

THE PERPLEXING PROMOTION PROBLEM AT THE MEMPHIS POLICE DEPARTMENT

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For over 30 years, the City of Memphis had faced charges of racial discrimination in its hiring and promotion practices in the Police Department. In the 1970s the City entered into a series of consent decrees in federal court that required the city to engage in affirmative action to eliminate a pattern of discrimination. Subsequent lawsuits by white officers sued the City under the Equal Protection Clause of the U.S. Constitution, claiming that they were unjustly passed over for promotion to permit black candidates with lower test scores to advance. The cases dragged on for years amidst appeals, delays, and a federal court injunction that stalled police promotions. The 1989 case was finally resolved when a federal court ruled in 1999 that the city's use of quotas to promote black officers in the 1980s was unconstitutional and awarded the plaintiffs \$2 million.

However, police promotions were soon disrupted again when promotion exams were stolen, a federal judge ruled that the promotion test was invalid, and city administrators rescinded the previous promotions. Following the development and administration of a new promotion test to a candidate group that was about half white and half black, nearly twice as many white as black officers qualified for promotion, a disturbing result to both the police administration and the officer candidates and their unions. Confronted with an urgent need to proceed with the promotion process, yet facing strong objections from some police officers and their associations, Memphis city officials must decide what to do.

THE NEW TEST

“The bottom line is this: why is the city even considering going ahead with promotions . . . ? We want a fair and equitable process before anyone is promoted,” said Tyrone Currie, president of the Afro-American Police Association. Currie was reacting to the impact of the results of the September 2002 sergeant's exam taken by over 500 patrol officers seeking promotion in the Memphis Police Department.

*This case was prepared as the basis for classroom discussion rather than to illustrate either the effective or ineffective handling of an administrative situation. All proper names have been disguised.

The pool of officers promotable to sergeant contained almost twice as many whites as blacks. In particular, Currie's group claimed that counting the written portion of the promotion test for 85 percent and the video portion, which he alleged African-Americans do better on, for only 15 percent was unfair. "We don't know if City Hall or police management will make the decision about the promotions, but we need some answers and we need them now," he said.¹

Memphis police officials, however, claimed that the test had been validated by an expert and that the department needed to go ahead with promotions to meet staffing needs in its investigative bureaus. Promotions in the police department had been delayed since July 2000 due to lawsuits filed in federal court. Police Director Walter Crews expressed concern about the unbalanced racial composition of those officers who qualified for promotion. "None of us like the test concluding where there are some unhappy folks, so to speak. We'd like everybody to be happy with it. But as it turned out, they will not be."²

MEMPHIS AND THE POLICE DEPARTMENT: BACKGROUND

Memphis, Tennessee is one of the South's largest and most diverse cities. According to the 2000 census, the population of the city was 650,100 with over 1.1 million in the metropolitan area. Geographically, Memphis was one of the largest cities in the nation, covering over 280 square miles. The changing racial composition of the city mirrored that of many larger U.S. cities with a movement of whites to the suburbs beginning in the 1960s and an increasing percentage of blacks within the city limits. In 2000, the city population was about 61% black and 34% white.

The struggle for civil rights in the 1960s in Memphis was punctuated by a bitter and costly strike by City of Memphis sanitation workers who fought for the right to unionize to improve employment conditions. The politically and fiscally conservative mayor and a majority of the city council had strongly resisted the initiative to introduce collective bargaining for public employees in the city. The cause of the sanitation workers gained national media attention when civil rights leader, Dr. Martin Luther King, Jr., made two visits to Memphis in support of the strikers. During his second visit, King was assassinated on the balcony of the downtown Lorraine Motel on April 4, 1968, sparking riots and civil disorder in many cities across the country.

Many years had elapsed since King's death, and race relations in Memphis had markedly improved. However, racial tensions were never far below the surface and remained a strong factor in local politics and institutions. The political impact of the

city's changing demographics became evident in the election of the first black mayor of Memphis, W. W. Herenton, Jr., in 1991, by a 142-vote majority, and the emergence of majority black membership on the Memphis City Council. In 2002 the Memphis Police Department had a total of 1,878 commissioned officers, divided between its Uniform Patrol and Investigative Services Branches. The racial composition was approximately 47% white, 40% black, and 13% other.

