Incremental Change and Transformational Governance:
A Case Study of the Promotion Testing Process for Firefighters in the City of

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Abstract

The recent U.S. Supreme Court ruling in Ricci v. DeStefano (2009) has raised a multitude of concerns about how cities develop and administer promotion tests for civil servants. The Ricci case involved the city of New Haven’s efforts to administer a promotion exam for firefighters in the city, with an explicit attempt to promote social equity in the upper reaches of the city’s fire department. Briefly, when no minority firefighters scored high enough on the promotion exam for the positions of Captain and Lieutenant, the city refused to certify the exam. White firefighters who passed the exam filed suit against the city claiming they had been discriminated against on the basis of their race. The High Court ruled against the City and for the white firefighters.

In light of the Ricci ruling, the purpose of this paper is to provide an in-depth review of the administrative process conducted by government officials of the City of New Haven with regard to the promotion testing process for firefighters. There are four main goals for this paper. The first aim is to provide a historical framework for the analysis; the second goal is to conduct an analysis of relevant literature and provide an account of the actual case. The third goal is to evaluate and elaborate on the concerns that arose from the case, and the fourth purpose of the study is to provide suggestions of how things could have been done differently.
In an attempt to make the City’s public workforce more diverse, a select group of public administrators, including the mayor, John DeStefano, engaged in an unconventional course rather than a deliberative process to create a fire department that was more representative of the current ethnic makeup of the City of New Haven. Many government programs are only modestly successful over the long term, are hard to evaluate on more than anecdotal evidence, and the public is the final jury on government policy outcomes. And, as a result, public administrators are often in a position to create policy that reflects political and economic realities. They have to constantly weigh the purposefulness of program inputs as well as the strength of program outputs. In addition to strong, evidence-based data and the presence of politically sensitive, good will interventions, transparency and deliberative evaluation is imperative for a meaningful policy process.

It is posited in this case study that while eliminating adverse and disparate impact from promotion testing is an urgent goal to create workplace diversity and representativeness, it can be accomplished through an incremental process. In a sense it has to be conducted this way because of the following three reasons:

1. Scientific findings in the area are incremental with several findings but no firm conclusions. In fact, over 60 years of rigorous study on the subject by the University of California have yielded statistically mixed results basically indicating that schools in lower and higher income areas continue to provide disparate preparation for tests.
2. Democracies change policies almost entirely through incremental changes, rather than in leaps and bounds (Lindblom, 1959). In principal every citizen has an equal say in our political and policy process. Because we have different perspectives and values, and because American citizens highly prize individualism, we support a participatory decision making process.

3. The public as a whole prefers homeostasis rather than crisis. Unless there is overwhelming, supportive public opinion for change, in general, the public prefers deliberation on an issue rather than a sudden shift in policy. While in this case, some administrators in New Haven thought that there was no time like a crisis to make a substantive change in promotion testing policy, there was no collective opinion on how this should be accomplished. Instead, a sudden reaction to the crisis provoked suspicion, alienation and resentment on the part of stakeholders and the general public. What was seen by the Mayor of New Haven as a representative and transformational move in a decision to not certify promotion test results, was instead perceived by others as an exploitive abuse of his personal power and privilege to make a change that he personally supported and possibly to burnish his image as a change maker. Whatever Mayor DeStefano's decision, his position would have been strengthened with both the courts and the various constituencies to which he was responding had he engaged in a deliberative process. As it was, he turned the case over to the City's Civil Service Board. Although the Board was divided and held hearings, given its political makeup, the outcome of these discussions was never really in doubt. The function of these hearings, then, was to bypass a genuinely deliberative process rather than to facilitate it. This process might have led to the same conclusion-- to reject the test. And given its
conservative makeup, the Supreme Court might still have found that the City was in violation of the law. Even so, the City's case would have been far stronger and it might have set a precedent for other cities to follow, allowing an incremental process to lead to a more representative city workforce.

Using a qualitative evaluation approach, a case study was conducted of the City of New Haven promotion policy decision making process for its firefighters in the context of the U.S. Supreme Court’s ruling in Ricci v. DeStefano (2009). Data was collected through interviews with a select group of administrators in New Haven, a review of testimony before the City’s Civil Service Board, and a review of related documents regarding the promotion testing of a group of classified civil servants in the city’s fire department in 2003.
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Chapter 1

Introduction

Many government programs are only modestly successful over the long term. Moreover, they are hard to evaluate on more than anecdotal evidence and the public is the final jury on government policy outcomes. Consequently, public administrators are often in a position to create policy that reflects political and economic realities. They have to constantly weigh the purposefulness of program inputs as well as the strength of program outputs. In addition to strong, evidence-based data and the presence of politically sensitive, good will interventions, transparency and deliberative evaluation is imperative for a meaningful policy process.

Public policy is more nuanced than it generally appears because it is created in a gradual, deliberate process in order to meet public, political and historical expectations and standards. On the other hand, government has much work to do in order to reduce inequalities in the public workforce. That means early and constant interventions so everyone has a chance to participate. Public entities also create a collaborative environment where individual skills can be integrated cooperatively to create solid policy. So, while public governance seeks to reform and modernize, it is simultaneously engaged in maintaining stability. Getting governance right is based on a pragmatic approach: an emphasis on what works in practice based on abstract theory. But, incremental governance can be transformational. This is because while government
entities are ensnared in crisis or preoccupied with tackling deep-rooted problems, they are also seeking to innovate and change.

Public sector decision makers continue to struggle to develop promotion testing policy that creates a representative, qualified and talented workforce and that meets government guidelines for equitable practices. In addition, research indicates that an incremental policy decision making process serves to create good policy within the context of a fairness narrative. But, what if an existing or new program is not producing the desired results? Should state and local officials immediately discard it? In the case of promotion testing policy, instead of creating a smart and concrete set of policy recommendations, what happens when administrators disregard an established promotion policy after this mutually agreed upon promotion process had already been implemented? Is the process sacrificed for immediate impact and possible political expediency? What are the consequences when ad hoc decision making contravenes previously established policy on promotion testing? How can a city rely on civil service exams to create diversity in the upper reaches of its government workforce without facing legal challenges?

These are some of the questions that arise from the policy and decision making processes of the City of New Haven, Connecticut in its efforts to diversify the upper levels of its fire department. In 2003, the New Haven Fire Department administered a promotion exam for lieutenant and captain. Out of 77 candidates taking the lieutenant exam, 19 were African American and 15 Latino. None of the African Americans or Latinos passed the exam. Forty-one applicants took the captain examination, of whom 8 were African American and 8 Latino. No African American and 2 Latinos (at least one
self-identified as white) passed. The city determined, given the statistical outcome, that the exam had an adverse impact on the African American and Latino candidates and, fearing litigation, scrapped it. Nineteen white firefighters and one white Latino firefighter filed suit against the city alleging discrimination under Title VII of the Civil Rights Act, and the Equal Protection Clause and the First Amendment of the U.S. Constitution. In the case, *Ricci v. DeStefano* (2009), both the federal district court and the U.S. Appeals Court for the Second Circuit ruled against Ricci and for the city. Ricci appealed to the High Court which ruled for the white firefighters (Ricucci, 2011).

This case study analyzes the chain of administrative decision making practices by city officials, human resources managers and legal practitioners that sought to avoid an anticipated violation of Title VII by declining to certify promotion exam results. In its efforts to promote racial diversity by declining to certify the exam results, these decision makers were sued by the predominantly white test takers who successfully passed the exam. The *Ricci* Court ultimately ordered the City of New Haven to certify the results exam. The High Court ruling was based on the legal precedent that non-certification being decided on racial results is a violation of Title VII’s disparate-impact provisions, regardless of which ethnic group the decision is being made on behalf of. The ruling of the Supreme Court indicated that an employer cannot use compliance with Title VII as justification for declining to certify test results.

Previous research findings regarding representative bureaucracy and policy making in the public sector indicate that variations in the structural characteristics of public organizations, bureaucratic role perceptions, and the political environment, influence the policy behavior of bureaucrats (Grissom, 2009). Two key questions
addressed in this research are: Did the City of New Haven’s Mayor John DeStefano’s policymaking processes regarding promotion testing of New Haven’s firefighters doom the policy and the outcome? Was Mayor DeStefano’s goal of creating a representative fire department achieved with this decision making process or would he have achieved the desired outcome had he instead used an incremental and deliberative decision making process to achieve this goal?

It is posited that while eliminating adverse and disparate impact from promotion testing is an urgent goal, it can be accomplished in an incremental process. In a sense it has to be conducted this way because of the following three reasons:

1. Scientific findings in the area is incremental with several findings but no firm conclusions. In fact, over 60 years of rigorous study on the subject by the University of California have yielded statistically mixed results basically indicating that schools in lower and higher income areas continue to provide disparate preparation for tests.

2. Democracies change policies almost entirely through incremental changes, rather than in leaps and bounds (Lindblom, 1959). In principal every citizen has an equal say in our political and policy process. Because we have different perspectives and values, and because American citizens highly prize individualism, we support a participatory decision making process.

3. The public as a whole prefers homeostasis rather than crisis. Unless there is overwhelming, supportive public opinion for change, in general, the public prefers deliberation on an issue rather than a sudden shift in policy. While in this case, some administrators in New Haven thought that there was no time like a crisis to make a substantive change in promotion testing policy, there was no collective opinion on how
Instead, a knee-jerk reaction to the crisis provoked suspicion, alienation and resentment on the part of stakeholders and the general public. What was seen by the Mayor of New Haven as a representative and transformational move in a decision to not certify promotion test results, was instead perceived by others as an exploitive abuse of his personal power and privilege to make a change that he personally supported and possibly to burnish his image as a change maker.

The case study relies on personal interviews and a review of related documents in order to identify the possible existence of patterns of administrative behavior in policy and decision making. It will also help to develop new hypotheses to address the issues examined here. According to Yin (2009: 63), this type of “research design enables the investigator to address more complicated research questions and collect a richer and stronger array of evidence than can be accomplished by any single method alone.” The case study interviews were conducted as “in-depth interviews” where the researcher asked “key respondents about the facts of the matter as well as their opinions about events.”

The next chapter provides a literature review. As will be seen, four streams of literature inform this research: Incrementalism, representativeness, organizational behavior, and test theory. In chapter 3, I present a fuller description of my research methods, followed by Chapter 4, which provides the history and background of promotion testing for firefighters in the City of New Haven. Chapter 5 presents a discussion of the lower courts’ and U.S. Supreme Court’s rulings in *Ricci*. 
Chapter 6 presents the research findings, and Chapter 7 presents an analysis of the decision making which led to the scrapping of the exam. The final chapter, Chapter 8, presents some conclusions and policy recommendations for cities seeking to promote diversity in their workforces within the context of civil service testing.
Chapter 2

Literature Review

There are four literature streams that inform this study: incrementalism, representativeness theory, organizational behavior, and test theory.

**Incrementalism**

According to general literature on policy making, there are considered to be four stages of the policy making decision process: agenda setting, alternative specification, policy choice, and implementation. Legal standards suggest that once the implementation occurs, i.e., once an exam is selected and given to a group of promotion candidates, the results of the exam are binding. The validity or legality of exams for promotion testing is considered during the agenda setting and alternative specification stages of the policy making process. Policy processes and outcomes in the public sector have consequences for multiple policy areas. As a result, public sector policy making tends to be incremental and path dependent. Decision makers often seek new input as well as consensus among legal, technocrat, political and interest groups during the policy creation process. The policy choice and implementation stages often occur long after a deliberative process has begun with appropriate stakeholders. This is typically the case for public sector policy making regarding promotions as well as broader issues such as equity, representativeness and political representation.

Theorists such as Wildavsky, Lindblom and others advanced the concept that policy and implementation are linked actions that are causal, reciprocal, and consistent
with political conditions of consensus and volatility (Wildavsky, 1973). Wildavsky’s studies of budget policy making revealed two types of reasoning among public officials in industrial societies: prudential reasoning and incremental reasoning due to the desire to maintain political authority and the complexity of the decision making involved, respectively. Officials may agree with a moral argument for a policy, but they all need to make a decision that the public finds acceptable, “Accordingly, by necessity they may have to work incrementally, continually assessing their political costs for implementation against their predictions of societal benefits and making appropriate adjustments” (Manzer, 1984: 587).

Lindblom proposed that public agencies, practitioners and policy outcomes are limited because political and legal restraints restrict their attention to relatively few values and relatively few alternative policies (Lindblom, 1959). According to the political science researcher, Paul Pierson (1993), “policies do create powerful packages of resources and incentives that influence the positions of interest groups, government elites, and individual social actors in politically consequential ways (p.610).” As a result, Pierson (1993: 613) goes on to explain that either because of the complexity of relationships and problems in the industrial society or variety of responses to policies in our society, “decision makers lean heavily on preexisting policy frameworks, adjusting only at the margins to accommodate distinctive features of new situations.”

Other current political scientists have suggested that public policies and political change are both the result of “political conflicts in which particular elements of national
cultural and ideological repertoires are mobilized and enacted into policy” (Lieberman, 2002: 709). However, the policies build upon rather than dismantle prior practices.

While policy outcomes are compromises they also can be inconsistent because all interest groups don’t have equal access to policy makers. Judging by the success of lobbying groups, the scope of political and private influence on policy outcomes is at times disguised by deceptive behavior and only exposed by litigation. Other times, it is quite blatant and certainly doesn’t reflect the rhetoric about transparency and equitable decision making. For example, Michael Hayes in his book, *The Limits of Policy Change* (2001), discusses various significant legislative acts that reflect the inequities and unrepresentativeness of decision making by public officials. With regard to race politics and policies, Hayes notes that the Civil Rights Act of 1964 evolved from mass public support for some kind of civil rights law. Among decision makers, however, serious disagreements remained within the civil rights policy community on issues such as public accommodations and equal employment opportunity. A coalition of liberals and conservatives had to be created in order to pass any bill. As an example of incremental change even with powerful interest group, media and public attention and support for policy change, as Hayes (2001: 96):

> In the final analysis, the 1964 Act represented an important breakthrough in federal authority…. On a wide variety of important specifics, however, the law reflected the classic tapering down from the ideal to the acceptable-a process that was conducted, of necessity, almost entirely out of public view.
Currently, as cities become more populated by non-white ethnic groups, we are seeing racial politics played out to the benefit of the ethnic groups on one level, but who really holds the keys to the city remains to be determined. The case of the City of New Haven and its firefighters highlights this tug of war between power, politics, and equitable practices in the public policy sector.

