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June 21, 2012

Ms. Maria Monteagudo
Director
Department of Employee Relations
200 E. Wells Street
Milwaukee, WI 53202

Re: Proposed Management Training Program

Dear Ms. Monteagudo:

You recently requested an opinion regarding the eligibility requirements for a proposed Management Training Program. We are in receipt of a copy of the April 16, 2012 communication from you to the Finance and Personnel Committee regarding the report of the Management Training Program Committee that had been established by Common Council File #111124. The minimum eligibility requirements that the Committee recommends for possible hire into the Management Training Program are:

Applicant Eligibility Requirements

Applicants must have successfully completed a Bachelor of Science or Bachelor of Arts Degree from an accredited college or university within two years of placement on the eligibility list. Students in their final year of college may be accepted for the Trainee examination but will not be considered for appointment until completion of their degrees. Eligible candidates must either be graduates of Milwaukee Public School high schools or of colleges or universities in the City of Milwaukee.

Potential applicants can come from two different pools: (a) MPS high school graduates who have completed, or will complete a B.S. or B.A. from any accredited college or university within two years; or (b) persons who have graduated, or will graduate from a college or university in the City of Milwaukee within two years. The applicant pools exclude, and therefore create a classification of ineligible candidates: individuals who graduate from a non-MPS high school and graduate from a college or university outside the City of Milwaukee. With respect to the high school criteria, individuals who graduate from private or parochial high schools in the City of Milwaukee are excluded unless they

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qualify by reason of attending a college or university in the City of Milwaukee, whereas MPS high school graduates do not have to meet that requirement. As compared to the college and university pool, individuals who graduate from local colleges that happen to be outside the City limits are excluded.

In regard to classifications that may create disparity in government treatment, we must examine potential issues under the Equal Protection Clause of the United States and the Wisconsin Constitutions. The first question is to whether any suspect class or fundamental interest is implicated; if so, then the courts will apply a higher level of scrutiny. If not, then the legislation only needs a rational basis to support it. *Nankin v. Village of Shorewood*, 2001 WI 92, ¶11, 245 Wis. 2d 86, 630 N.W. 2d 141.

The classifications at issue here do not implicate a suspect class or a fundamental interest. Although parochial high school graduates are excluded unless they attend a City of Milwaukee college or university, so are private non-sectarian high schools as well as publically funded charter schools. Thus, we turn to the rational basis test to determine if the classifications would survive legal challenge.

“A statute violates equal protection only when ‘the legislature has made an irrational or arbitrary classification, one that has no reasonable purpose or relationship to the facts or a proper state policy.’ ” *Id.* (quoting *Milwaukee Brewers Baseball Club v. DHSS*, 130 Wis. 2d 79, 99, 387 N.W. 2d 254 (1986)).

The basic test is not whether some inequality results from the classification but whether there exists a rational basis to justify the inequality of the classification. Any reasonable basis for the classification will validate the statute. A statute will be declared violative of equal protection only when the legislature has made an irrational or arbitrary classification, one that has no reasonable purpose or relationship to the facts or a proper state policy. *Milwaukee Brewers Baseball Club v. DHSS*, 130 Wis. 2d at 99.

In addition to the rational basis test required by the Equal Protection Clause of the Federal Constitution, a local ordinance must be “rationally related to the public health, safety ... or general welfare” of the governmental unit issuing the legislation. State ex rel. *Grand Bazaar Liquors, Inc. v. City of Milwaukee*, 105 Wis.2d 203, 211, 313 N.W.2d 805 (1982). “Stated in somewhat different words, ‘to be reasonable, an ordinance must tend in some degree to accomplish the object for which the municipal corporation was created and powers conferred upon it.’ *Id.* at 212, 313 N.W.2d 805 (citation omitted),” cited in *Metropolitan Milwaukee Ass'n of Commerce, Inc. v. City of Milwaukee*, 332 Wis.2d 459, 492, 798 N.W.2d 287, (Wis.App. 2011).

The purpose of the Management Training Program is described in the resolution file number 111124. The resolution states that the purpose of the program is to stem

Milwaukee's "brain drain," provide opportunities for college-trained minority¹ professionals to enter public service, and attract college-trained professionals to careers in public service. It further states that the program is intended to benefit the City by providing highly qualified professionals to be part of the next generation of City managers, and improve the City's operating efficiency and service.

There is no judicial decision directly on point relative to a similar management training program. In general, however, it would appear to be a proper state policy to take steps to reduce the loss of qualified professionals in the community (the "brain drain"). See *Porten v. Commissioner of Internal Revenue*, T.C. Memo 1993-73, 1993 WL 53759 (U.S. Tax Ct.) [discussing the State of Alaska's forgiveness of student loan program which was designed to stem a brain drain of professionals leaving the State following college graduation.] The question then is whether the minimum eligibility requirements are rationally related to the stated purpose.

In an Opinion dated January 4, 2005 to the Executive Director of the Fire and Police Commission, we opined that limiting the applicant pool to the Fire Cadet Program to MPS high school attendees would not withstand a rational basis challenge. That opinion noted that state statutes specifically created and allowed choice schools to operate within the Milwaukee system, allowed alternative educational programs for learn fare pupils, allowed full time student open enrollment, charter schools and a system for the equivalency of graduation for high school. See §§119.23, 119.82, 118.51, 118.40, 118.15. Since there is no rational distinction between graduating from a private versus public high school, or achieving the required level of education needed via home school and equivalence testing, there would be no rational basis to limit a pool of candidates to *MPS* high school graduates alone.

The purpose of the Management Training Program is to retain local college students with professional qualifications to graduate and stay in the City of Milwaukee, and to encourage young professionals who were raised in the City, and may still have roots here, to return and contribute their professional talents to the City. There appears to be no rational basis to limit the pool to MPS high school graduates and exclude individuals who graduated from a non-MPS high school, or obtained a high school diploma while he or she was a City resident. Although one can support a rational relationship to the qualification for applicants to be graduates of high schools in the Milwaukee metropolitan area as relates to stemming the 'brain drain,' limiting the pool of returning professionals to MPS high school graduates does not appear rational and may not be enforceable.

¹ Although one of the stated goals is to provide opportunities for "minority" professionals, we are not aware of any intention to provide any preference, priority or other special treatment to hiring "minority" candidates; nor is there any indication of what groups would qualify for minority status. As such, this opinion does not address any affirmative action question and assumes that no employment qualifications will be placed on candidates with respect to race, ethnicity, National Origin or other legally protected categories. A separate opinion should be requested in the event any such qualifications or hiring criteria is intended.

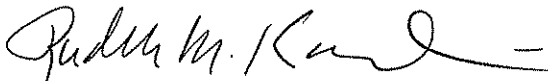
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In addition, the provision that limits eligibility to persons attending colleges or universities inside the city limits may also be susceptible to challenge as not rationally related to the intended purpose. For example, individuals who attend or graduate from Cardinal Stritch University which is located in Glendale, are just as much part of the local 'brain drain' by moving outside of the Milwaukee metropolitan area as other college graduates who leave the Milwaukee area. Therefore, the City of Milwaukee college requirement provision may also be subject to judicial invalidation. A safer approach would be to revise the eligibility requirements as including any individual who graduated from a Milwaukee County high school or college. The rational relationship would then be apparent; namely, that the program is designed to induce local high school graduates to return to Milwaukee, and local college graduates to stay in Milwaukee, with city residency becoming part of the requirements of employment after employment is obtained.

Very truly yours,



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