In bargaining with the City of Memphis over wages, hours, terms, and conditions of employment, police officers were represented by the Memphis Police Association, an affiliate of the AFL-CIO. The association was formed in 1973 and late that year became the officially recognized bargaining unit for police officers. In the same year, the Afro-American Police Association was formed with the expressed purpose of addressing the problems of black officers on the force.³

POLICE PROMOTIONS FROM 1989-1996: A SEVEN-YEAR DROUGHT

The promotion of police officers in the Memphis Police Department had been a contentious and litigious issue for many years (a time line of events is shown in Exhibit 1). In 1974, the United States Department of Justice filed a civil rights action against the City of Memphis alleging that the city engaged in racial and gender discrimination in hiring and promotion. Although the city denied it had unlawfully discriminated in the hiring and promotion of city employees, it acknowledged "that certain of its past practices may have given rise to an inference that it had engaged in unlawful discrimination."⁴ To remedy past racial discrimination against blacks and women in the hiring of city employees that might have occurred, the city entered into a series of consent decrees with the Justice Department. Within the police department, the implementation of those agreements had, in effect, resulted in the use of a quota system in the promotion of officers.

In 1989, two white males representing over 100 police officers filed reverse-discrimination claims against the city (*Aiken v. City of Memphis* and *Ashton v. City of Memphis*). The suits alleged that the plaintiffs were unfairly denied promotions when black candidates with lower promotion scores were promoted to sergeant positions to meet the proportionate goal of black officers specified in the consent decree. Their suits challenged the constitutionality of the consent decrees under the Equal Protection Clause (Article XIV) of the U.S. Constitution. The federal trial judge, Odell Horton, Jr., dismissed the lawsuits, supporting the constitutionality of the consent decrees, and his decision was upheld by an appeals panel. Subsequently, the appellants consolidated their cases and requested that the full 15-member U.S. Sixth Circuit Court of Appeals hear the case. In October 1994 the appeals court, while determin-

ing that the use of race-based promotions in 1988 and 1989 had been supported by a compelling government interest, remanded the case to Judge Horton to determine why the city had not limited the duration of a race-based remedy and not developed racially neutral job-related tests for police promotions.⁵ The court termed the city's failure to do so over this extended time period (1974-1988) "incredible."⁶

After the ruling, police director Walter Winfrey, facing a severe shortage of supervisory personnel since promotions had been banned pending the outcome of the 1989 lawsuits, termed the severe shortage of supervisory personnel a "crisis situation." He stated that racial quotas would no longer be used in promotions and a testing procedure would be developed that would meet federal court approval for racially neutral tests. His remark caused concern that promotion opportunities for blacks and women in the department could be hindered.⁷ The attorney representing the white officers, David Sullivan, would not comment on the city's plan, noting his clients wanted a testing program that would give promotions to those officers who had the highest test scores on "knowledge, skills, and ability."⁸

In 1995, the city retained Memphis industrial psychologist Dr. Mark Jones to develop a race neutral test that would stand Justice Department scrutiny. The program included development of detailed job descriptions, personnel qualifications, and tests that included cognitive ability tests and videotaped simulations of practical police situations (e.g., domestic violence calls or auto theft) to which candidates for promotion would respond. The testing program reportedly cost the city about \$200,000.⁹ Following administration of the new tests, police officials were hopeful that the program would meet requirements of the court since the new tests resulted in a nearly-equal percentage of blacks and whites on the promotion list. Attorney for the city, Louis Britt, had commented, "There was no adverse impact in any of them. It's probably the best promoting procedure in the city's history."¹⁰

In May 1996, based on the development of this promotion test designed to meet federal court requirements and interests of police officers and the city, Judge Horton ruled that promotions in the police department could resume, having been stalled for seven years. Although not all attorneys were satisfied, the judge concluded, "There comes a time when a judge says, 'Enough is enough.' We can't stand still. . . . I have heard many times, 'These things just can't be worked out.' There's no such thing."¹¹

The next day police director Winfrey announced the promotions of 147 officers, 72 patrolmen to sergeant, 50 sergeants to lieutenant, 18 lieutenants to majors, and 7 majors to inspectors. Newly promoted sergeant Gary Creasy commented on the long

wait, "It was nerve racking. We knew it was not the city's fault. We knew it was because of the lawsuits."¹² Winfrey expected that the increase in sergeants would improve police service, particularly in the areas of burglary and auto theft, where the high caseload had overloaded existing personnel.¹³