As the theorist Lindblom (1959) notes in his essay on “The Science of Muddling Through,” government creates policy that is not comprehensive but is instead a response to a wide variety of interests called “mutual adjustment.” The response distributes resources to resolve problems that have been neglected at one point in the decision processes which become central at another point. This incremental process is appropriate for mutual adjustment among interest groups, “[f]or when decision are only incremental-closely related to known policies, it is easier for one group to anticipate the kind of moves another might make and easier too for it to make correction for injury already accomplished” (Lindblom, 1959: 181).
For example, the following diagram graphically depicts one approach to the policy implementation process:

**Representativeness Theory**

According to Herbert Kaufman (1956), the quest for representativeness began in the colonial period with the struggle between the colonists and the British for local political control. Kaufman suggests that the American government system was originally designed to fulfill three values; the first among them is representativeness. During this period among the three branches of government, the legislature held the most significant administrative power, “The enthronement of the legislature was one of the two major tangible indications of the value placed on representativeness; the other was the rather uncritical faith in the electoral principle” (Kaufman, 1956: 1059). Kaufman adds that the providers and beneficiaries of representativeness are engaged in administrative power
struggles due to political power shifts between the branches of government and the political influence of the “urban-labor-liberal entente” (p. 1073).

A more contemporary treatment of representativeness can be seen in the normative theory of representative bureaucracy. This construct theorizes that there are two types of representation: passive, where the bureaucracy has the same demographic origins as the population it serves, and active, where bureaucrats act on behalf of their counterparts in the population (Riccucci, 1997). Previous research regarding representative bureaucracy indicates that factors such as variations in the structural characteristics of public organizations, bureaucratic role perceptions, and the political environment, influence the organizational behavior of bureaucrats (Grissom, 2009). Researchers have identified factors that can contribute to active, representative organizational behavior. For example, depth of agency representation by minority bureaucrats (Riccucci, 1997), regional demographics and the degree of bureaucratic identification with the population (Grissom, 2009), and attitude congruence among bureaucrats and the represented population (Bradbury, 2007) all likely contribute to organizational behavior and policy outcomes in varying degrees depending on the specificities of each public agency policy, as well as the individuals being represented.

Bureaucratic organizations, processes and values have been evaluated regarding representativeness in recent studies of school systems and student performance. Kenneth Meier and Laurence O’Toole’s research of Texas school districts and school performance of Latino students suggests that front line workers (i.e., teachers) of Latino descent have a
direct, positive influence on student performance. However, there were other indirect influences on performance from other Latino policy makers including board members, politicians, and student parents. They suggest that focusing on teachers alone “would omit, the indirect influence flowing through the system…and might seem to support the invalid inference that political and administrative levels are unimportant for performance.” Governance, diverse workforces, bureaucratic and organizational values all characterizes representative bureaucracy (Meier, 2004). In another study of the Texas school district data set, O’Toole and Meier (2008) analyzed a combination of managerial efforts, i.e., independent variables such as personnel constancy, managerial networking, and a measure of this organization’s effort to buffer environmental influences from internal operations; control variables, i.e., class size, teacher experience, percentage of state aid, percentage of low-income and ethnic students; and their impact on student test exam pass rates, the dependent variable. Of the 4,114 cases analyzed, the results revealed that “buffering” can help improve test pass rate performance. According to O’Toole and Meyer, “these control variables rule out many alternative explanations for performance fluctuations such as socio-economic differences among the districts or personnel management activities…..public organizations can benefit both from protecting their operations internally—for instance, by stabilizing their personnel in front-line and managerial positions, and also by insulating internal operations from externally generated perturbations.(p. 952).” These findings suggest that more research should be conducted to examine the relationship between managerial influences and what public organizations actually do.
Research on diversity—as it relates to representativeness—in the workplace suggests that employees with a wide variety of backgrounds help agencies remain competitive, retain workers, and improve customer service. According to a report published by the International Public Management Association for Human Resources, *Personnel Practices: Diversity in the Workplace Policies*, 2006, “In the public sector, customer service has an even greater meaning, because the services provided are often critical to the well being of the community, such as public safety. Public agencies who employees have backgrounds similar to the citizens are able to serve their customers better (p. 5).” The report also provides details on several public agencies that have instituted diversity and affirmative action programs that include actively reviewing the qualifications of employees that are being considered for promotion to ensure that women and minorities are being treated equitably. Diversity policies in the states of Colorado, Oklahoma, Washington, Wisconsin and the cities of Los Angeles and Ft. Collins, Colorado are identified in the report to provide benchmarks for policy making.

For example, in a 1983 affirmative action plan enacted in the City of St. Petersburg, Florida, workforce utilization analyses are conducted quarterly. If underutilization exists, the city’s affirmative action plan requires enforcement of the city’s ‘1 for 1’ policy. This policy requires that at least one member of the protected class must be hired/promoted for every hire/promotion of a non-protected class member, assuming the protected class candidates are available. Once the city’s goal has been achieved, the ‘1 for 1’ policy ceases. In 2006, the City noted that upper management had become more diverse, with minority female representation in the job category,
Professional, increasing from 1.7% to 7.9%. Representation for minority males in the job category, Officials and Administrators, had increased from 4.1% to 9.7%. The report doesn’t indicate, however, the time period for and under what circumstances (i.e., a lawsuit) these increases in representation occurred (see, www.ipma-hr.org/content.cfm?pageid=297). In addition, affirmative action/diversity goals are implemented city-wide and in individual agencies.

Organizational Behavior

Philip Selznick suggested in 1943 that organizations and organizational behavior can account for “the special case of bureaucratic behavior.” He hypothesized three purposes for organization:

1. Every organization creates an informal structure;
2. In every organization, the goals of the organization are modified (abandoned, deflected, or elaborated) by processes within, and
3. The process of modification is effected through the informal structure (Selznick, 1943: 47).

He further suggests that the bureaucrat in an organization eventually responds to established rules for the common good of the organization rather than professed ideals (p. 49). And, “his interest in the ultimate purpose of the organization, or in the common good, becomes subordinate to his preoccupation with the problems involved in the
maintenance of his post” (Selznick, 1943: 52). The bureaucrat, attempting to maintain power, to remain neutral to corrupting outside influence, and to fit into a formal, hierarchical, administrative structure, will because of the series of problems that the bureaucrat must face, his action in the name of the group, that is, that activity carried on to further its professional purposes, comes to have more and more a chiefly internal relevance. Actions are taken, policies adopted, with an eye more to the effect of the action or policy on the power-relations inside the organization than to the achievement of its professed goals (Selznick, 1943: 52).

Charles Perrow’s 1986 *Complex Organizations* explains Max Weber’s rational-legal bureaucracy theories as providing the mechanisms for control over performance of individuals as well as the means for coordinating roles to prevent them from interfering with each other. Perrow similarly suggests that organizations keep employees in line and eventually create the ideal organizational worker by controlling organizational decision making and the flow of information to make these decisions: 1. Direct, obtrusive controls with regulations and rules; 2. Somewhat unobtrusive or bureaucratic ones such as hierarchy and specialization; and 3. Fully unobtrusive ones such as control of cognitive premises underlying action (Perrow, 1986: 119-156).

In the late 1930s, Chester Barnard was one of the first theorists to propose that humans and organizations are innately cooperative systems. In other words, “because organizations are cooperative systems, people cooperate in organizations” (Perrow, 1986: 65). This may be a straightforward explanation of public and private sector administrative behavior; organizational behavior is tradition bound and routine, and not
nearly as complex as the environment in which the organization operate. Barnard, according to Perrow, suggests that the organization is part of much larger interconnected universe of other organizations that survive because of cooperation. As Barnard envisions, employees are a part of “the environment of the organization, part of a larger cooperative system that includes the organization…organizational actions are non-personal in character, even executive decisions do not reflect personal choice. It is because the activities of humans are coordinated to make a system” (Perrow, 1986: 66).

Barnard, Weber and Perrow propose that the employee who successfully becomes the ideal organizational prototype is duly rewarded with promotions based on expertise, performance, and specialized training. Conversely, it is precisely the constant drive by organizations to keep the system afloat, maintain the status quo and fear of loss of power and control that prevents real cooperation and coordination among organizations. Internal values and norms rarely change and few organizations integrate the complex environment on a timely basis. Reactions to social legislation, community conflict and even economic conditions are crisis driven. The lack of proactive information gathering subsequently prevents substantial decision making and enables the status quo.

Promotions may naturally result from organizational restructuring, such as employee layoffs or organizational flattening. Individuals also may choose not to take advantage of promotional opportunities because of lack of motivation to do so. A recent study of a group of 326 mid-western metropolitan police officers, who were eligible to participate in a promotion process, revealed that only 65 officers actually took the promotion exam (Whetstone, 2001).
The organizational reasons that were cited by this study’s survey of eligible officers as to why they didn’t take the exam included a reported “universal distrust of the promotional process and departmental management.” Specifically, 53 whites and 12 minority candidates said that they didn’t take the exam because of an unfair test process, 44 white and 18 minority candidates replied that there was a biased administration, 43 white and 10 minority candidates responded that there weren’t enough openings, 36 white and 4 minority candidates said that there was no encouragement, 24 white and 9 minority candidates said that there was no test prep help, 11 white and 9 minority candidates said that the exam was in disfavor, and 8 whites and no minority candidates said that there was no officer respect for the promotional process (Whetstone, 2001: 154).

Test Theory

The University of California educational system working with state policy makers have incrementally adjusted their admission standards repeatedly over the years in order to create a more diverse and representative student body. In 2006, The Board of Admission and Relations with Schools of the University of California’s Academic Senate (BOARS) recommended the addition of admissions test scores to the University’s eligibility requirements. The use of university specific admissions tests have been reconsidered on several occasions and the specific role that test scores play in determining eligibility has been adjusted. The UC educational system has engaged in a series of modifications to its admission standards since the 1960s in order to identify the top 12.5% statewide pool of California high school graduates as mandated by the state’s Master Plan for Higher Education. UC distinguishes between “eligibility” for the UC
system as a whole and “admission selection” at particular campuses. The use of an Eligibility Index is currently used for admission selection. The Index incorporates both the SATI (ACT) and SATII scores to create a minimum test score to be combined with every high school GPA score. UC is currently considering a school admissions test to possibly replace its current admission standard. The history of the process and this current new admission test will be presented in the analysis section of this paper. In a comparative analysis of practical intelligence tests and intelligence tests used to predict job performance, the researchers Sternberg and Wagner (1993) conducted multiple studies of the concept, “tacit knowledge,” or the practical know how one needs for success on the job. The results of their studies suggest that “tacit knowledge” was a better predictor of job performance than IQ, best single predictor of simulation performance, and that it is “best taught through modeling and simulation, rather than through direct instruction” (Sternberg and Wagner, 1993: 3). Findings from a study included in the Journal of Negro Education (1990), noted that “after seventy years of testing hundreds of millions of recruits and service personnel, military manpower experts are still asking questions that strike some as fundamental. That the military is presently willing to review its testing practices and policies is encouraging…In essence, the military is admitting that it does not know if test scores reflect real differences in ability” (Gifford, 1990: 68). Researchers studying the relationship between intelligence and job performance did report that “if an employer were to use only intelligence tests and select the highest scoring applicant for each job, training results would be predicted well regardless of the job, and overall performance from the employees selected would be maximized (Ree and Earles, 1992: page 87).”
A recent study on bias in intelligence testing and variance in test scores related to socio economic status was conducted by a graduate student at Penn State Graduate School, Department of Education. The 2006 PhD thesis paper entitled, “Predicting Achievement For Students From Low Socioeconomic Backgrounds Using Intelligence Tests,” explored the extent to which the Weschler Intelligence Scale for Children (WISC-III, Weschler, 1991a) and the Universal Nonverbal Intelligence Test (UNIT; Bracken & McCallum, 1998a) predicted achievement for children from low socio-economic backgrounds. Achievement was measured by scores on the WJ-III Broad Reading and Broad Mathematics clusters. The stated purpose of the study was to identify whether a non-traditional, non-verbal test of intelligence such as the UNIT improves prediction of achievement and academic success for this particular population. The Unit had been formulated with five core concepts: a. a language free test, b. an intelligence test with multiple indexes of ability, c. minimizes the impact of previously acquired knowledge (crystallized knowledge); d. minimal emphasis on speeded performance, e. varied response modes which makes the test more motivating.

The study attempted to further substantiate findings mentioned in literature on “culturally neutral testing” including is socioeconomic status a more important factor( than race) when considering bias in intelligence testing? Literature on this subject suggests that “ for every culture, there is a cultural frame of reference that referred to the correct or ideal way to behave within the culture (Ogbu, 1984),” and, “ intelligence tests are artifacts of culture that because a particular culture may not be represented equally in
every household and community in a heterogeneous society, subcultures must vary in ways that inevitably affect scores on intelligence tests (Mercer, 1984).” The research results in this study found no statistical significance for the claim that socio economic status had a significant effect on student performance on either the WISC-III or UNIT when predicting reading or math achievement. More significantly for this study, both the WISC-III and the UNIT are statistically significant predictors of achievement for children from the study population. This study among other studies conducted by a variety of researchers in other fields, attempt to identify “culturally neutral tests” or culturally neutral promotion tests that promote on ability and don’t penalize minority, low income or cultures that are different from those individuals (i.e. academics, statisticians) creating the tests.

Which individual job applicant’s personal, familial, racial, economic, cultural, physical, and educational attributes predicts future success in a particular job are still being debated. The persistent achievement gap between minorities and whites is also often attributed to genetic and environmental influences but with statistical data that neither supports nor refutes these broad generalizations. More recent research indicates that differences in standardized tests for intelligence may be a result of differences in pre-test availability of information rather than cognitive ability alone. A series of experiments conducted by Fagan and Holland in 2002 and 2005 suggest that differences between African Americans and Whites for items tested on an intelligence test can be eliminated with equal exposure to pretest information. In a sample of 925 young adult participants (620 White Americans and 305 African Americans), representative of the
“young adult” population in terms of age and educational level, Fagan and Holland’s research results suggest that

1. The results…support the null hypothesis that there are no differences between African-Americans and Whites in the processing of equally available information. In so doing, the present results, theoretically and experimentally based, point to an environmental rather than to a genetic source for racial differences in IQ;

2. Multiple regression analyses revealed that that there are two influences on IQ, the influence of processing ability( intelligence) and the degree to which exposure to the information to be processed has been provided to individuals. In so doing, the analysis confirms the theoretical view that an IQ score can have multiple determinants, and

3. The theory which guides the present study assumes that intelligence is information processing ability and that the IQ score is a measure of knowledge, knowledge gained by processing information. Providing a child with relevant information as soon as possible and as clearly as possible, results in more knowledge. Delay and failure to provide knowledge will result in a poor knowledge base and, hence, a lower IQ score (Fagan and Holland, 2002: 327-331).

