. *See* Exh. 3, Jones Declaration, para. 4. Therefore, several important aspects of the exam development process cannot be completed until after the exam is given to candidates. *Id.* at paras. 3, 5. Following the administration of the examination, Dayton will need to collect the data from the exam administration, assess whether the exam functioned as intended, determine the most appropriate method of use, and establish an eligible list. *Id.* at para. 4; Exh. 1, Evans Declaration, para. 5. This process is expected to take several months. Exh. 1, Evans Declaration, para. 5.

The United States, with the assistance of its expert Dr. David Jones, has provided extensive feedback during the police officer exam development process. The parties are concerned that the expiration of the Decree prior to the completion of the exam development process will have a negative effect on the remainder of that process. Therefore, the parties are requesting a six month extension of the police officer selection procedure development provisions of the Decree.

III. CONCLUSION

For the reasons discussed above, the parties respectfully request that the Court set a new expiration date of November 23, 2013 for the provisions of the Consent Decree pertaining to the development of a lawful police officer selection procedure and that the Court terminate the Consent Decree provisions relating to individual relief and the firefighter selection procedure.

Respectfully submitted,

THOMAS E. PEREZ
Assistant Attorney General
Civil Rights Division

Delora Kennebrew
Chief
Employment Litigation Section

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Attorneys for Defendant City of Dayton

Certificate of Service

I certify that today, May 10, 2013, a copy of the forgoing Joint Motion for a Partial Extension of the Consent Decree will be served upon counsel for the City of Dayton and counsel for intervenors, Fraternal Order of Police, Lodge 44 and International Association of Fire Fighters, Local 136 via the ECF system.

/s/ Elizabeth Banaszak
Elizabeth B. Banaszak (IL Bar No. 6299035)
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Exhibit 1

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

v.

CITY OF DAYTON, OHIO,

Defendant.

Civil Action No. 3:08-cv-348 (TMR)
Hon. THOMAS M. ROSE

DECLARATION OF MAURICE J. EVANS

I, Maurice J. Evans, declare the following:

1. I am employed by the City of Dayton Civil Service Board as the Secretary Chief Examiner. My primary duties in this position include overseeing the City of Dayton's hiring procedures for competitive and noncompetitive employment. As part of these duties, I oversee the development and implementation of the police recruit exam and all pre-employment hiring processes.

2. Pursuant to the Consent Decree between the United States and the City of Dayton, the City established a settlement fund of \$450,000 and paid out the money in that fund to claimants in the amounts set forth in the Final Relief Awards List. Those payments were completed in 2011.

3. Pursuant to the Consent Decree, the City also hired two priority hire claimants as police officers with retroactive seniority. The crediting of retroactive seniority to priority hire claimants will be complete on May 23, 2013.

4. The City developed a written examination for the selection of firefighters. This examination was administered in June 2012. The City intends to continue to use this exam for future firefighter hiring.

5. The City also developed and successfully administered a police recruit exam in 2011. However, future use of this exam was impractical, and both Dayton and the United States agreed that a different selection process would be developed and used. The City is currently in the process of developing a new written examination for the selection of police recruits. The police recruit examination is scheduled to be administered on June 8, 2013. Following the administration of the exam, the City will need to score the exams and create an eligible list. We expect that this process will be completed by September 2013.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on

MAY 8, 2013

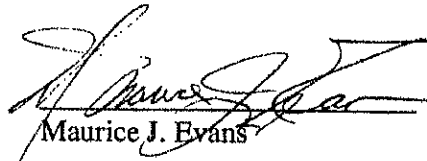

Maurice J. Evans

Exhibit 2



U.S. Department of Justice

Civil Rights Division

DLK:EGL:EBB:jw
DJ 170-58-238

Employment Litigation Section - PHB
950 Pennsylvania Ave, NW
Washington DC 20530
www.usdoj.gov/crt/emp

May 2, 2012

Via Electronic and U.S. Mail

Joseph Brossart
Law Clerk to the Hon. Thomas M. Rose
United States District Court, Southern District of Ohio
Federal Building
200 West Second Street
Dayton, Ohio 45402
Joseph_Brossart@ohsd.uscourts.gov

Re: United States v. City of Dayton, Civil Action 3:08-cv-348 (S.D. Ohio)

Dear Mr. Brossart:

This letter is to follow up on your email correspondence of April 5, 2012, inquiring about the expiration date of the Consent Decree in the above-referenced matter. As I stated in the voicemail that I left for you previously, there are two provisions in the Decree that provide for the Decree's expiration. Paragraph 73 of the Decree states:

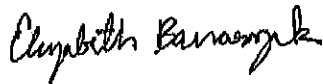
- "73. This Decree shall be dissolved and this action shall be dismissed, without further order of the Court, upon the occurrence of the later of the following two events:
- (a) The passage of thirty-six (36) months from the date of entry of the Decree; or
 - (b) The fulfillment of all the parties' obligations regarding Individual Relief contained in Section VI of this Decree, including crediting by the City of retroactive hire date to claimants hired as priority hires."