REVERSE DISCRIMINATION SUIT FINALLY DECIDED

Although Judge Horton's action lifted the ban on police promotions, the 1989 reverse discrimination lawsuit remained unsettled. In February 1999, U.S. District Judge Jerome Turner (who received the case after Judge Horton retired) heard testimony in the 10-year old case that had nearly stopped promotions of sergeants and lieutenants. David Sullivan, the plaintiffs' attorneys, asserted that the careers of his clients "have been stagnated, if not extinguished by the use of racial quotas." Representing the city, attorney Louis Britt claimed, "affirmative action was necessary . . . it was properly applied." Frank McGowan, a former Memphis police officer, testified that he did not get promoted even though he had higher scores than some candidates who were advanced: "I felt I was more qualified than some of the officers promoted."¹⁴ Attorney Sullivan argued that the city's use of racial preference in promotion of officers was unconstitutional. "The consent decree does not allow them to do that . . . the purpose of the consent decree was to develop a fair and neutral promotion process."¹⁵ On May 11, 1999, in a 20-page ruling, Judge Turner entered his decision. His conclusion stated:

The court finds that the plaintiffs have proven by a preponderance of the evidence that the City's use of affirmative action in the 1988 and 1989 sergeant promotion processes was not narrowly tailored. . . . The use of affirmative action was unnecessary, in that the City could have developed validated testing procedures under Title VII. Although the decrees were flexible, in light of the City's lack of effort to use validated testing as an alternative to race-based relief, the City's operation under the decrees for fourteen years was too long. . .¹⁶

In the subsequent hearing to award damages, the plaintiffs, including some current and former police officers, received \$2 million.¹⁷

THE STOLEN TEST: PROMOTIONS AND DEMOTIONS

In June 2000, just as a new group of candidates for sergeant were taking the promotion examination, Memphis Police officials discovered that a portion of the test had been stolen. While candidates were taking the test, a transcript of the video portion of the exam that dealt with practical field situations faced by police was anonymously

delivered to the newspaper, television stations, and the Memphis Police Association. After viewing the video scenarios, candidates for promotion were asked to write responses indicating what they would do. The script for the video that was stolen had been held in an unspecified location outside the city. Interim Police Director Walter Crews lamented, "It was a deliberate sabotaging of our (promotion) process, which we have not been able to hold for several years."¹⁸ The president of the Memphis Police Association, Lt. Sam Williams, said, "We've been out there all afternoon trying to see if we can find out where it came from. Hopefully, we will find out who is responsible for this. We've only had promotions one time in the past 10 or 12 years. I thought that everyone would have been excited."¹⁹

In an effort to maintain the promotion schedule, Interim Director Crews announced in July 2000 that the video portion of the exam would not be used in the sergeant's promotion process since it had been compromised by the theft. Test performance would be judged only by scores on the written portion of the test taken by over 439 candidates. Crews claimed the promotions were badly needed to fill positions in understaffed investigative bureaus and to reduce the workload of lieutenants who have been working overtime and even double shifts.²⁰ However, many police officers objected to Crews' decision to scrap the results of the video portion of the exam. Attorney David Sullivan unsuccessfully sought a temporary restraining order in federal court, claiming that the officers' due process rights were violated by Crews' unilateral decision to use only the written portion of the test. Despite the controversy, the promotions went forward with over 100 officers promoted to sergeant and lieutenant.²¹ Six months later 60 more patrol officers had been promoted to sergeant and 130 qualified for promotion.

Attorney Sullivan, on behalf of 52 disgruntled officers, subsequently filed a lawsuit against the city in federal court to stop all promotions, partially because the video portion of the test had been thrown out. In June 2001, U.S. District Judge Jon McCalla ruled that the original test was invalid. As a result, Memphis Police officials said that those promoted would have to take a new test to regain the promotions along with others who wish to qualify for promotion. The officers who lost their promotions would maintain their present duties and receive five percent "out-of-rank" pay.²²

In August 2001, fifty-nine sergeants who lost their promotions sought a restraining order in state court to stop the demotions and requested that they not have to retake the promotions test until their case is heard. The motion alleged:

The city's action in demoting these officers on July 3 will cause irreparable harm and deny them due process and equal protection. Further, the court never required

the city to effectuate demotions or take action to reduce these officers' pay or job status."²³

Chancellor Walter Evans sided with the 59 officers and restored their rank and pay, finding, "There is nothing that has been filed or ordered that states the individuals should not remain as sergeants and receive their benefits."²⁴ On the same day in another hearing in federal court, U.S. District Judge McCalla stated that he didn't order the city to demote the officers. However, the city claimed that the officers were demoted because the judge ruled the test invalid, and the city charter requires that employees must take a valid, competitive test to be promoted.²⁵ The city's attorney, Louis Britt, claimed the officers were not "demoted," but that the promotions were "rescinded" after Judge McCalla's decision. "When you rescind a promotion what are you doing?" Chancellor Evans asked Britt. "Demoting them," responded Ted Hansom, attorney for the Memphis Police Association. Hansom had argued that the officers were still fulfilling their duties as sergeants yet had their pay reduced by \$400 per month.²⁶