Research focusing more specifically on language and its use in communication of social relationships and activities suggest that it is culturally bound. James Paul Gee’s book, *An Introduction to Discourse Analysis* (2005), focuses broadly on human behavior,
and more specifically on discourse models and the language that constitutes these models. According to Gee, “We learn then from experiences we have had but, crucially, as these experiences are shaped and normed by the social and cultural groups to which they belong (p.71).” In addition, “Discourse models are linked to simulations in our minds…but these models are not just mental… In many cases, individuals do not know all the elements of a Discourse model, but get parts of it from books, media, or other people as they need to know more (p. 76).” Therefore, language can be simultaneously inclusive, exclusive as it is derived from the groups or cultures we belong to and ultimately influences the distribution of goods and services, “we use language to convey a perspective on the nature of the distribution of social goods, that is, to build a perspective on social goods (p. 100).” Gee concludes that “Language, then, always simultaneously reflects and constructs the situation or context in which it is used…the partiality and inconsistency of Discourse models reflects the fact that we have all had a great many diverse and conflicting experiences, we all belong to different, sometimes conflicting groups; and we are influenced by a wide array of groups, texts, institutions, and media…(p.85).”

In accordance with these research findings, the ultimate goal of creating truly representative governmental entities via culturally neutral policies and tests appears to be a rather daunting task. It is up to the administrator, then, to build an exam or promotional test that reflects the task being measured with relevant text and ideas. The exam should contain the communication material that is specific to the position as opposed to the language or discourse models of the individuals taking the exam, and all those taking the
exams should be prepped on the job specific communication material so as to eliminate
the influence of disparate factors. As tests relate to human resource decision making,
there are benefits and costs as well as “fairness” considerations for the public
agency/department. Human resource management is at the cross roads between
organizational behavior, representativeness and testing theory. Most state and local
governments participate in extensive human resource planning which consists of the
integration of employee development goals, budget and economic constraints, and
overarching state/local government initiatives. The use of standardized tests to make an
employment decision can be the most efficient and consistent means used to make
employee selection decision for promotion, but can have a negative impact on worker
diversity. When designing and using an assessment program, human resource
professionals consider how different types of people perform on different types of tests
(i.e., difficulty on standardized tests may be due to different levels of mastery of the
English language).

The benefits of using standardized tests in employment decisions consist of:
employment tests are an easier and cost efficient way to determine the candidate that
meets the job requirements; testing reduces the number of wrong choices; the costs of
making the wrong decision are high; the job requires in-depth knowledge acquired over a
long period of time or specific personality traits; standardized tests gather the same
information in a similar way on all individuals tested; there are a lot of applicants for a
position and this is the most timely and cost efficient method for gathering information.
Reasons for not using standardized testing in employment decision making include: costs, the test would not improve the quality of the current decision making process, and practical constraints such as the fear of legal action. Employers can be sued and the internal test validity and reliability examined in a court of law if it appears that discriminatory practices were used in the employment decision making process.

According to the SIOPs Principles for the Validation of Employee Selection Procedures (2003), adverse impact is a result of the selection rate of a given demographic group, i.e., females vs. males, whites vs. blacks, being substantially lower than the selection rate of the majority group. While any selection procedure may show score differences that result in exclusionary effects upon a group, some types of tests, i.e., physical or cognitive tests, are more likely to show significant score differences. Despite these differences, these tests can be accurate predictors of job performance and other outcomes of interest for certain jobs. Before using a test, it is important to anticipate whether or not adverse impact might occur and to consider ways that minimize any exclusionary effects while preserving the ability to make valid inferences based on test scores. If adverse impact does occur, it is important to demonstrate that the inferences made based on test scores are appropriate. U.S. case law and guidelines have clearly established that well-developed and validated tests can withstand legal scrutiny (p.2). Validity refers to the content of the test to demonstrate the job-relatedness of the exam. Validity evidence refers to the accuracy of the inferences made based on test results, i.e., a higher test score indicates that an employee will be a better performer. Examples
include documentation of links between test performance and job outcomes, or, content of the test and the requirements such as knowledge, skills, and ability “ksa” of the job.

Government agency hiring and promotion practices are based on a merit system which uses a civil service examination process to assess the level of qualifications of candidates. Relative merit is often defined in terms of to do the job, so the need for a more content oriented exam. Because public agencies follow a rigid job classification system, jobs are specifically and narrowly defined. The civil service exams may consist of one or more tests, such as multiple-choice tests, essays, interviews, physical ability, and performance tests. Some tests are evaluated on a pass/fail basis. One or more tests can be scored to yield percentage scores to permit ranking of candidates. If more than one test is used, the scores can be weighted, and then combined to yield an overall score. Typically, three candidates with the top three scores are selected for a job. Because testing is being conducted in the public sector, all aspects of the testing process are open for public review and litigation.

The most often cited reasons in human resource and legal studies for promotion testing program reevaluation include: the need to ensure that tests are valid measures of workforce skills, that tests are measuring what is actually needed to do the job, and that the test being used does not result in disparate impact. In addition, agency workforce planning practices typically includes an assessment to determine whether future skill needs of the government agency or department will be met by promoting and/or training current employees. Staffing decisions such as promotions are important to retain
competent employees to provide high-quality programs and service delivery. This is an especially significant issue in the current, difficult economic environment where public sector layoffs, hiring freezes and reduced work schedules are asking government workers to do more with less. Proactive human resource departments engage in ongoing planning and decision making to identify and develop needed employees for key positions. The use of testing for staffing decisions should be done after reviewing the key job requirements and determining the best means of assessing these requirements. From a legal standpoint, a test is defined as any method used to make an employment decision.

The increasing use of assessment centers for promotion testing by public sector agencies has caused some concern that these centers also operate autonomously and without compliance with guidelines established by human resource personnel. The primary concerns regarding use of assessment centers is how tests are integrated to include all relevant data on the candidates such as prior work experience, performance appraisal ratings, background interview data, and job knowledge tests and panel interview results. Assessment centers typically will initially conduct a job analysis to determine the relevance of a written examination or a simulation test for a particular job title. Candidate dimensions that are assessed on a test can include written and oral communication, problem solving, customer service, conflict resolution, leadership/teamwork. In a study of an assessment center conducted for the promotion of candidates into the position of Sergeant in the city of Dallas, the cost of running the assessment center was more expensive than panel interviews, but the assessment center
yielded far more information. In addition, the center’s economic utility increased in the long run as compared to panel interviews (Thornton, 2006).

**Bridging Testing and Representativeness: Examples and Experiences**

Recognizing the increasing diversity of voting constituents in cities and states, elected officials and civil servants have been making efforts to increase the representativeness of government workforces. Many states such as New Jersey, have made strides to reform civil service tests, increased minority hiring and promotion, and attempted to meet public expectations of expertise, customer service and representativeness. Beginning in the 1990s, New Jersey legislatively enacted The New Jersey State Employment and Training Commission (SETC). The role of the commission, among other things, was to improve New Jersey’s service delivery system and to promote diversity and parity in the workplace (www.njsetc.net ). In 1974, minorities made up 19 percent of the State Government workforce, in 2008 they make up 41 percent of the workforce. Females account for 55.8 percent of the workforce in 2008, which increased from 46.2 in 1974 (State Government Workforce Profile, 2008). New Jersey has also moved towards promoting its government employees on the basis of a formal test, rather than the opaque “qualifications and experience” measure that substitutes for a formal test.

One example of a civil service reform initiative, The Civil Service Oversight Public Hearing held on October 27, 1988, attempted to address concerns regarding
revamping the NJ Department of Personnel’s Title Consolidation Project in response to the passage of the NJ Civil Service Reform Act in 1986. The point of the Project as described here was to encourage job title consolidation at the state, county and local level (in 1987 at the state, county and local level there were total of 300 jurisdictions, 180,000 Civil Service Workers, 12,000 titles, and 37 different occupational groups). The consolidation process consisted of DOP attempting to consolidate between 6,000 to 9,000 existing job titles to create new, generic job titles. The DOP intended to develop 37 questionnaires to be administered to up to 100,000 state and local government workers. These questionnaires would then be used to develop a data base to create work profiles, and where profiles match titles would be consolidated (p. 2x). The Civil Service Reform Act would intentionally affect the current classification system including job descriptions, exams, and promotional opportunities.

The union representing state workers, the Communications Workers of America (CWA), filed several requests for a review of the title consolidation plan out of concern that rules and regulations were being adopted that violate the existing collective bargaining agreement. The Union also filed an Unfair Labor Practice charge against the State for their refusal to include the Union in the consolidation work process. Subsequently, the legislature convened a hearing regarding protests from the CWA leadership and several state employees over how the process was being conducted and problems with the plan. Among the problems identified by those testifying included:
1. The Department of Personnel (DOP) did not provide the Union or any other interested authority with information on how they would conduct job documentation, job evaluation, and wage translation in the title consolidation process.

2. State employees have a three year contract which entitles them to layoff protection, i.e., if people are to be laid off, it is by department—not across the board by position; employees have bumping rights based on seniority to go to another institution in the department; the Merit Systems Board is required to adopt rules for preventive actions that lessens the possibility of a layoff or demotion of permanent employees. The new layoff rules being proposed by the Board do not provide new pre-layoff planning.

3. Civil Service now seems to be coming in the middle of the contract and wiping out rights previously negotiated with the CWA including downgrading wages, seniority rights and eliminating alternative layoff measures.

4. The new civil service reform act charges the new merit system board and the commissioner of personnel to write new regulations that are not being fully vetted by the employees and their union and possibly could be in violation of the collective bargaining agreement currently in place.

5. With regard to promotional testing, the examination, appeal process and the retroactiveness of the new regulations are unspecified. In addition, employees claimed that the new generic testing procedures are unfair and unreasonable because they do not really test for aptitude or competence to a specific job (knowledge, skills and abilities-ksa), duties and responsibilities, but instead test in
some general way. According to a commissioner questioned in the hearing, generic testing is widely used in merit system types of agencies because “it added an additional dimension by saying that in those situations where you had particular basic level skills tested at one level, there was not necessarily a requirement or should not be a requirement to retest those same basic skills at the next level or higher levels. What this did was develop another form of generalized test, which essentially said, only test those skills at the higher levels which have not been previously assessed or tested for (p.71). In response, a representative of the CWA pointed out that: (a) the development and giving of tests should be relative to the job in question, and (b) with job consolidation, there will be more generic testing because along with the rewriting of every person’s job spec, there will be generated a new title salary level and an associated test that will assess basic skills rather than skills learned on the job or more advanced skills associated with the work requirements (p.73).

6. Specifically, for example, one auditor with 10 plus years of experience working for the State was part of a previous reclassification process and in that process her department was reorganized, and because there was a disparity between her new title and the work she was doing she was given a generic test of basic skills and knowledge. She was subsequently demoted a title but continued to do the same auditing work as before the entire process was begun.

7. Under the general provisions of the proposed regulations, it is the public policy of the State to select and advance employees on the basis of their relative knowledge, skills and abilities (ksa). Appointments and promotions in the Civil
Service are to made according to merit and fitness based on competitive exam. However, as the Union pointed out, the State employs a number of workers that are special service and provisional pending open-competitive and promotional exams. In addition, there was an attempted reallocation of titles to non-competitive positions where workers are not selected based on their “relative knowledge, skills and abilities, but selected based on their basic qualifications—there is no ranking and no competitive exam (p.18).

Alternatively, The Management Test Battery has been used by state government in different variations in states including New Jersey, New York and Massachusetts. The Battery has been used by these states over the last five years at the state and municipal level for the promotion of supervisors and managers, in all departments and in all work capacities. The states’ civil service commission oversees The Battery. The purpose for the test is not only to provide a valid and reliable test, and equitable promotion process, but also to identify the best candidates for promotion to supervisor and management level positions. In some cases, The Battery is used in combination with a technical skill test for promotion decisions. Prior to the use of The Battery, most promotion decisions were based on qualifications and seniority. The concepts of qualifications and seniority, and, the weighting of each factor in importance for promotion decision making varied by department and candidate under consideration for promotion. As a remedy, The Battery test questions all concern issues, tasks, and situations, etc., associated with a fictitious situation, and, no special knowledge regarding the work of this fictitious organization is required to advance. Candidates are provided a suggested reading list that can be
purchased by the individual taking the test. The major competency areas tested are those areas considered important for a manager to succeed in a variety of public service positions. These competency areas include: problem solving, leadership, decision making, interpersonal skill, human resource management, communication, team building, conflict management and process improvement. A candidate’s test score is banked for up to two years and can be used for future job announcements (www.state.nj.us/csc/jobs).

Steps taken by human resource administrators towards more representative government seem to have fallen short, as exemplified by the recent lawsuit filed by the Justice Department in January 2010 alleging that New Jersey’s Written Civil Service Examination for Promotion to Police Sergeant discriminates against non–white officers. The complaint suggests that New Jersey’s use of the promotion examination to promote police sergeants violates Title VII because the state has not demonstrated that its pass/fail used of the examination or its certification of candidates in descending rank-order to local jurisdictions is job related and consistent with business necessity. New Jersey certifies candidates for promotion to police sergeant in descending rank order based primarily upon each candidate’s written examination score. According to the complaint, New Jersey administers the written examination as part of its police sergeant promotional process for local jurisdictions that participate in its civil service system. Police officers in participating local jurisdictions cannot be considered for promotion to police sergeant unless they take and pass the written examination. Currently, 18 of New Jersey’s 20 largest cities and 20 of New Jersey’s 21 counties participate in the state’s civil service system.
Biases that have been documented in research on standardized testing, organizational behavior and representativeness, have likely yielded some practical changes in public sector promotional process. In addition, many public sector agencies have attempted to create diversity/ inclusiveness personnel policies and procedures. However, are these token or substantive procedural changes? A federal court ruled in July 2009, United States, et al. v City of New York, that the plaintiffs—the Federal Government and the Vulcan Society representing Hispanic and black fire fighter candidates—rightfully sued the City of New York for using examinations that had an adverse impact on black and Hispanic candidates. According to Title VII, civil service examinations must test the relevant knowledge, skills, and abilities that will determine which applicants will best perform their public duties and the test cannot adversely affect minority groups. Between the years 1999 to 2007, the New York City Fire Department “used written examinations with discriminatory effects and little relationship to the job of a firefighter to select more than 5,300 candidates for admission to the New York City Fire Academy…Today the courts holds that New York City’s reliance on these examinations constitutes employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (United States, et al. v City of New York, p.1).”

