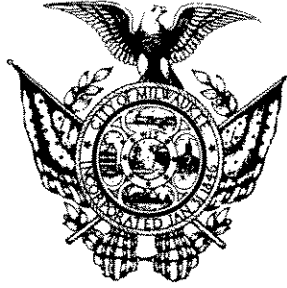


CITY OF MILWAUKEE

Form CA-43

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January 10, 2006

Honorable Common Council
City Hall, Room 205

Re: File 050292 - Testing for English Language and Other Proficiencies of Applicants for Public Passenger Vehicle Driver's License by Amending § 100-54-2-e Milwaukee Code of Ordinances

Dear Council Members:

We are signing and approving this file as to legality and enforceability. We are doing this because we believe that the general concept of examining individuals to see if they have a sufficient ability to correctly communicate with passengers in English and convey them to various destinations within the City are job-related and thus legal and thus enforceable.

Presently Section 100-54-2-e of the Milwaukee Code of Ordinances provides:

100-54-2-e. Be able to write and speak the English language to the extent necessary to operate a public service vehicle licensed by the city. In order to satisfy this requirement, applicants must pass a test regarding knowledge of city streets, major buildings, facilities and city regulations regarding public passenger vehicles. Alternate tests shall be available for those applicants who possess limited ability to read the English language.

The proposed change in the language states:

100-54-2-e. Be able to write and speak the English language to the extent necessary to operate a public service vehicle licensed by the city. In order to satisfy this requirement, applicants must pass a test *established by the City Clerk*, regarding knowledge of city streets, major buildings, facilities and city regulations regarding public

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passenger vehicles. Alternate tests shall be available for those applicants who possess limited ability to read the English language. *Any applicant taking any test under this paragraph shall present for purpose of identification a valid State of Wisconsin motor vehicle driver's license to the examiner at the time of testing.*

(Emphasis added and to show proposed changes).

We are reliably informed that in one form or another, this legislation and its predecessors have been a part of the Code of Ordinances since 1979. It was last amended in January, 1988.

However, we are concerned that much of this legislation leaves to the City Clerk and to the Milwaukee Police Department (MPD) the details of implementation of the policy decision. We caution that it is in the administration of the details of the examination process that care must be taken to ensure that laws prohibiting unlawful national origin or racial discrimination not occur.

We start our analysis with the observation that any selection mechanism that screens out a disproportionate number of individuals of a particular racial or national origin, which is not also justified by the business necessities of the entity using the examination will be found to be unlawful under Title VII of the 1964 Civil Rights Act, 42 USC § 2000e *et seq.* *Griggs v. Duke Power Company*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed. 2d 158 (1971). Title VII of the 1964 Civil Rights Act applies to employment and licensing agencies as well as employers.

Applying the *Griggs, supra* analysis, courts have held that "English only" rules, when not justified by some business necessity will be found to violate Title VII of the 1964 Civil Rights Act, *supra*. The United States Equal Employment Opportunity Commission (EEOC), in its guidelines, distinguishes between blanket "English only" rules and rules of a more limited nature where English may be necessary for the conduct of the business of the employer and the employees may nonetheless speak other languages when not directly engaged in the business of the employer. 29 Code of Federal Regulations, § 1606.7(a).

We are aware of the fact that this legislation does not require the use of "English only." Rather, the requirement is that those who are seeking to be taxicab drivers within the City of Milwaukee demonstrate a sufficient command of the English language to be able to communicate with customers of taxicabs for the purpose of the business of taking fares about the City of Milwaukee. The council is thus making an assumption, probably warranted, that most customers of taxicabs in the City will choose to communicate with the driver in English.

While the council is making an assumption on that point, it is one that we feel is generally justified. However, we again caution that it is certainly possible that some cab drivers may have a greater command of some language other than English, and their fares may speak, or even

prefer to speak, in a language other than English. In those, we feel rather limited circumstances, the requirement that the driver be able to speak English sufficiently is completely irrelevant to the business of conveying such fares within the City of Milwaukee.

We recognize that most individuals who will need the services of a taxicab coming to the City of Milwaukee are more likely to be stronger English speakers than most other languages. It would have been helpful if the Council would have held hearings on that particular issue and made legislative findings to that effect for purposes of this legislation. Legislative hearings to demonstrate that fact and thus address it in the legislation with the appropriate legislative findings would have made this legislation more defensible in the event of a challenge. Indeed, the available evidence from the Taxicab Improvement Task Force that we have seen suggest there is no serious problem with taxicab drivers not being able to communicate appropriately in English.

We have checked the report of the Taxicab Task Force, and note that on January 10, 2005, at ¶ 4, where the English language proficiency issue is addressed, there was a notation that there did not seem to be "a lot of complaints" regarding drivers who were not completely fluent in English. Indeed the minutes of January 31, 2005 indicated that the City of Chicago gives a test for English proficiency, but where the applicant does not score high enough on the test, there is a system for further education before denial of the license. Such a system would seem to prevent the adverse impact that could occur when the Council imposes the English proficiency testing.

There have been cases that have observed that where there is a need to speak English at an acceptable level in order to effectively convey orders to handle a ship at sea, it has been held to be completely consistent with the purposes of Title VII of the 1964 Civil Rights Act even if an English-only practice seems to have a disparate impact along racial or ethnic lines. *Antonio v. Wards Cove Packaging Company*, 827 F.2d 439 (CA 9, 1989) vacated on other grounds cert denied, 99 L.Ed. 2d 503. That case dealt specifically with the dangers that could arise on a ship at sea if the members of the crew could not effectively and quickly communicate with each other in English. In our view the concerns of being able to communicate effectively with a cab driver fall somewhere between the situation presented in *Ward Cover Packing Company*, *supra*, (danger and safety) and mere convenience for a member of the public being able to arrive reasonably at a destination within the City of Milwaukee.

Addressing ourselves to the issue of implementation of this test, the City Clerk will have to develop a test which eliminates or at least minimizes its disparate impact upon ethnic minorities. While the council has not defined exactly what it means by "being able to write and speak the English language to the extent necessary to operate a public service vehicle. . . ." some effort will have to be made to develop such a standard. It is clear to us that a job analysis will have to be undertaken to determine what is the appropriate level of English knowledge that a driver applicant must possess, and then a test must be developed at that level. Such tests are usually


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developed by testing experts after studying the nature of the job duties and then developing the test for purposes of those who seek licensure as a taxicab driver. Such studies are usually expensive to develop and implement.

The second issue that must be kept in mind is that individuals who take the test and fail it must be tracked. They must be tracked to see if there is a disparate impact along lines of ethnicity or national origin. If so, modification may have to be made to that test so as to minimize such an observed disparate impact.

Very truly yours,


GRANT E. LANGLEY
City Attorney


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BDS:wt:100712

c: Ronald D. Leonhardt, City Clerk