The relevant date for subparagraph (a), thirty-six months after the final entry of the Decree, is November 30, 2012. I contacted counsel for Dayton to obtain updated information regarding the relevant date for subparagraph (b), the completion of individual relief including the crediting of retroactive seniority. I have been advised by counsel for Dayton that the crediting of retroactive seniority to priority hire candidates should occur on May 23, 2013, which is the date upon which they are currently scheduled to complete their probationary periods as Dayton police officers. Therefore, under the terms of Paragraph 73 of the Decree, May 23, 2013 is the date upon which we anticipate that the Decree will expire.

Please contact me if you have any additional questions or if I can be of further assistance. I can be reached at (202) 305-4071 or elizabeth.banaszak@usdoj.gov.

Sincerely,

Delora L. Kennebrew
Chief
Employment Litigation Section

By: 

Elizabeth Banaszak
Trial Attorney
Employment Litigation Section

Cc: John Musto
Counsel for the City of Dayton

Exhibit 3

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

v.

CITY OF DAYTON, OHIO,

Defendant.

Civil Action No. 3:08-cv-348 (TMR)
Hon. THOMAS M. ROSE

DECLARATION OF DAVID P. JONES, PH.D.

I, DAVID P. JONES, declare the following:

1. I currently serve as President and CEO of Growth Ventures, Inc., a human capital advisory firm. I hold a Ph.D. in Industrial/Organizational Psychology from Bowling Green University, received in 1976. My experience includes hands-on involvement and supervision of the development of examination procedures for entry-level law enforcement positions. I have been qualified by federal courts to serve as an expert witness in connection with lawsuits and other matters related to employment selection and promotion, and in matters involving both challenges to, and defenses of, employer practices. These assignments have called for my professional opinion regarding evidence of validity, or job-relatedness and business necessity. I have been retained by Plaintiff United States as an expert consultant in the above-captioned matter.

2. I have reviewed information provided to the United States by the City of Dayton regarding the design, development, and proposed implementation of a new written examination

for the hiring of entry-level police officers. I have provided extensive comments and advice to the test developer retained by the City of Dayton, Siena Consulting, based upon this information.

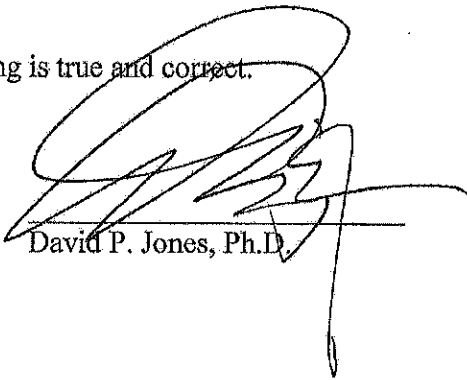
3. While the steps followed by Siena Consulting in executing initial validation of its entry-level police officer selection exam have proceeded essentially as anticipated, additional steps remain to be completed. Some of these steps are currently underway. Additional steps, however, must await information produced through actual administration of the exam to police officer applicants, since applicant data frame conclusions regarding the exam's level of job-relatedness and business necessity

4. Professionally accepted procedures that guide exam design and validation involve statistical analyses on data collected from both current police officers and actual job applicants. Only by drawing upon both sets of data can the exam developer ensure a) that its initial estimate of the exam's validity holds when applicant scores are compared to the scores of current officers who participated in the validation research, b) that its initial estimates of how individual components of the exam contribute to the overall exam score hold for both current officers and applicants, c) that analyses undertaken to explore alternate methods for scoring, weighting, establishing cut-off (qualifying) scores, or ranking applicants maintain validity and minimize adverse impact on protected groups in the applicant population, and d) that the overall method recommended for using the exam to process applicants is consistent with findings of the initial validity study.

5. It is for the above reasons, as well as other more detailed psychometric and statistical analyses reasons, that final completion of the new exam's validation, demonstration of job-relatedness, and clarity regarding its usefulness in ensuring business necessity must await collection of actual police officer applicant data.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 8, 2013



David P. Jones, Ph.D.

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

UNITED STATES OF AMERICA,

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Defendant.

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Hon. THOMAS M. ROSE

[PROPOSED] ORDER

Upon consideration of the Joint Motion of Plaintiff United States and Defendant City of Dayton, it is hereby ORDERED this _____ day of _____, 2013, that the provisions of the Consent Decree between the parties related to the development of a selection procedure for police officers are EXTENDED and shall now expire on November 23, 2013 and that the remainder of the Consent Decree is TERMINATED.

THOMAS M. ROSE
UNITED STATES DISTRICT JUDGE