The governing case in this Circuit for assessing the validity of employment tests is based on a case involving a test administered by the City of New York in 1979 for applicants for positions in the New York City Police Department. In this case the court established that the city should, based on EEOC guidelines for test validation:
“determine the content validity of an employment test, which is flexible enough to encompass concepts of construct validity:

1. the test makers must have conducted a suitable job analysis;
2. they must have used reasonable competence in constructing the test itself;
3. the content of the test must be related to the content of the job;
4. the content of the test must be representative of the content of the job;
5. and there must be a scoring system that usefully selects from among the applicants those who can better perform the job” (United States, et al. v City of New York, p.52).

Therefore, the basic question was whether the examinations used by the City selected candidates who would be better firefighters, and more specifically, whether the City had met the detailed requirements of test validation as previously noted.

The presiding judge, United States District Judge Nicholas G. Garaufis, ruled in favor of the plaintiffs, stating that “In its defense, the City failed to raise a triable issue that this disparate impact was a result of business necessity; failed to take steps to ensure that the reading level of the examinations was appropriate it has failed to test for various recognized important abilities of a firefighter; it has failed to test for abilities needed upon entry into the Academy, rather than abilities to be learned on the job; it has failed to demonstrate that the examinations it administered actually tested the abilities it intended to test; the City has imposed arbitrary pass/fail scores, that are unrelated to the qualifications for the job of entry-level firefighter, and has constructed eligibility lists based on distinctions in test scores that are unrelated to corresponding differences in the
qualifications of the firefighter candidates, and,…the court concludes that the City improperly relied upon these poorly constructed examinations in the face of a disparate impact upon minority candidates” (p. 92).

The ruling does not mention anecdotal evidence that cheating on promotion tests is so prevalent in police and fire departments that human resource officials must change the exams each year to provide a fair testing process. As a result, officials are reluctant to invest too much money in alternative tests because promotion tests have be changed frequently, often annually, to reduce the likelihood of cheating among test takers and subsequently faulty promotions.
Chapter 3

Research Methods

This case study, including interviews and analysis of related documents, enabled the identification of relationships to determine if patterns of administrative behavior existed, and to test theories of public sector behavior, and develop new hypotheses (Yin, 2009). According to Yin, “The research design enables the investigator to address more complicated research questions and collect a richer and stronger array of evidence than can be accomplished by any single method alone” (Yin, 2009: 63). The case study interviews were conducted as “in-depth interviews” where the researcher “asks key respondents about the facts of the matter as well as their opinions about events. In some situations, you may even ask the interviewee to propose his or her own insights into certain occurrences and may use such propositions as the basis for further inquiry. The interviewee also can suggest other persons for you to interview, as well as other sources of evidence” (Yin, 2009: 107). Similar to Creswell’s (2009: 185) work, the data gathered were analyzed as seen in Figure 3.1 below.
Figure 3.1. Process for Conducting Research.
Data Sources and Gathering

The data gathering process addressed the theories previously discussed with regard to how the policy process occurs when creating promotion testing policy in the public sector. Data was collected to more closely examine the policy making process and to answer the questions identified for this case study. In particular, Did John DeStefano’s ambiguous policy- and decision-making process regarding promotion testing of New Haven’s Firefighters doom the policy and the outcome? Was DeStefano’s goal of creating a representative fire department achieved with this decision making process or would he have achieved the desired outcome had he instead used an incremental decision making process to achieve this goal? In order to answer these questions, data had to be collected that address these general policy creation areas:

1. What was the history of the promotion policy for firefighters in New Haven?
2. Was there political, public and practitioner consensus on policy change during the four stages of policy making process?
   - (a) Agenda setting
   - (b) Alternative specification
   - (c) Policy choice
   - (d) Implementation
3. What was the degree of change from previous promotion policy?
4. Was there isolation of policy makers in decision making process from other bureaucrats, interest groups, politicians and the general public during the proposed policy change?

5. Was there general political consensus or volatility during the stages of the proposed policy change?

An important source of data was the verbatim proceedings of the City of New Haven Civil Service Board regarding the Fire Captain and Fire Lieutenant Promotional Examinations (see Appendix A). The Civil Service Board is an independent five-member organ of the City that administers the City’s civil service employment system, including by supervising the process of competitive examinations and reviewing their results before certifying lists of eligible candidates. The Board held five hearings over a period of two months to consider whether to certify the test results for Captain and Lieutenant. The verbatim questions and responses during the proceedings are all public information obtained via the state’s open records act. All of the meetings were public, and the Board was given the authority to make the ultimate decision regarding test certification. One of the five Board members, the only African-American on the Board, did not participate in the final vote. The Board heard testimony from multiple sources on all sides of the issue.

Interview Participants

Participants in the interviews and the verbatim proceedings included:

- The City’s then-Corporation Counsel, Thomas Ude;
• The current Corporation Counsel, Victor A. Bolden;

• The City’s then- Director of Personnel, Tina Burgett;

• The current City’s head firefighter union official, Pat Egan;

• The current chair of the City’s civil service board, Jimmy Segaloff, and

• The then-Director of Planning and recently retired administrator with the City of New Haven, Brian McGrath.
Chapter 4

Promotion Testing in the City of New Haven: Background and History

The case study of the promotion practices for the firefighter civil servants in the City of New Haven and the ruling of the United States Supreme Court in Ricci v. DeStefano (2009) exposed ongoing technical and philosophical shortcomings of promotion testing for firefighters in New Haven. The City, under the leadership of Mayor John DeStefano, Jr. has consistently hired highly qualified and representative administrators to run its several city agencies and departments. The current City workforce, typical of most city workforces, is composed of a diverse group of civil servants and union members, with some political appointees. Mayor DeStefano Jr. is a career mayor and the son of a top political official from New Haven. Mayor DeStefano rose through the ranks of City government, first entering City government as a comptroller and eventually serving 13 successive terms as Mayor. He prides himself on being educated, progressive, and currently serves as the president of the National League of Cities.

Mayor DeStefano is an advocate of unifying city residents, elected officials and government employees across social and ethnic lines and is also a very involved in city revitalization. The City partners with locally situated Yale University, Yale Law School, and Yale Medical hospital and research facilities on many initiatives. The City’s budget and official literature reports on program and funding achievements in many of its equal
opportunity, city revitalization, and community outreach efforts. Currently, the city is
demographically diverse with:

- 56,794 white residents (45.9%);
- 48,604 black residents (39.3%);
- 25,443 Hispanic residents (20.6%), and
- 5,497 Asian residents (4.4%).

Most of its residents are employed, there are more blue collar than white collar jobs
(53,932 vs. 39,296 respectively), and the population is about 123,625 residents.

**Early Testing Experiences**

In the last three decades, the City of New Haven had experienced approximately
twenty legal actions regarding its civil service practices in promotions, testing and civil
service rules and regulations for fire and police departments. In 1996 to the present,
noting the length of history of civil service violations in the City’s fire department, a
Superior Court judge appointed a special master to oversee promotions within the fire
department and report to her as to the City’s compliance with all federal, state and local
laws. The discrimination challenge concerning promotion testing procedures that set the
standard for promotion of firefighters in the City of New Haven is *Firebird Soc. of New
Haven v. City of New Haven*, 66 F.R.D. 457(1975). The case involved a minority
firefighters’ association that claimed that the City’s hiring and promotion practices
discriminated against African-Americans. Non-minority firefighters in the New Haven
Fire Department subsequently formed a Firefighter’s Committee to Preserve Civil
Service, Inc. The Committee was a non-profit corporation formed for the sole purpose of setting aside an earlier opinion and court order in 1973. The Committee stated that by setting aside the Court’s final decree they would “preserve a system of promotions within and appointments to the New Haven Fire Department…based upon merit and not upon considerations of race.”

The City of New Haven had asserted in the lawsuit that it had not intentionally discriminated, but admitted that its procedures needed improvement. Plaintiffs in the City had agreed on a preliminary order, and later acquiesced in a final order providing for additional minority hiring and promotions. The Court restated a resolution from its earlier 1973 Order that included:

1. Establish a detailed plan for recruitment of minorities into the Department;
2. The department must develop hiring and promotional tests;
3. In order to achieve substantial minority representation in the Department, the Department was required to hire at least 16 of 24 firefighters from among qualified minority group applicants, and thereafter, to hire at least one minority applicant for every non-minority applicant until the total number of minority privates reached 75, and
4. The defendants promised to exercise ‘good faith’ to insure that minorities would have representation in the ranks of lieutenant and captain.

As was stated previously, several more lawsuits including the Ricci case were filed against the City Fire and Police Departments regarding violations of selection and
promotion procedures required by the civil service rules and regulations of the City of New Haven. There are currently several lawsuits pending.

Promotional tests for firefighters in the City are given every six or seven years. According to the local union contract, promotions are made based on exams with written and oral components weighted 60% and 40%, respectively. The City’s Charter states that the cut-off score for passing the test is a score of 70, the applicants who take the test are ranked by score, and then the top three candidates—the Rule of Three—are considered for promotion. If the top three candidates decline to accept the promotion, the next candidate on the list is offered the opportunity, and so on down the list. The union contract states that the list is only retained for two years, so that the exam in 2003 yields a list of candidates valid for promotion during the years 2004-2006.

Exam Results

In the years the Lieutenant’s promotion exams were given, 1996, 1999, and 2003, the results can be seen in Table 4.1.

<table>
<thead>
<tr>
<th></th>
<th>1996</th>
<th>1999</th>
<th>2003</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Whites</strong></td>
<td>50</td>
<td>25</td>
<td>26</td>
</tr>
<tr>
<td><strong>African Americans</strong></td>
<td>13</td>
<td>8</td>
<td>6</td>
</tr>
<tr>
<td><strong>Latinos</strong></td>
<td>6</td>
<td>9</td>
<td>3</td>
</tr>
</tbody>
</table>

The results of the Captain’s promotion exam can be seen in Table 4.2.

<table>
<thead>
<tr>
<th></th>
<th>1998-99</th>
<th>2003</th>
</tr>
</thead>
<tbody>
<tr>
<td>Whites</td>
<td>35</td>
<td>16</td>
</tr>
<tr>
<td>African Americans</td>
<td>7</td>
<td>3</td>
</tr>
<tr>
<td>Latinos</td>
<td>3</td>
<td>3</td>
</tr>
</tbody>
</table>

In 1999 for both the Lieutenant’s and Captain’s exams, Caucasians were in rank 1, African-Americans in rank 5, and Latinos in rank 4. In 2003, Caucasians were in rank 1, African-Americans in rank 15, Latino in rank 6. Under the City’s Charter, only the three highest scoring applicants (only three individuals) can be considered for a particular position. Therefore, zero African-Americans were eligible for consideration for selection under the current selection process in the Charter and the Civil Service rules.
Given the high population of people of color in this city which is similar to other urban cities, and because of the racial tensions of the past, the city scrapped the promotion exam. Table 4.3 presents the demographics of the City based on the year 2000 census data.

<table>
<thead>
<tr>
<th>New Haven</th>
<th>State of Connecticut</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total Population</td>
<td>124,000</td>
</tr>
<tr>
<td>Total Population</td>
<td>3,400,000</td>
</tr>
<tr>
<td>White persons</td>
<td>43.5%</td>
</tr>
<tr>
<td>White persons</td>
<td>81.6%</td>
</tr>
<tr>
<td>Black persons</td>
<td>37.4%</td>
</tr>
<tr>
<td>Black persons</td>
<td>9.1%</td>
</tr>
<tr>
<td>Asian persons</td>
<td>3.9%</td>
</tr>
<tr>
<td>Asian persons</td>
<td>2.4%</td>
</tr>
<tr>
<td>Hispanic persons</td>
<td>21.4%</td>
</tr>
<tr>
<td>Hispanic persons</td>
<td>9.4%</td>
</tr>
</tbody>
</table>

The City of New Haven had a volatile history with race relations, and in the recent past, there had been several race related political demonstrations and litigations directed at the City police and fire departments. There had been allegations by many individuals that the Mayor was creating policy to favor a local black minister. As this case study demonstrated, the ongoing promotion policy process remains problematic for the City as well as for other public sector employers regarding this issue even after the high court ruling. There remains a dilemma for public sector officials in fulfilling the responsibility of complying with the various provisions of Title VII so as to avoid
discrimination, and, to create a representative and most qualified workforce. Based on this case study, it is apparent that the City of New Haven’s Mayor John DeStefano recognized the shortcomings of current government policy regarding promotion testing the City’s firefighters, in particular the lack of representativeness of the policy. White firefighters, other decision makers and the public justifiably perceived them to be acting unfairly and unjustly.

The ruling of the Supreme Court in *Ricci*, which will be discussed in further detail in the following chapter, suggested that an employer cannot use compliance with Title VII as justification for declining to certify test results. The City of New Haven made a decision to scrap the promotion test because of the adverse impact it had on the firefighters of color.
Chapter 5

The Ricci v. DeStefano Rulings

In 2003, the City of New Haven sought to fill lieutenant and captain vacancies in the Fire Department. According to a local union contract, promotions were to be made based on exams with written and oral components weighted 60% and 40%, respectively. The City retained a consultant to create the exams and, in order to prevent cheating, did not allow anyone in the City to review the exams prior to administration. The cut-off score for passing the test was 70 and a “Rule of Three”, which requires that promotion be awarded to a job applicant that has one of the top three scores on the exam, was used by the City as identified in the City Charter and a long standing union contract. However, when City officials reviewed the results of the tests, they found that the pass rate of black candidates on both exams was approximately 52% of the corresponding rate for white candidates. Under the “Rule of Three”, out of the nineteen possible candidates for promotion (for fifteen positions), none would be African-American.

The City’s Civil Service Board is an independent five-member entity of the City that administers the civil service employment system, including supervising the process of competitive examinations, reviewing their results, and certifying lists of eligible candidates. Following a review of the test results, City officials referred the issue to the Board which subsequently held five hearings over a period of two months to consider whether to certify the test results. Because of a split vote by Board members, the exams
were not certified. The Plaintiffs and their lawyer filed petitions with the state, federal and subsequently with the Supreme Court on a claim of disparate –treatment under Title VII.