A NEW TEST AND AN OLD PROBLEM

On September 27, 2001, over 500 police officers took a new promotion test to attempt to qualify for the rank of sergeant. The test had been developed by Jeanneret & Associates, Inc., a Houston-based management consulting firm. The test consisted of a written portion that counted 85% and a video situational component that counted 15%. In determining eligibility for advancement, three factors determined an officer's overall promotion score. Test scores counted 45%, performance appraisals for the last two years constituted 45%, and seniority could make up 10%. The city then rank-ordered the overall promotion scores of the officers with the top candidates slated for advancement to the 264 available positions.

The results of the new test were dramatic and alarmed both police officials and promotion candidates: 175 white officers made the promotion cut, but only 86 black officers and three others qualified to be promoted. Just over half the 517 officers who took the exam were black.²⁷ These would be the first promotions in the department in two years. Tyrone Currie, Afro-American Police Association President, insisted that the promotion test was unfair to blacks because blacks did better on the video portion, which counted only 15%:

In the Afro-American Police Association's opinion, the written test was created and designed to have an adverse impact on minorities. . . In previous promotional tests, the written test has never counted that much (85%).²⁸

Currie said that the association might go to court if it did not get the opportunity to meet with city officials before the promotions are made. Attorney David Sullivan, who represented the 52 officers trying to stop the promotions, also argued that the test placed too much weight on the written questions with too little emphasis given the practical job skills in the video section.²⁹

Police Director Crews expressed his concern about the imbalanced results of the test, but he was also troubled by the prospect of further delays in the sergeants' promotion process given the supervisory staffing needs of the department. Although Memphis city attorney Robert Spence acknowledged that City Hall was concerned about the imbalanced results of the test, he stated, "But we want to move forward. We have an operational need."³⁰

The City of Memphis faced another dilemma. Confronted with the opposition and animosity of some police officers and their representatives, it faced the possibility of further litigation. Yet city officials had a pressing need to staff vacant sergeant positions in the interest of police effectiveness and public safety. The police director, city human resource officers, and city attorneys met intensively. Should the city proceed with promotions or suspend the process?

EXHIBIT 1

Chronology of Events in Memphis Police Department Promotions

1974 – U. S. Department of Justice brought a Civil Rights action against the City of Memphis, alleging the City had engaged in race and gender discrimination in the hiring and promotion of city employees. The City entered into consent decrees to settle the lawsuit.
1989 and 1990 – Two groups of white officers filed reverse discrimination suits against the City, claiming they were passed over for promotion because of racial considerations.
1992 – Federal Judge Odell Horton dismissed the lawsuits and upheld the constitutionality of the consent decrees.
November 1993 – A panel of the Sixth Circuit Court of Appeals upholds Horton's ruling. Plaintiffs' attorney David Sullivan asked for a hearing before the full court.
October 1994 – Sixth Circuit Court of Appeals remands the case to Judge Horton to determine why the city had not developed race-neutral tests for promotions.
1995 – City hires industrial psychologist Dr. Mark Jones to develop race-neutral promotions test.
May 1996 – Judge Horton lifts ban on police promotions after determining that a race-neutral test was developed. Police director promotes 147 officers the next day, the first promotions in seven years.
February 1999 – U. S. District Judge Jerome Turner (who received the case after Judge Horton retired) hears testimony in the 10-year old case brought by white officers who alleged reverse discrimination in the use of racial preferences in promotion.
May 1999 – Judge Turner found the City's use of affirmative action in the 1988 and 1989 cases was not "narrowly tailored," ruling for the plaintiffs. In subsequent hearing, plaintiffs were awarded \$2 million.
June 2000 – During the administration of promotion exam for candidates for sergeant, Police discovered that the script for the video portion of the exam was stolen.
July 2000 – Interim Police Director Walter Crews announced the video portion of the exam would be thrown out and only the written exam results would be counted.
June 2001 – U. S. District Judge John McCalla ruled that the original test was invalid. Memphis Police officials required those promoted to take new test and rescinds promotions since test was ruled invalid.
August 2001 – Fifty-nine sergeants who lost their promotions sought a restraining order to stop their demotion. Judge Walter Evans ruled that the federal court did not require rescission of promotions and ordered their rank and pay restored.
September 2001 – Over 500 police officers take new promotion test to qualify for promotion to sergeant. Although nearly an equal number of white and black officers take the test, 175 white officers passed, but only 86 black officers passed.
December 2002 – Police and city officials faced decision: to proceed with the promotions to address severe staffing need and face potential continuing litigation, or suspend promotions to investigate racially imbalanced results of the new test.

