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MAYOR
DANNEL P. MALLOY

DIRECTOR OF LEGAL AFFAIRS
AND CORPORATION COUNSEL
ANDREW J. McDONALD

DEPUTY CORPORATION COUNSEL
SYBIL V. RICHARDS

ASSISTANT CORPORATION COUNSEL
BARRY J. BOODMAN
JAMES V. MINOR
JOHN W. MULLIN, JR.
KENNETH B. POVODATOR
BURT ROSENBERG

CITY OF STAMFORD
OFFICE OF LEGAL AFFAIRS
888 WASHINGTON BOULEVARD
P.O. BOX 10152
STAMFORD, CT 06904-2152
(203) 977-4081
FAX (203) 977-5560

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Mr. David Martin
President
Board of Representatives

Dear Mr. Martin:

RE: Preferential Points for Hiring Firefighters

During the last term of the Board of Representatives, then-President Carmen Domonkos asked this office for an opinion concerning the legality of providing bonus points, based on residency in Stamford, in connection with civil service testing of prospective firefighters. The proposal is that five preference points be given to Stamford residents who achieve a passing score.

We have been provided with certain materials believed to be of assistance in evaluating this question. In particular, we were given some materials from other municipalities around the State (obtained through CCM) as well as some prior opinions rendered by this office – notably, two prior opinions from former Assistant Corporation Counsel Richard Robinson.

Before addressing the substance of the question, some comments about the supporting/source materials provided to us would seem to be in order. Some of the materials that were provided do not really relate to this issue but rather solely relate to veterans' preference points. (The cover letter from CCM indicated that the materials being provided dealt with preference points in general, without differentiating between residency and veterans.) Thus the materials from Bridgeport, Hamden, Windsor, and the older materials from Hartford, all pertain only to veterans. The newer materials from Hartford as well as the materials from Norwich and Waterbury allow preference points for residency (or domicile) in the relevant municipality. (There also is an indication in a communication from the Fire

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Department that a limited number of other municipalities may also have enacted resident preference programs.)

Also something of a threshold issue is the question of the proper body to adopt such a program. The Personnel Commission generally is charged with promulgating rules concerning the merit system. See, Stamford Charter §C5-20-10 (especially subsections (2) and (4)); see, also, Stamford Charter §C6-140-6(5). Presumptively, then, the Commission is the proper body to consider implementing such a preference. However, Stamford Charter §C6-140-10 gives the Board of Representatives the power to supersede otherwise applicable provisions of the Charter concerning the duties of the Commission. The net result, then, is that either the Commission in the ordinary course of its operations *or* the Board of Representatives can choose to implement such a program — if both bodies act, the Board's power to supersede the Commission means that the Board's enactment would be controlling.

One of the opinions from former Assistant Corporation Counsel Robinson specifically addressed the question of preference points, concluding that both legally and practically such a program would be inappropriate. The fact that we are receiving another request for an opinion on this topic suggests that the Board wants the issue to be revisited. We will attempt to do so, but it seems that the earlier opinion provides a suitable frame of reference for any discussion or analysis.

We agree that §7-460b of the Connecticut General Statutes is significant, but not for quite the same reasons as articulated in the January 5, 1993 opinion. We agree that we must be sensitive to the possibility that a dissatisfied (and unsuccessful) job seeker might sue the City. However, the mere possibility of such a suit does not really go to the question of whether or not the underlying procedure is proper. Rather, we believe that this more accurately is a "practical" consideration, with the underlying merits of such a suit as the appropriate legal issue.

We believe that the practical consideration in that earlier opinion is or should be a substantial concern. While the proposed program would provide an advantage to people who currently reside in the City for purposes of obtaining a job, it would do nothing to encourage or preserve residency in the City once the job was obtained — at that point, the cited statute would become applicable. One can easily envision a situation where the primary effect of the proposed preference would be to give an advantage to adult children living with parents in Stamford, seeking a career, and leaving home (and possibly/probably Stamford) as soon as the position is awarded.

This, in turn, leads to the question that was implicit in the earlier opinion – what is the purpose to be served by the proposed preference? The Connecticut

Supreme Court has recognized a valid if not compelling[1] interest in residency of emergency personnel such as police and firefighters. (*Carofano v City of Bridgeport*, 196 Conn. 623, 642-43 (1985).) The statutory inability to compel residency (apparently prompted, at least in part, by the *Carofano* decision) diminishes the ability to fulfill that purpose.

Carofano clearly distinguishes between residency as a condition of continued employment (constitutionally allowed) and residency (for some minimum duration) as a condition of getting a job in the first instance (not allowed). Section 7-460b prohibits the constitutionally-permissible form of residency requirement; the preference points program, creating at least a modest link between residency and ability to obtain a position, treads very close to the scenarios that have been held to be unconstitutional. (To the extent that the appointing authority has expressed a preference for residents, such residents would be getting a "double" advantage — additional points to make it more likely that they would be among the candidates identified to the appointing authority as eligible for selection, and a greater likelihood of selection from the group of candidates eligible for selection, given the stated preference for residents.)

We also agree with the concern expressed in the earlier opinion that a preference program could effectively be a "back door" attempt to accomplish that which the statute (§7-460b) prohibits. Indeed, at least some of the purpose of the program would be to accomplish, indirectly, that which the statute prohibits, i.e. linkage of a job with residency. (To the extent that diversity and/or representation of the community (ethnic, racial and/or gender), reduction in local unemployment, etc., have been identified as possible justifications for residency requirements (see, e.g. *Carofano*), these justifications arguably would remain viable ones.)