A more comprehensive discussion of the Ricci case is presented in this chapter, because it is the ruling in here that motivated this case study of administrative decisions making. I begin with a brief discussion of the lower court rulings, and follow with a discussion of the High Court’s decision.

**The Lower Court Rulings in Ricci**

Both the U.S. Federal District Court and the Appeals Court for the 2nd Circuit ruled in favor of the City of New Haven. The district court stated that the:

- defendants’ desire to avoid making promotions based on a test with a racially disparate impact was not intentional discrimination against white candidates….there was no Equal Protection violation in the decision not to use the promotional exams; and…[the] decision not to use the exams did not constitute a targeting of the plaintiff applicants for not supporting a political coalition or its interests, so as to violate their First Amendment rights (*Ricci v. DeStefano*, 2006: 1).

The court went on to say that:

- while race was taken into account in the decision not to certify the test results, the result was race-neutral: all the test results were discarded, no one was promoted, and firefighters of every race had to participate
in another selection process to be considered for promotion (*Ricci v. DeStefano*, 2006: 1).

Thus, the district court found that the City had not acted illegally or unconstitutionally when it refused to certify the promotion exams for Lieutenant and Captain.

The U.S. Court of Appeals for the 2nd Circuit upheld the lower court ruling, stating that:

in this case, the Civil Service Board found itself in the unfortunate position of having no good alternatives. We are not unsympathetic to the plaintiffs' expression of frustration. Mr. Ricci, for example, who is dyslexic, made intensive efforts that appear to have resulted in his scoring highly on one of the exams, only to have it invalidated. But it simply does not follow that he has a viable Title VII claim. To the contrary, because the Board, in refusing to validate the exams, was simply trying to fulfill its obligations under Title VII when confronted with test results that had a disproportionate racial impact, its actions were protected (*Ricci v. DeStefano*, 2008: 1).

Interestingly, current Supreme Court Justice, Judge Sonia Sotomayor was at the time a member of the appeals court for the 2nd circuit and was one of the circuit judges who sat on the case and ruled in favor of the City.

**The Supreme Court’s Ruling in Ricci**
The Supreme Court reversed the lower court decisions and ruled for the white firefighters. The Ricci Court opined that the city of New Haven incorrectly denied promotion to a group of successful, promotion test takers based on the appearance of disparate impact, and subsequently discarded the test and made no promotions. The 5-4 ruling which revolved around Title VII and not the Constitution, stated that “statistical imbalances alone do not give rise to liability. Instead, presented with a disparity, an employer has the ‘opportunity and the burden of proving that the test is job-related and consistent with business necessity’” (Ricci, 2009: 6).

The Court went on to say that: “Fear of litigation alone cannot justify the City’s reliance on race to the detriment of individuals who passed the…examinations and qualified for promotions. Discarding the test results was impermissible under Title VII” (Ricci, 2009). The Court instead argued that there must be a “strong basis” in evidence for concluding that the tests might be vulnerable to a disparate impact claim. The statistical imbalance alone was not enough. According to the Court, without this showing, the city engaged in “express, race-based decision-making,” resulting in disparate treatment, which, along with disparate impact, is also prohibited by Title VII. The Court’s Ricci decision, in effect, sets the two provisions of Title VII—disparate treatment and disparate impact—in a endless battle for primacy which can only deter employers’ efforts to promote equal opportunity and to end discriminatory practices.

As a result of the Supreme Court ruling, if results of the original hiring or promotion exam have produced disparate impact, the results can be retained if a city can prove that the exam has job related validity. In order to toss the exam, the city must prove
disparate impact and that the exam was invalid. In addition, the city has to provide a substitute exam that is considered more valid.

In a dissenting opinion in the high court ruling, the U.S. Supreme Court Justice, Ruth Bader Ginsburg, identified promotion testing mistakes made by the City of New Haven. As Solomon and O’Neill (2009: 7-9) observe:

1. Selection tests should be designed to measure the skills required by the job;

- If a test selection process disproportionately excludes persons in protected categories, the process has disparate impact. The City did not validate why this particular test would predict success on the job better than any other test that might have less disparate impact. The City did not evaluate whether- or how the weight of 60 percent on a written exam and 40 percent on a oral exam would affect the test’s validity. Justice Ginsburg noted a survey which showed that the median weight that municipalities assigned to the written portion of exams was 30 percent.

2. The agency should be able to prove that the test is a valid predictor of a candidate’s success on the job;

- In the public safety area, the police or firefighter’s job involves interpersonal skills, command presence, the ability to make decisions under pressure, for example. Many municipalities use assessment center
developed tests that include simulations or real-work situations to enable
the worker to demonstrate how they would address the situation using
individual knowledge and abilities. Instead, written and oral tests
encourage the applicant to repeat back memorized text. The City was
unable to prove that its test measured job-related criteria.

- The City did not use internal experts to certify that test questions
developed by the consultant were measuring important aspects of the job,
were based on source materials that apply to and do not contradict city
policies and procedures.

3. The agency should ensure that there is equal opportunity for success
for all candidates;

- The City firefighters reported that many white candidates could obtain
materials and assistance from relatives in the fire service, while most
minority candidates were first generation fire fighters. Some of the
minority firefighters reported that the study materials were too expensive
and long and had been on back order while others already had the books
available to them.

- The City did not do a validation study of the results to evaluate for adverse
impact on any protected group. Adverse impact exists when the selection
rate for any one group is less than 80 percent of the selection rate for the
group with the highest selection rate. A test can have adverse impact and
be considered legal if the agency can provide evidence of validity, i.e., the
The Challenge

The U.S. Supreme Court ruling in *Ricci v. DeStefano* (2009) established a new legal standard to determine when cities can throw out promotion exams that have discriminatory effects on public employees. Some observers noted that this case created “pragmatic” hiring/promotion rules for cities, while civil rights advocates, legal experts and human resource officials suggested that the ruling further complicated hiring/promotion policy making. The new rules require human resource officials to look at disparate impact as well as disparate treatment in the policy making process.

Some legal experts and human resource officials have questioned why the City did not do a more thorough, comparative analysis of promotion tests for their New Haven firefighters. A representative of the Northeast Region of the International Association of Black Professional Firefighters, Donald Day, noted that another Connecticut city, Bridgeport, no longer utilized the exam method New Haven used: a combined multiple choice, written exam and an oral exam, weighted 60 percent and 40 percent, respectively. Instead,

Bridgeport….had once used a testing process similar to New Haven’s, with a written exam accounting for 70 percent of an applicant’s score, and oral exam for 25 percent, and seniority for the remaining 5 percent. Bridgeport recognized however, that the oral component, more so than the written component, addressed the sort of ‘real-life scenarios’ fire officers
encounter on the job. Accordingly, the city ‘changed the relative weights’
to give primacy to the oral exam. Since that time, Day reported,
Bridgeport had seen minorities ‘fairly represented’ in its exam results
(Ricci, 2009: 7-8).

One justice on the Supreme Court, who concurred with the majority opinion,
suggested that the City tossed the exam results because of a fear of a backlash from
politically powerful representatives of the minority groups that failed the exams and were
subsequently not promoted. The plaintiff’s attorney in the case also argued that politics
solely accounted for the tossing of the test results, rather than the concern of city that
their test, test results, and promotion standards were flawed.

The decision by the city of New Haven to toss the promotion exam for fear of race
based impact as well as the subsequent Supreme Court decision to retain the test results
exposed the often complex and paradoxical issues of test representativeness, fairness and
validity. While promotion tests are designed to measure employee experience and
passing results represent success, the question remains as to what standards public sector
employers have to meet to create an acceptable promotion process, and, are the
promotion standards that employees are subject to considered fair measures of
accomplishment among the population that is seeking the desired promotion.

The Ricci Court ultimately ordered the New Haven Civil Service Board on
November 24, 2009 to certify the results of the 2003 promotional examinations.
Eventually with the consent of the City’s Corporation Counsel, the Board certified exams
of 21 fire fighters for promotion to Fire Captain based on their exam scores of 70 or higher and certified exams of 32 fire fighters to Fire Lieutenant based on their exam scores of 70 or higher. Under the Petitioners’ view, Title VII and the Constitution required the City to certify the test results and revisit the test policy if there was indeed adverse impact on certain ethnic groups. The City officials felt that making the promotions first and sorting out problems with the test later would violate the same law.

Questions that are only vaguely addressed by the Supreme Court ruling regarding the socialization of test taking include: Are pass rates on exams similar for different ethnic groups and are scores on exams generally higher for whites than other ethnic groups? Does ethnic makeup of civil service boards and unions that negotiate the use of written tests for promotion, weighting of exams and passing standard, oral, written, and visual tests make a difference? Does measuring ability to memorize rather than real life, leadership, and experience skills reflect what the employee actually has to do in the job. And are the standards for promotion representative, i.e., are those promoted individuals representative of the racial background of community and employees taking the test. Title VII and disparate impact generally require that employers’ tests make a good faith effort to measure job related skills, and/or that the employer use an alternative test that is considered job related. Title VII ensures that all employees, regardless of race or ethnic background, are required to have the same test score for promotion, and, Disparate Impact ensures that ethnic groups are not barred from specific jobs. Title VII also requires that the employer consider disparate treatment before implementing the test.
Chapter 6

Research Findings

The findings presented below are a summary of several data sources including interviews and a review of the verbatim proceedings of the City of New Haven Civil Service Board regarding the Fire Captain and Fire Lieutenant Promotional Examinations. As stated earlier, The Civil Service Board is an independent five-member body of the City that administers the City’s civil service employment system, including by supervising the process of competitive examinations and reviewing their results before certifying lists of eligible candidates. The Board held five hearings over a period of two months to consider whether to certify the contested test results in Ricci. The verbatim questions and responses during the proceedings are all public information obtained via the state’s open records act (see Appendix A). All of the meetings were public, and the Board was given the authority to make the ultimate decision regarding test certification. One of the five Board members, the only African-American on the Board, did not participate in the final vote. The Board heard testimony from multiple sources on all sides of the issue. The Board eventually voted to not certify the test results. Following the Board hearings and the vote to not certify the test results, the petitioners appealed the ruling to the Second Circuit Court and the Supreme Court, respectively.

The appeals court initially ruled in favor of the City (Ricci, 2007), but the petitioners’ filed an action with the Supreme Court and won. The majority ruling in the high court was that by refusing to certify the test results, the City had used race as a
factor in that decision. Subsequent to this decision, all applicants who got a passing grade of 70 or higher were promoted. This resulted in 23 test takers being promoted. One of the plaintiffs who is Latino was promoted as a result of the Ricci decision, and an unidentified number of ethnic minorities, including African Americans and Latinos have either been recruited or promoted in the fire department subsequent to the Ricci decision (July 2010 interview with City Attorney, Victor A. Bolden). Mr. Bolden was hired as Corporation Counsel for the City of New Haven during the Ricci Supreme Court hearings. He previously served as General Counsel for the NAACP Legal Defense and Educational Fund, Inc. (LDF). In that capacity, he served as chief advisor on legal matters affecting the organization, provided advice to LDF’s legal staff on the organization’s civil rights cases, and handed administration for both the LDF’s New York and Washington offices.

The City’s Decision-Making Process

The Ricci v. DeStefano case received overwhelming media, political, and judicial scrutiny because it addressed how a city with a sizable minority ethnic population, should address work place diversity and potential discrimination in the promotion testing process. Participants in the interviews and the verbatim proceedings presented here included the City’s then-Corporation Counsel, Thomas Ude, the current Corporation Counsel, Victor A. Bolden, the City’s then- Director of Personnel, Tina Burgett, the current City’s head fire fighter union official, Pat Egan, the current chairman of the City’s
civil service board, Jimmy Segaloff, and the then-Director of Planning and recently retired administrator with the City of New Haven, Brian McGrath.

What can employers of any kind do when the statistical evidence in promotion testing is likely to result in adverse impact? During the verbatim proceedings of the City of New Haven Civil Service Board regarding the Fire Captain and Fire Lieutenant Promotional Examinations and presented below, several arguments were made against using promotional exams to fill the vacancies in the fire department or any city agency. For example, Ms. Karen Dubois, serving as the Chief Administrative Officer for the City of New Haven and on behalf of the Mayor, argued about the discriminatory nature of combining the current test results with the rule of three as outlined in the City’s Charter and the existing number of vacancies at the Lieutenant and Captain ranks. According to Ms. Dubois:

A combination of the results, the Charter rule of three and the existing vacancies create a situation in which African-Americans are excluded from promotional opportunity on both the Captain and Lieutenant positions and Latinos are excluded from the promotional opportunity on the Lieutenant examination. …Like trying to understand the perfect storm, it is not any one of these factors that by themselves necessitate the need to not certify the exam or create the storm. But, when faced with these three in combination, what results is an aligning of factors that leads to the exclusion of racial minorities…We are facing a glaring
situation where the alignment of three factors, these results, the rule of three and the existing number of vacancies, will result in a discriminatory promotional process.

Ms. Dubois concludes her statement with the following: “We will test again, but only after having made significant changes to the process. Further, we have real wounds to heal in this department. The City will work collectively again with the Local 825 to address the issues of diversity that have been brought to light most clearly through this process. There are also issues of training that have to be addressed…The work begins tonight, I believe, with the recommendation that the Civil Service Board vote No on certification of the results” (Hearing, March 2004:30-35).

The action filed by the petitioners’ with the Appeals Court specifically addresses ongoing issues related to promotion testing discrimination and workforce diversity. For example, based on the expert testimony noted in the Chapters 5 and 6, it is unlikely that you can have a promotion test without adverse impact. However, there is Supreme Court jurisprudence indicating other things that can be done to remedy racial imbalances. This case study and ongoing litigation regarding hiring and promotion practices in the public sector in general, reveal that there is significant uncertainty as to when a governing entity seeks and selects a valid-alternative with demonstrably less adverse impact. The City of New Haven, for example, claimed adverse impact after a test was given, but conducted no studies to determine if alternative methods of promotion testing were available that would be more valid and fair.
During the appeal to the Federal Court (*Ricci*, 2007), Judge Sotomayor responded to the petitioner’s attorney, Karen Lee Torre from New Haven, Connecticut who was disputing the testimony to the Board that there was less adverse impact from prior firefighter promotion tests than this one:

And are we supposed to say to potential employers of any kind, we know that the statistical evidence always shows an adverse impact, so now you can live with it and do what you’ve been doing up to now, because it is okay. We’re not going to charge you with being creative, with trying to find a better way to do things. We’re not going to permit that of you. Once you’ve gone down this course and it shows what it’s always shown, you got to live with it… What do you do with Justice Kennedy’s observation that there are creative ways to deal with racial diversity, targeting certain groups for more recruitment, doing other things so that you can undo racial imbalance. Why is this different? The City coming and saying, the Board coming and saying, we see it, we think it’s wrong, let’s look at it and figure out if there’s a better way of doing this?