ENDNOTES

- ¹ Jones, Y. (2003). Black Group Asks Promotion Delay. *The Commercial Appeal* (Memphis), January 8, B6.
- ² McKenzie, K. (2003). Promotions Announced Amid Debate. *The Commercial Appeal* (Memphis), January 11, B1.
- ³ Memphis Police Association Website, <http://members.aol.com/xmpax1/home.htm>.
- ⁴ William Ashton et al., v. City of Memphis and Russell Aiken et al., v. City of Memphis. (1999). No. 89-2863-TUA, United States District Court for the Western District of Tennessee, Western Division, 49F. Sup. 2d 1051; U.S. Dist. LEXIS 7311; 75 Empl. Prac. Dec. (DDH) P45,886.
- ⁵ Ibid.
- ⁶ Conley, C. (1994). Appeals Court Wants to Know Why City Lacks "Neutral" Job Testing." *The Commercial Appeal* (Memphis), October 7, 3B.
- ⁷ Klose, R. (1995). City Seeks Advice on Halted Cop Promotions. *The Commercial Appeal* (Memphis), January 8, B1.
- ⁸ Ibid.
- ⁹ Lepeska, T. (1996). 145 Police Gain Rank Today After 7-Year Fight, "Racially Neutral" Process for Promotions Is Approved. *The Commercial Appeal* (Memphis), May 30, 1A.
- ¹⁰ Ibid.
- ¹¹ Ibid.
- ¹² Johnson, R. (1996). Police Officers Relish Awaited Promotions. *The Commercial Appeal* (Memphis), May 31, 15A.
- ¹³ Lepeska, T. (1996). 145 Police Gain Rank Today After 7-Year Fight, "Racially Neutral" Process for Promotions Is Approved. *The Commercial Appeal* (Memphis), May 30, 1A.
- ¹⁴ Conley, C. (1999). Ex-Officer 1st Witness in Police Testing Suit. *The Commercial Appeal* (Memphis), February 17, 14A.
- ¹⁵ Conley, C. (1999). Judge Rejects Police Quota System; City Owes White Officers Damages. *The Commercial Appeal* (Memphis), May 14, A1.
- ¹⁶ William Ashton et al., v. City of Memphis; Russell Aiken et al., v. City of Memphis. (1989). No. 89-2863-TUA, United States District Court for the Western District of Tennessee, Western Division, 49F. Sup. 2d 1051; 1999 U.S. Dist. LEXIS 7311; 75 Empl. Prac. Dec. (DDH) P45,886.
- ¹⁷ Appeals Court Rules Against Officers in Memphis Police Promotions Case. (1992). Associated Press State & Local Wire, February 19.
- ¹⁸ Conley, C. (2000). Sabotage Puts Police Promotion Test at Risk. *The Commercial Appeal* (Memphis), June 2, 1B.
- ¹⁹ Ibid.
- ²⁰ Conley, C. (2000). Dragnet Tightens in Test Theft, Says Police Director. *The Commercial Appeal* (Memphis), July 7, B3.
- ²¹ Conley, C. (2000). 106 Promoted, 1st in Years. *The Commercial Appeal* (Memphis), July 13, B1.
- ²² Ibid.
- ²³ Jones, Y. (2001). Police Sergeants Want Demotions Halted. *The Commercial Appeal* (Memphis), August 7, B3.
- ²⁴ Ibid.
- ²⁵ Jones, Y. (2001). City Ordered to Restore 59 Sergeant's Rank, Pay. *The Commercial Appeal* (Memphis), August 17, B1.

²⁶ Ibid.

²⁷ Conley, C. (2002). White Cops 2-to-1 on Promotion List, City Admits to Judge. *The Commercial Appeal* (Memphis), December 17, B6.

²⁸ McKenzie, K. (2002). Police Promotion Test Roils Tempers—Twice as Many White Officers Make Cut for Sergeant's Jobs. *The Commercial Appeal* (Memphis), December 8, B1.

²⁹ Ibid.

³⁰ Ibid.