Somewhat more problematic is the inherent inconsistency between a preference program and a merit system. Thus, §7-414 of the Connecticut General Statutes states that persons passing a test "shall take rank as candidates upon such register or list in the order of their relative excellence as determined by test . . . ."[2]

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[1] The Court concluded that a fundamental right was not truly at issue such that a true "compelling interest" standard was inapplicable. The Court then concluded that the residency requirement satisfied an "intermediate" standard of review and therefore satisfied an even lower "rational basis" standard of review.

[2] See, also, §7-409: "The purpose of this part is to provide means for selecting and promoting each public official and employee upon the sole basis of his proven ability to perform the duties of his office or employment more efficiently than any other candidate therefor ...."

We note that the relationship of statutorily-created merit systems and Charter-created merit systems is not always clear (compare *State ex rel. Sloane v. Reidy*, 152 Conn. 419 (1965) and *State ex rel. Barnard v. Ambrogio*, 162 Conn. 491 (1972)), such that the applicability of these statutes to the City's merit system is, in many instances, open to question. However, at a minimum, the statutes do

Reinforcing this concern/approach is the existence of §7-415, concerning preference points for veterans. This is of significance for at least two reasons.

First of all, the General Assembly clearly has contemplated the topic of preference points, and has only seen fit to authorize points for veterans. The fact that the General Assembly has seen fit to create only one such exception to a "pure" merit system can be interpreted as indicative of a desire to allow only that one exception.

Somewhat reinforcing the foregoing is the final sentence of §7-415: "No such points shall be added to any earned rating in any civil service or merit examination except as provided in this section, the provisions of any municipal charter or special act notwithstanding." Read most broadly, "such points" could mean *any* addition of points to an examination score, prohibiting anything other than points for veterans. Read somewhat more narrowly (and probably correctly so), with "such points" only referring to points for veterans, it nonetheless reflects a lack of willingness to allow municipalities to "tinker" with preferences. For example, this provision prohibits adding points if the individual has not achieved a passing grade, and it also prohibits a municipality from deciding to award six points or four points rather than the statutorily-prescribed five points. Such "inflexibility" is inconsistent with allowing municipalities leeway in creating "new" preference programs. (Could a municipality enact a complementary program of "military service" preference points, not dependent on service in time of war? Would that not frustrate the intended mandatory and exclusive nature of the veterans' preference program?)

Note that if "other" preference programs are allowed, they would not be subject to the mandates of §7-415. That would lead to an arguably-anomalous situation where veterans' preference points, explicitly authorized, would be statutorily regulated and uniform across the state, whereas other programs, without any explicit legislative "blessing," could vary widely. (If a five point preference for residents is good, would ten points be better? And fifteen points best?)[3]

An alternate approach that is used by New Britain does not rely on points but rather relies upon an expansion of the pool of names submitted to the appointing authority. Under the New Britain provisions, it is the "rule of 3" that has been modified to create a preference. (Prior to adoption of the preference, New Britain had replaced the "rule of 3" with a "rule of 5.") Instead of reliance strictly on the highest scores, a two-stage rule was adopted — in addition to the 5 highest ranking scores,

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create a standard against which the City's system can be measured, particularly as they express the policy behind such a system.

[3] Ironically, *after* drafting this paragraph, it was noted that the Hartford preference program awards ten points to residents.

the 3 highest-ranking candidates who are domiciled in the municipality (but not in the top 5) also are submitted for consideration for appointment.

This alternate approach has a limited curative effect as to the problems outlined above, at the cost of injecting new problems. This system represents a greater departure from a pure merit system, both because of the substantial increase in the "pool" of candidates eligible for appointment as well as allowing markedly-inferior scores to be overcome *solely* on the basis of residency ("domicile"). In other words, a 5-point-preference system only makes a difference when candidates are within 5 points of each other; the New Britain system would allow a top-3-domiciled applicant to be considered for appointment while a non-domiciled applicant who scored 5, 10 or even more points higher would not be eligible for appointment if he/she were not in the top 5. This is more than a thumb on the scale — this is a guarantee that at least 3 domiciled applicants will be eligible for appointment (as long as there are enough domiciled applicants with passing grades).

Accordingly, although we recognize that Home Rule gives the City some flexibility with respect to the details of a merit system, we continue to have significant reservations about the legality of the preference program that has been proposed, and have further significant reservations about the efficacy of such a program. We recognize that other municipalities have enacted such programs, but that fact alone does little to lessen our concerns. We have not found any court decisions addressing such issues (except in the statutorily-authorized area of veterans' preferences). We also recognize that such a program is not prohibited explicitly. All of these factors result in a situation that is not free from doubt. However, although we recognize the desirability of the goals that have prompted the proposal for such a program, we continue to believe that such a program is inconsistent with the nature of a merit system for municipal employees, raises potential constitutional issues about the linkage to residency, and is uncertain to accomplish the intended goal.

We trust this is a satisfactory response to this inquiry.

Yours truly,

Andrew J. McDonald
Director of Legal Affairs

By _____
Kenneth B. Povodator
Assistant Corporation Counsel