Ms. Torre responded to this statement saying that the City anticipated problems with the test and took all kinds of preemptive steps to deal with the issue:
They (the City) knew that there’s a race and achievement gap in the country. It manifests itself in testing. So what they did was they did a lot of things that other cities don’t do. They brought the reading level down to a fifth grade literacy rate. They gave the candidates a road map to study—even giving them the places where they can get the –comparisons. They made sure that minorities were dominating on the panels. Whites composed a majority of the test takers, but minorities dominated the assessment process. They gave them three months study period and they did something else. They are doing that in New Haven, Judge Sotomayor, because other cities don’t allow you to proceed in an examination if you flunked the written test. If you fail the substance of job knowledge test in any other jurisdictions, you can’t go on. But New Haven did, we said look, we’re going to let somebody who fails that test still to proceed to the oral assessment because we don’t want to leave anybody out… Everything the EEOC wants you to do, they did. I would urge you to look at the details of how this test was devised with the input of the chief of the department, the black assistant chief of the department, a battalion chief, African Americans were consulted…Disparate impact is not illegal. It only becomes a violation of Title VII when either you can show that the test was not keyed to the job knowledge you need, or even if it was, that there was an equally valid available alternative….Title VII is the law and it says no employer, no employer shall use race as a factor in a decision (Ricci, 2007: 19-28)
Ms. Torre concluded her argument by saying that there was a real reason for denying certification and it had to do with racial politics. She substantiated her claim on the fact that the City subsequently realized that they had more openings for promotions for three additional black and three additional Latino applicants, but the City continued to insist that the test was discriminatory. And, she suggested that an alternative promotion process should have been used. The test results could be banded and all the applicants who had exam scores at or above the 70 passing score could be promoted. At the closing of the argument, Ms. Torre suggested that there were other political reasons to not certifying the results:

…We had read scuttlebutt that they had miscalculated vacancies and six minorities-three Hispanics, three African-Americans, were deprived of promotions because of this race racketeering by Boise Kimber. His friends weren’t going to get promoted… This wasn’t concern over Title VII. They’ve had dissimilar results in every test they’ve ever had….It was because Boise Kimber’s cronies weren’t on the list (Ricci, 2007:58).

During the Board hearings and the Appeal, the City argued with reference to this point that the petitioners’ offered no basis to conclude that Board members were influenced (improperly or otherwise) by Kimber, petitioners’ counsel or anyone else. The City also asserted that the arguments concerning Kimber ignored the relevant
decision makers regarding test certification, namely the members of the Civil Service Board.

Testimony on behalf of the petitioners’ at the five Civil Service Board hearings that occurred prior to the Second Circuit Appeal provides evidence that several arguments were presented as to when a city should address potential discrimination in the policy process. One example of what the Board was told during the hearings was that there was less adverse impact from prior promotion tests than from the current one that lead to the *Ricci* suit. In 1999, the city sought to fill 42 lieutenant’s positions. The adverse impact and the ratios in that test were no different than in the current case; only one African-American scored in the top 16. But, because the City was filling 42 vacant positions, the City was able to reach further down the list and one African-American was promoted.

In 2003, the City was only seeking to fill seven vacancies. Yet, the actual statistical breakdowns, the adverse impact ratios, the passing rates for Hispanics, African-American, Whites, had been consistently the same with almost every test. In fact, in the captain’s exam for 2003, there was an in improvement in the scores of Latinos. In the 1998 captain’s exam, the test produced one qualified Latino for captain. In the 2003 exam, three Hispanics qualified for captain. Notwithstanding, a review of previous litigation, the testimony and interviews for this case study, the history of the promotion testing process for firefighters in the City of New Haven reflects that Whites consistently perform better than other ethnic groups regardless of whether you look at actual test scores or ranking. But, members of the City administration introduced strong evidence
during the five Board hearings that they anticipated problems with the test and took all kinds of preemptive steps to deal with the issue. As testimony and interviews revealed, the City administrators and decision makers recognized that a racial gap exists in this country which is typically identified in aptitude and achievement testing.

Regarding, political, public, and practitioner consensus on policy change during the four stages of policy making process—Agenda Setting, Alternative Specification, Policy Choice, and Implementation—the following comments reveal resentment and suspicion on the part of stakeholders for being excluded from aspects of the decision-making process. For example, promotional tests for firefighters in the City are given every six or seven years. According to the local union contract, promotions are made based on exams with written and oral components weighted 60% and 40%, respectively. The City’s Charter states that the cut-off score for passing the test is a score of 70, the applicants who take the test are ranked by score, and then the top three candidates are considered for promotion. If the top three candidates decline to accept the promotion, the next candidate on the list is offered the opportunity, and so on down the list. The union contract states that the list is only retained for two years; thus the exam in 2003 yields a list of candidates valid for promotion only during the years 2004-2006.

According to the current City’s head firefighter union official, Pat Egan:
During the Board hearing of January 22, 2009, the issue was brought up of the fairness of the test or the process. I can as of this date say that as far as the process goes, not the test itself, but this has kind of come forward to us, you know, hasn’t really been fair to any of the firefighters. You know, when the rumors and everything started breaking and everything, we certainly asked to be brought into the loop. Obviously, these are passionate issues that get raised. And we were certainly denied that opportunity…You know, what we don’t want to do is become part of what I feel is the somewhat divisive politics that are going on with regard to this issue. As a union, we want the facts of law to dictate the outcome and not personal opinion…You know certainly in Mr. Ude’s (former Corporation Counsel) statements and legal opinion you know, with his position—I think you raised the question of we should see if the test was fair. And his response (Ude) of throwing the baby out with the bath water, to say that ‘Even if it’s fair, you can still throw it out’ I think is totally ridiculous…everybody wants a fair shake. And, you know, everybody wants to take an exam that is held by any of the legal forums to be a valid and fair exam. No one wants to be---you know, have something voided down the road. Just like, you know, it is totally unfair to discard something that is legally void. You know, that is---you know, that’s I think the issue at hand (Hearing, March 2004: 47-55).

As the testimony indicated, a substantial amount of preparation went into the promotion testing process and there was a degree of change from previous promotion
policy. Research findings on disparities between minorities and whites on school test performance indicate that the quality and quantity of test preparation is an important factor that accounts for these disparities. If an employer is concerned about complying with the provisions of Title VII in order to avoid discrimination while attempting to obtain the most qualified workforce, remedial test preparation before the test is given appears to be a reasonable policy practice. However, as stated previously, the weighting of the written and oral components of the exams was based on historical, labor-union contract obligations.

Minority firefighter organizations challenged promotion practices in the late 1980s early 1990s. Lawsuits indicate that positions were created in the fire department that were considered assignments rather than promotions, so no testing was conducted. However, the courts ruled that these positions were promotions and needed to be tested in accordance with civil service rules. In addition, lieutenant positions were left vacant or under-filled in order to preserve more funding for captain positions; and, individuals who had taken only the lieutenant tests were promoted to captain. Individuals were also unlawfully promoted from ranking lists that had expired and those individuals eventually were demoted. The 2003 Lieutenant and Captain firefighter tests were developed and administered by an outside consultant because there had been concerns in the City about cheating on prior exams.

According to testimony before the Board from the consultant that had been hired by the City to develop and administer the exams, IOS’s Chad Legal:
The City decided to forgo internal review, so no one in the City had reviewed the tests before they were given…. The consultant used the City Charter’s cut-off score of 70, but conceded that “using the conventional cutoff of 70 isn’t very meaningful when you are trying to find the cut off score that defines minimally competent or minimally qualified” (Hearing, February 2004: 7-18).

Dr. Boise Kimber, a local African-American religious leader and community activist in New Haven, also provided an assessment of the promotion testing process in the city. He objected to the lack of structure in the exam policy process, especially the lack of transparency in the process. According to Dr. Kimber:

As you [Chairperson Segaloff of the Board] stated and others have stated, there were many rumors that were going around with reference to the composition of this test and the make-up of this test….I served as a Civil Service Commissioner for almost ten years. This is the first time that I’ve ever known that a commission, that this commission has had an open forum to hear from the public and try to allow the public to decide how we want to pass this examination or whether or not we want to disregard it. ..If you also look at the problem where…there’s only one African-American Captain and 18 Caucasian Captains, and 12 African –American Lieutenants and 30-some Caucasians… There is
great disparity within this department and certainly we have to come to some conclusion on how we administer exams, how we prepare individuals for exams. For instance, Mr. Chair, there are certain people who get trained versus other people who do not get certain training. You have people that get more training than those on a truck, for example...reading material to study for the test was based on New York Fire Department material, not the Essentials book that is at the fire department that everyone has access to. Firemen had to order the other material at a great expense and the material was on back order. Some firemen had the books ahead of time...they knew what materials to study from...I don’t know how we can...how this examiner can make up this exam really without consulting with...and I don’t know whether he consulted with the Director of the Training Academy...the person who does the training (Hearing January 2004: 71-75).

For all the proactive energy focused on creating a new promotion testing process, the transcripts and interviews reveal a significant degree of isolation of policy makers in decision making process from other bureaucrats, interest groups, politicians and the general public during the proposed policy change. According to testimony before the Board at its first hearing on January 22, 2004, a representative of the human resource department with firsthand knowledge of the promotion testing process provided the following details:
I, Ms. Noelia Marcano, Chief Examiner for the City of New Haven and also Secretary to the Civil Service Board, can speak to summarizing the process that is used whenever we test. Test activities commence with a job analysis performed by the consultant. The job analysis gives the opportunity to gather the necessary knowledge, skills, abilities and other job-related factors essential to both the positions of Captain and Lieutenant. The consultant we hired was Industrial/Organizational Solutions, Incorporated (ISO Solutions). We used them in 2000 for the firefighter entry examination. The job analysis consisted of visits where the consultant spoke to pertinent individuals in the indicated rank and other ranks. A job analysis questionnaire was disseminated to members of the firefighter force to gather knowledge, skills and abilities information. The consultant proceeded with the process of test development of the written and oral exams and the acquirement of approximately 33 subject matter experts, out of Connecticut to serve as assessors for the oral examination process. I maintained continuous communication with the test consultant throughout all the phases in the process and I updated my Director regularly. To the best of my knowledge, nothing unusual or extraordinary occurred during any phases of the process.
Marcano went on to say:

Regarding the oral exam, in this particular case, we worked very hard with the consultant throughout the process to be talking about the demographics of the panels. I did not know names until the day of the assessor training or location where people came. But we had been very specific here in the City that assessors do not come from the state of Connecticut…The panels were very demographically well-balanced panels…Regarding the board hearings today, I think it is important for us to hear from everyone…. I haven’t heard it stated what the City’s position is right now. I think it is important for us to hear from some of them because there’s two things here. People go into an exam. You know, they pay good money to take the exam (Hearing, January 2004: 10-20).

During the same special meeting, Thomas Ude, the City’s then-Corporation Counsel, discussed the legal ramifications of exam certification, stating that:

…alternatives would include not certifying the results of this exam, giving another exam with the expectation that promotional exams in the New Haven Fire Department could reasonably be expected to result in some opportunity for African-Americans to be promoted…But even if the test is potentially defensible, that doesn’t require us to accept it….A
test can be job-related and have a disparate impact on an ethnic group and still be rejected because there are less discriminatory alternatives for the selection process… it’s the end selection process that you look at… Step one, is there a disparate impact of the test on any group? Step two is, was the test job-related? Step three, even if the test is job-related and fair, was there--- and it would not be the City’s burden to prove this. But, the way that it plays out, the third question is was there or is there a less discriminatory process of comparable expense….Now currently, the City is under its contract with the fire union where there is an agreement in place which under state law is binding as to the format of the exams. 60 percent is—60 percent of the weight of the score is written, 40 percent is oral. That’s not to say it’s impossible to change that. But, I’m working with that as where we are now. The preference--- and it’s--- I would say it’s a strong preference---would be to find a process if---if there is--- if there was going to be a decision to try an alternative process which I believe could include another exam which would be weighted the same, the strong preference would be for a process that complies with not only with federal law and Title VII but also with our Charter and our Civil Service Rules and state law (Hearing, January 2004: 40-45).
James Segaloff, the current chairman of the City’s Civil Service Board, responded:

First of all, if it’s a fair test, it sounds to me what you’re saying is we can conclude that but then also conclude, because of the results, that we should look at some other ---not certify this test, but look at some other alternative. I don’t know what that is….I can’t make a decision based on getting sued.

Then, Mr. Ude stated that:

an alternative process which I believe could include another exam which would be weighted the same, the strong preference would be for a process that complies with not only with federal law and Title VII but also with our Charter and our Civil Service Rules and state law” should have been on the table at the agenda setting stage of the policy making process. Unfortunately, when politics trumps informed decision making, mistakes occur and cities get sued by the discriminated party. The taxpayers’ cost for the mistake exam was $100,000 and an undisclosed amount of money associated with the cost for the subsequent lawsuits and administrative expenses from those lawsuits (Hearing, January 2004: 45).
The findings for this case study also reveal more volatility rather than general consensus during the stages of the proposed policy change. A career mayor and public administrator reelected continuously over a thirteen year period would likely lead a unified administration and citizenry. However, this case study revealed much volatility among residents and government officials because of race-based practices and politics. Efforts by Mayor DeStefano to create a more representative and equitable administration had been perceived by many individuals as token efforts for political reasons. The decision to not certify the results of the firefighter promotion test was the tipping point for the City regarding this issue.

The question is, does race based decision making compensate for previous racial inequities and efforts to increase workforce diversity? This case study indicates that unless the policy-making process is conducted fairly, is knowledge-based and with minimal political influence, the process violates legal standing, and instills resentment and resistance from citizens and the public workforce. While no Board interviewer or interviewee specifically addressed the political climate during the time that the certification meetings were occurring, there were suggestions that a review of the verbal proceedings and legal documents would reveal this information. In addition, there was reference by at least one administrator interviewee that the racial politics in the City were always a problem and that efforts to increase diversity in the government workforce was a combination of a token political effort as well as a sincere desire on the part of the City officials to create more representativeness and equity in the government.
Exam Preparation and the Test

One aspect of the promotion process that was repeatedly referenced as an area overlooked and of concern regarding inequities in the promotion testing of minorities is the training and preparation for the promotion exams. During each of the Board hearings, many experts testified to concerns about the training and preparation for the exams, rather than just the content of the exams. In defense of the actual exams, the developer of the tests, IOS’s Chad Legel, offered this testimony:

We did everything within the parameters of best practice, within the parameters of the RFP, to put together a process that as highly fair as well, form the composition of the assessor panels and seeking a diversity there that would be representative, if not more than representative of the demography of the fire department and the City, to engaging in reviews with fire service experts to make sure that everything we are asking was consistent with what you would expect someday at that particular level in a fire agency…..There’s no reason to conclude that there would be a result as has occurred in New Haven. ..And, certainly my response would be the process was facially neutral.

Mr. Legel added:

Realize too, on the written exam, the exam can only be biased to the extent that the source materials are biased. That exam is being drawn specifically from textbooks. And if you’re going to say the exam items
are biased, I think by process you’d have to say that the test itself was biased… which is what we’re specifically talking about here, a test that measures job knowledge derived from certain resource materials. Now, the oral interview is a bit different…But again, same level of scrutiny is being applied, the review of the interview questions themselves, review of the criteria and review by outside, independent fire experts that would be able to evaluate that these are, indeed, best practices in the fire department…I think by association you would be accusing the operations of the department, the structure of the agency, and the operations they engage in to be inherently biased, which again I think is a poor conclusion to come to (Hearings, February 2004:7-61).

During the same Board hearing, a second expert, Vincent Lewis, an experienced firefighter, stated that the tests were comparable to examinations he had taken in the past. However, when Mr. Lewis was questioned on the mix of questions on the exam, he replied:

I would say that in the Lieutenant’s exam I thought there was quite a heavy emphasis on issues that only drivers of an apparatus would be more familiar with. And if you were a new firefighter, three-year, four-year, five-year, --I don’t know if you hadn’t had a chance to drive, if you hadn’t been trained in driving the apparatus and using the equipment, there are going to be some issues there for you on the
Lieutenant’s exam. You’re definitely going to have some difficulty…In some of the material that I read, training was an issue. I don’t know how training is done here. I don’t know what is required…But, I understand that training is not all on a level playing field as it should be. And those trained the best, those with the right materials, they will do the best (Hearings, February 2004: 30-39 ).”

A third expert, Dr. Janet Helms, spoke about general problems of race and culture in testing:

My name is Janet Helms. I’m a professor of counseling psychology and Director of the Institute for the Study and Promotion of Race and Culture at Boston College….Test-takers’ scores might be lower if their socioeconomic status is lower than socioeconomic status of the group on which the test was developed. This is because they are less likely to have the same kinds of exposure to experiences the test might cover….We know that it’s often the case that minorities and white women must use innovative approaches to do the job because they don’t received the kind of mentoring that allows them to perform in the traditional kinds of way…..We know for a fact that regardless of what kind of written test we give in this country, that we can just about predict how many people will pass who are members of under-represented groups. And your data are not that inconsistent with what predictions would say were the case. But we have very little
information why it is that people of color and sometimes women perform more poorly on these devices than do their white male counterparts.

Dr. Helms went on to say:

Most of the literature on firefighters shows that the different groups perform the job differently. This is often because the kinds of experiences that are open to white male firefighters are not open to members of these other under-represented groups. I do not know the extent to which this is true of the environments here in this location. But, nationally, it’s a fairly well-documented issue. It is also important to determine whether, in fact, it was the case that different kinds of preparation were available for people depending on their racial and/or gender membership groups… The other area to consider is language. If one looks at the performance of the Hispanic test-takers, for instance, on average they would have passed the written exam. But, the oral exam appears to be the place where the most adverse impact occurred. And so one has to ask what kinds of factors were operating that influenced their test score in that way (Hearing, March 2004:43-57).

During a fifth and final Board hearing, a final expert spoke about the underlying issue of political influence and long standing, structural problems with the fire
department that contaminate the entire promotion process. Matthew Marcarelli, Lieutenant with the New Haven Fire Department stated:

I’m not only Lieutenant with the New Haven Fire Department, but I’m also a Connecticut Fire Academy Instructor and I hold a college degree in fire administration… The question here remains as to the problem with the examination process… In fact, there were several fire officers who took the last Lieutenant’s exam that complained about the oral portion of the exam.

The City has vehemently defended the existing process that was used to give these exams and the past exams, both in court and in public as well as in this meeting room… Those questions that were in writing, and, in fact, you received a letter on or about 1996 or 1997 from me regarding the oral examination process—basically went unanswered. So, because I and some of my colleagues did not have a public forum that there happens to be for these two examination processes, our concerns went unnoticed. The City, however, vehemently defended the 40-percent oral examination portion during the recent contract negotiations because, in the words that were expressed to me, to level the playing field.

Marcarelli further stated:

The problem herein is that we are trying to fix a process that was flawed from the beginning and you waited until the results did not meet
the political concerns and the political correctness until after the exam results were published. And I don’t seem to hear any problem with that...So that leads me to the next question, is what were the individuals doing that developed this examination with the testing consultant who now claim that there was a problem with the exam? Also, I would like to say that in regard to comments that were made about previous litigation and demotions as a result of exams, it was not an issue of adverse impact, to my knowledge. It was a direct result of the City’s illegal manipulation of scores and the rounding off of numbers.

Regarding training issues, Mr. Marcarelli made these remarks:

…..a lot of training that’s done in the fire house is done by the company officer to the individuals receiving the training...I’ve spent probably a quarter of a million dollars on firefighting training including getting my college degree…a lot of training is based on initiative…the department only sent me in an official capacity to a training class one when I was a member of the training staff (Hearing, March 2004: 56-61).

The then-Corporation Counsel, Thomas Ude, and the then-Director of Personnel, Tina Burgett, announced that the promotion exams had not served the purpose of finding
a good supervisor(s), and upon closer review of these two exams, their content has raised, rather than answered, questions about how valid these tests were for their purposes intended. At the end of the fifth meeting, the Board members held a public vote. The vote was split, 2 to 2, and because of the split vote, the results could not be certified. The petitioners for certification subsequently filed a lawsuit. Petitioners’ suit alleged a Title VII claim against the City and equal protection claims against the City and two of the Board members who voted not to certify. The City’s current corporate counsel Victor Bolden, reports that the promotion applicant list expired in 2006 so test scores are no longer valid for promotion and there is not going to be another promotional test for some time. Mr. Bolden acknowledges that more research should be done before any future promotion exam process if undertaken.
Administrators and public officials approach policy issues by reviewing policy choices made up to the present, especially in making decisions about difficult problems. So, for individuals such as Mayor John DeStefano, who has been involved in city government and politics for a good part of his life, it seems unusual that he would turn to a unconventional approach to dealing with the complex problem of promotion testing. According to Lindblom (1959: 181), an administrator enjoys an intimate knowledge of the incremental steps taken up to the present, and an administrator enjoys an intimate knowledge of his past sequences that “outsiders” do not share, and his thinking and that of the “outsider” will consequently be different in ways that may puzzle both. Both may appear to be talking intelligently, yet each may find the other unsatisfactory…for the chains of policy are quite different…and the two individuals consequently have organized their knowledge in quite different ways.

Nevertheless, government subsystems can become enmeshed and can’t be disengaged from their problems. Possibly, the Mayor thought that the ensuing crisis of having only one Hispanic and no African Americans pass the test for promotion provided an opportunity to make a change.
Many government leaders use a moment of crisis in a system to make a change because substantive changes can occur in a crisis. But, if you are going to make change, you have to secure the by-in of stakeholders. History has shown the consequences when a person uses his or her power and privilege of position to make change without taking the time to explain the “new” decision-making process. Stakeholders have to reframe their perspective when we restructure rules and procedures. And, people as a rule, prefer stability to upheaval and uncertainty. While stakeholders may agree that they need to change the system and outcomes of a specific policy, they are more interested in being involved in the process. They are less likely to be opposed to the content of what is being considered if they are involved in the policy change. While DeStefano can be praised for using resources to change the outcomes of an archaic promotion testing policy with a critical goal of improving representativeness, it appears, from the research conducted here, that he did so without fully disclosing his purpose and without including his stakeholders in the process.

As discussed earlier in the context of testing theory, the University of California educational system working with state policy makers has incrementally adjusted their college admission standards repeatedly over the years in order to create a more diverse and representative student body. This provides an excellent example of how test scores are used for eligibility and how educationally sound processes are created. For example, according to a 2002 discussion paper prepared by the Board of Admissions and Relations with Schools (BOARS) for the UC Office of the President, the goals of BOARS for a reassessment included:
1. Understanding the historical and philosophical background of UC’s use of admissions tests, including the principles that led to the original decision to include test scores in the determination of eligibility and selection.

2. Examine carefully the statistical justification for the use of admissions tests including their usefulness in predicting college GPA.

3. Consider carefully the policy implications of the UC admissions test requirement, especially its relationship to the work studied in high schools and the desirability of certain tests to fulfill this requirement,

4. Evaluate the degree to which existing tests meet the needs of UC.

5. Lay the groundwork for a broader faculty dialog on these issues (BOARS, 2002: 2).

The report goes on to address UC’s concern that while test scores serve a pragmatic purpose to help the college admit students to a highly competitive school and select students for particular campuses, tests may still be inappropriately correlated with other factors, such as socioeconomic status. One recent proposal of BOARS is for UC to create its own admission tests. They note four required ‘properties’ for this new test:

1. An admissions test should be a reliable measurement that provides uniform assessment and should be fair across demographic groups.

2. The test should measure levels of mastery of content in UC-approved high school preparatory coursework

3. It should be able to predict future GPA.
4. The test should be useful in that it justified its societal and monetary costs (BOARS, 2002: 16).

There is another point in the BOARS study that is of significant relevance to the New Haven case with regard to the relationship of socio-economic and demographic characteristics and test scores. Over the past 35 years, BOARS has adjusted the testing requirements for UC several times and has undertaken multiple statistical studies to justify the use of admission tests. One conclusion they draw from these studies is that:

It is well known that admission tests of all types-along with high school grades and other indicators of academic achievement—are strongly correlated with family income. This does not reflect the bias in the tests, but rather inescapable fact that schools in California-like those throughout the country-vary widely in available resources and students from poor families are more likely to attend schools with fewer resources. The members of BOARS are well aware that they cannot eliminate this level of disparate impact admission tests have on students from socio-economically disadvantaged circumstances (BOARS, 2002: 11).

An important conclusion that can be drawn from this statement is that the ability to prepare for the tests, then, is the better predictor of future performance, not the actual scores on the test.
In the case of the City of New Haven and Ricci, preparation for the tests may have been the better predictor of future performance, not the actual scores on the test. While the test itself was at a fifth grade level, the study materials were not. For example, the language in the study materials may have been too difficult for some firefighters. Other firefighters with relatives in the Department could have received extra tutoring on the materials. The firefighters who failed the promotion test testified during the Board meetings that they could not obtain all the preparatory materials needed to study for the written and oral exams. Some firefighters had relatives in the Fire Department who could provide them with the needed materials, while other firefighters were unable to purchase the materials either because of availability or cost.

As noted in the previous chapter, one individual testifying before the Board, Mr. Legel, the developer of the test, stated:

Realize too, on the written exam, the exam can only be biased to the extent that the source materials are biased. That exam is being drawn specifically from textbooks. And if you’re going to say the exam items are biased, I think by process you’d have to say that the test itself was biased… which is what we’re specifically talking about here, a test that measures job knowledge derived from certain resource materials. Now, the oral interview is a bit different…But again, same level of scrutiny is being applied, the review of the interview questions themselves, review of the criteria and review by outside, independent fire experts that would be able to evaluate that these are, indeed, best practices in the fire department…I think by association you would be accusing the
operations of the department, the structure of the agency, and the operations they engage in to be inherently biased, which again I think is a poor conclusion to come to.

In retrospect, the City should have made all the study materials available to each firefighter by purchasing the materials themselves and selling them to the firefighters on a payment schedule.

Another conclusion that can be drawn from the information collected from testimony during the Board hearings is that confusion and resentment on the part of the public officials and stakeholders in the City administration regarding promotion policy is palpable. The testimony of a union official, Pat Egan, before the Board hearings, as noted in the previous chapter, reflects the recognition that the existing process might be broken but also that a decision to not certify the exam results had been unfairly conducted outside of public view.

**Testing and Representativeness**

While there has been an increase in public awareness of the need for representativeness in government and concern over disparate impact in testing, there is no concerted opinion on how to remedy these issues. In the current economic climate and with anti-government attitudes increasing among the general public, issue salience is high for advocates but is a passive interest for a majority of citizens. Political leaders recognize the complexity of the issues and leadership on the issues has been fragmented.
However, if public opinion solidifies around the issue based on a particular event, then leaders can take a “change agent” approach on the issue. With this case, the decision to not certify the test results increased fragmentation on the issue rather than solidifying it. The economic climate may have contributed to the tension surrounding employment issues and promotion policies as a whole.

A study conducted by Ospina, (1999: 232-233) suggested that individuals who are involved in these issues should adopt a long-term view in implementing a diversity process and avoid quick fixes. For example, she noted that at the program level, the administrator should be cognizant of potential problems and remedies in performing this work such as:

1. Difficulty convincing relevant stakeholders that multiculturalism is needed;

2. Difficulty marketing the diversity plan as the costs are easier to quantify than the benefits;

3. Potential employee resentment or disillusionment stemming from, disappointed hopes for rapid improvement, fear of exclusion or loss of benefits, and general uncertainty,

4. Be prepared to change the direction of the program and remind team members of the possibility,

5. Reexamine assumptions, but maintain high standards. Set high but realistic goals. Test assumptions and support claims with evidence,

6. Communicate directly with program participants about the importance of the program and the requirements involved and solicit feedback. In this case, the lack of
administrative skill involved in the process and decision to not certify the exams makes it seem as if the decision was a knee jerk reaction in face of political pressure rather than long term structural strategy (Ospina, 1999: 232-233).

**Back to Basics**

Lindblom (1959) and Hayes (2001) provide theoretical and pragmatic examples of the policy-making process engaged in by policy makers and political leaders. For example, if a political leader becomes involved in an issue and values, the individual then seeks the support of stakeholders to create legislation and administrative policies. With complex societal problems such as representativeness and disparate impact of tests, citizens and stakeholders often disagree on what the outcome of a decision-making process should be. By nature, individuals prefer stability to crisis and public opinion on an issue is often divided. As a rule of thumb, because of this realization, administrators “choose directly among alternative policies that offer different marginal combination of values….and, evaluation and empirical analysis are intertwined; that is, one chooses among values and among policies at the same time…the administrator focuses his attention on marginal or incremental values” (Hayes, 2001: 90).

While the policy outcome is incremental and typically suffices for the moment, the test of good policy is, as Lindblom (1959: 182) points out: “Agreement on policy thus becomes the only practicable test of the policy’s correctness. And for one administrator to seek to win the other over to agreement on ends as well would accomplish nothing and create quite unnecessary controversy.” So, agreement on policy is a measure of success rather than whether a policy meets its objectives. Considering the disparity of values
among the public as well as the basic, shared goals we have as a society such as economic viability, family life, health and safety, this may be the best that can be accomplished over the short term by decision makers.

While it may sound as if policy creation is characterized by a lot of petty squabbling and negotiations among like-minded administrators and stakeholders outside of public view, relevant academic information and knowledge that informs policy decision making is often limited. The administrator or public official, in order to avoid crisis and make the most informed decision, is also held hostage to the lack of public consensus or knowledge of an issue and the lack of available scientific evidence that a new policy would work. Similar to a scientist, an administrator never expects the new policy to be a final resolution of a problem, just a step in the right direction. Lindblom suggests that there are multiple factors at play in making a policy work and that only by incremental decision making can we sort out what works. While advocates for a particular agenda are adamant about attaining the ultimate outcome they desire, and theorists cannot explain all purposes or consequences of policy, the administrator has to be pragmatic in decision making.

For example, as Lindblom (1959: 185) points out:

It may be worth emphasizing that theory is sometimes of extremely limited helpfulness in policy–making for at least two rather different reasons. It is greedy for facts; it can be constructed only through a great collection of observations. And, it is typically insufficiently
precise for application to a policy process that moves through small changes.

Ultimately, what is of importance for process to work is that relevant stakeholders be included in a deliberative process or confusion and resentment occur and little change ultimately takes place, “the test of good policy is agreement itself, which remains possible even agreement on values is not” (Lindblom, 1959: 181).

**An Example with Clean Air Policy**

Hayes provides an example of incremental decision making in policy formation via a case study of the evolution of clean air policy in this country. In the year 2011, legislation is being stalled regarding how best to capture and reduce carbon emissions and reduce greenhouse gases. He describes policy formation as “the development of policy proposals that are aimed at solving or, at least ameliorating social and economic problems. Because policy proposals must be formulated with an eye towards political feasibility, the line between formulation and a legitimation can be thin at times” (Hayes, 2001: 75). When there is no overwhelming public consensus on an issue, decision makers often take advantage of the absence of a concerted demand for change and make incremental changes to reduce rather than solve a problem. While this activity doesn’t satisfy interest groups, it typically is satisfactory for the mass public. In the 1960s, there were some public interest in the problem of air pollution and environmental issues, and interest groups representing industry were more prevalent than environmental advocacy groups. President Johnson became interested in the issue, but not because of person
interest “but stemmed from his need-as a strong president bent on legislative activism-to find policy proposals that would expand the federal government’s authority while shifting monetary costs to private industry” (Hayes, 2001: 77). The result was the Air Quality Act of 1967 which provided federal money for research on the effects of emissions on public health. The Act was basically a compromise between Johnson and senators who want to preserve states’ rights in setting air quality standards.

But, when the Act expired in 1970, no policy implementation had occurred. The federal agency assigned the task of writing regulations and enforcing them received no extra funding and as such nothing happened at the federal level. States did nothing claiming that it would be wasteful to make changes given there were no regulations to follow. By 1970, there was increasing public interest and advocacy group focus on air pollution and its effects on human health. As a result, The Clean Air Act of 1970 placed authority for setting clean air standards with the newly formed Environmental Protection Agency. There were some non-incremental changes as well such as strengthened air pollution legislation and new rights for citizen’s groups to bring class action law suits against polluters. Most of this intense focus can be attributed to organized and increased public demand for the government to address environmental issues.

Similarly, as Hayes (2001: 77) observed: “President Nixon (never considered a friend of environmental causes) made the environment one of the four major themes of his State of the Union address in 1970 and sent clean air legislation to clean air legislation to Congress… advocacy of environmental causes suddenly looked like very smart
of politics indeed.” Of even more significance, “although the congressional policy community had not been changed in any formal way by the sudden emergence of mass public concern over the environment, new and significant players outside the community were now asserting jurisdiction over the issue” (Hayes, 2001: 80). But, legislative process and community involvement may have increased dramatically, but the policy making process and change has been incremental at best. By 2011, scientific advances in capturing pollutants and cleaning the air have only proceeded incrementally and the technology that is in existence is extremely expensive. And, advocacy groups for and against the polluting industries are still at odds with each other on what is the most proactive, and cost effective means of controlling the problem emissions. Legislators are still on the fence as to what to do and continue to yield to pressures from lobbyists and take contributions from industry supporters.

The evolution of air pollution policy as described by Hayes suggests that a public official who serves as a “change maker” and focused intense public demand for change can spur rapid policy movement in the public sector. But, if we look closely at these policy changes, we can see that policy is basically slightly adjusted with good will gestures. Symbolic responses to public demand are more frequent than substantive content. That is because the public and well as public administrators focus more on process than they do on content. Again, the public prefers homeostasis as do public officials. Too much change provokes anxiety and ambiguity in process promotes uncertainty and resentment.
Legal Impact

The Ricci v. DeStefano case illustrates the necessity of incorporating sensible principles in creating and implementing a promotion testing process. For example, in practice, employers have to balance the goal of creating workplace diversity with two forms of discrimination prohibited by Title VII: disparate treatment and disparate impact. The Court decision in Ricci distinguishes between designing employment practices to promote equal opportunity and taking race-based adverse action to further equal opportunity after implementing employment practices. The main point is that the test design stage is the best time to ensure that a promotion test reflects the job responsibilities as well as information gathered in study materials, and can potentially further equal opportunity. The EEOC’s Uniform Guidelines on Employee Selection Procedures outline validation procedures for tests. The Ricci outcome was decided on Title VII grounds and Title VII applies to all employers, public or private, that maintain 15 or more full-time employees. Although Ricci involved claims of reverse race discrimination, the opinion is based on the balance between disparate impact and disparate treatment law under Title VII.

The Court decision supports the principles behind Title VII:

[W]e need not decide whether a legitimate fear of disparate impact is ever sufficient to justify discriminatory treatment under the Constitution. Nor do we question an employer’s affirmative efforts to
ensure that all groups have a fair opportunity to apply for promotions and to participate in the process by which promotions will be made. But, once the process has been established and employers have made clear their selection criteria, they may not then invalidate the test results, thus upsetting an employee’s legitimate expectation not to be judged on the basis of race. Doing so, absent a strong basis in evidence of an impermissible disparate impact…is antithetical to the notion of a workplace where individuals are guaranteed equal opportunity regardless of race. Title VII does not prohibit an employer from considering, before administering tests as practice, how to design that test or practice in order to provide a fair opportunity for all individuals, regardless of their race. And, when during the test design stage, an employer invites comments to ensure the test is fair, that process can provide a common ground for open discussion toward that end (Ricci, p. 2677).

The City of New Haven, regardless of whatever the desired outcome of the promotion testing process, rejected the test results because the higher scoring candidates were white. This is because the City believed that it could avoid disparate impact liability by engaging in disparate treatment. The transcripts of the Board hearings and legal records reveal, though, that the City had enough evidence to show that they could avoid disparate impact liability because the exams were job-related, consistent to business necessity, and had not rejected another equally valid, less discriminatory
alternative. The testimony presented to the City’s Civil Service Board when it debated whether to certify the test results indicated that the City’s test developer took several steps to create a valid test by observing firefighters on duty, interviewing fire fighter experts from other towns, including minority firefighters from other cities. The test developer offered statistical evidence validating their tests, but the City ignored that evidence. There were no equally valid or less discriminatory tests to use at this point. Based on this evidence, the Court ruled that the City could not show that it had evidence that they would be subject to disparate impact liability.

Workforce diversity litigation has occurred prior to and following Ricci refer to Title VII. In particular, creating a careful balance between disparate treatment and disparate impact prohibitions in employment practices as been stressed. For example, pursuant to Title VII, employers generally may not discriminate against protected employees in hiring, firing, or with regard to other terms and conditions of employment. In 1971, the Court issued its landmark decision in Griggs v. Duke Power Co. (1971), recognizing that Title VII prohibited both disparate treatment as well as disparate impact. In Griggs, the Court addressed Duke Power’s testing policy that was adopted without discriminatory intent but adversely affected African Americans. In holding that the testing requirements violated Title VII, the Court held that in determining whether a test or practice violates Title VII’s disparate impact prohibition, the standard is “business necessity.”

In Albermarle Paper Co. v. Moody (1975), the Court ruled that when an employer implements a test for hiring or promotion that has a racially disparate impact, the
employee must show that another less discriminatory alternative existed and would similarly serve the employer’s purpose. The following court cases resulted in several testing programs being overturned because of disparate impact on ethnic minorities: Bridgeport Guardians, Inc. v. City of Bridgeport, 1991; Fickling v. N.Y. Department of Civil Service, 1995; Vanguard Justice Soc’y. Inc. v. Hughes, 1979, and York v. Ala. Bd. of Educ., 1983.

Finally, in Wards Cove Packing Co. v. Atonio (1989), “the Court held that the employer bears only the burden of production (and not persuasion) for showing that a practice is of business necessity. It also eliminated the “manifest relationship” test from Albemarle, and held that a practice would be permissible so long as it “serve[d], in a significant way, the legitimate employment goals of the employer” (Dichter and Evans, 2010: 31). This litigation led to Congress’s passage of the Civil Rights Act of 1991, which codified a disparate impact claim and amended Title VII to reinstate the concepts of business necessity and job related. More recently, in Ricci, Justice Ginsburg’s dissent referred to this history and suggested a need for Congressional action on the case outcome. Meanwhile, Justice Scalia’s opinion that the Court may need to revisit whether provisions of Title VII of the Civil Rights Act of 1964 is consistent with the Constitution’s guarantee of equal protection, suggests that litigation and legislation regarding the outcome of Ricci will be ongoing.

The Ricci decision has a number of potential practical implications for employers. The possible workforce diversity implications according to Dichter and Evans (2010: 16-22) from the law firm of Morgan, Lewis & Bockius LLP, are as follows:
a. Ricci’s Impact on Diversity Recruiting

First, it does not appear that Ricci will have an impact on employers’ efforts to recruit minority employees. The starting point for the Court’s Ricci decision was its opening assertion that, absent a viable defense, the City’s decision not to certify the test results due to the disparate scores of white and nonwhite test takers was a form of intentional discrimination… By contrast, many courts have held that employers may consider race or gender when making recruitment decisions without violating Title VII’s prohibition against intentional discrimination. See *Duffy v. Wolle*, 1997, *Ensley Branch NAACP v. Seibels*, 1994, *Billish v. City of Chicago*, 1992, and *Shuford v. Alabama State Bd. of Educ.*, 1995… Because an employer’s attempt to recruit minorities is not itself discriminatory against non-minorities, it would not implicate a Title VII disparate treatment analysis. *Ricci* applies only when balancing disparate impact and disparate treatment, and it thus should not affect employers’ minority recruiting efforts.

b. Ricci’s Impact on Hiring and Diversity Promotion Efforts

Similar to inclusive recruiting efforts, nothing in Ricci prevents an employer from ensuring that it requires or considers diverse panels of candidates for open positions to satisfy its legitimate objective of achieving a diverse workforce, especially in management, professional,
and other categories where female and minority representation has not been significant. Much like the recruiting analysis set forth above, Ricci does not touch on these employer efforts because they are not themselves discriminatory...“Title VII does not prohibit an employer from considering, before administering a test or practice, how to design that test or practice in order to provide a fair opportunity for all individuals, regardless of their race (Ricci, 2010).”

...On the other hand, Ricci’s decision clearly reaches employer hiring and promotional programs that directly consider an applicant’s protected class as a factor. As explained above, the City’s decision to deny promotions to the aggrieved firefighters was made solely on the basis of the racial disparity in testing results; therefore, it was deemed to be disparate treatment in violation of Title VII...(Ricci, p. 2673). Ricci could be applied to preclude an employer from directly considering race or gender as a factor in making such hiring or promotion decision absent a “strong basis in evidence” that failing to do so would require the employer to violate Title VII’s disparate impact prohibitions. It is hard to envision a circumstance in which any individual hiring or promotion decision would meet such a standard, or where an analysis of all factors would lead an employer to believe it was in its best interests to even attempt to meet the Ricci standard. As a result, employers wishing to move beyond diverse panels for hiring and
promotion decisions in an effort to meet a goal of increasing diversity within a workforce will likely need to look toward traditional voluntary affirmative action defense. These are discussed in more detail below.

c. Ricci’s Impact on Compensation Programs

For years, employers have faced disparate impact and disparate treatment challenges to compensation systems. Typically, such challenges are brought as pattern or practice claims by the government or in a private class action. See… Serrano v. Cintas Corp., 2009, Holloway v. Best Buy Co., 2009. As a result, employers have increasingly undertaken affirmative risk assessments designed to identify any pay disparities and correct them before a lawsuit is filed. Ricci creates potential risks for employers depending on the manner in which employers take action based upon such risk assessments, and counsels for race-neutral and gender-neutral pay changes and/or sophisticated individualized pay changes for protected group members based upon observed inconsistencies in the application of an employer’s pay policies.

d. Ricci’s Impact on Termination/RIFs

Employers are all too aware of the potential for class actions premised upon disparate impact flowing from RIF programs. See, Sean Farrell, Citi Faces $1bn Class Claim on Discrimination …Citigroup faces a
potential class-action lawsuit for more than [1 billion dollars] over allegations that the stricken bank discriminated against women when slashing jobs last year. As a result, many employers finalize RIF decisions only after considering the effect of the chosen RIF criteria on women and minorities. Ricci permits such analysis prior to implementation of RIF programs, and employers would, therefore, be best suited to study RIF factors in advance of announcing and implementing a RIF program. For example, if an employer is considering using tenure or past performance ratings as factors to be considered in determining who will be terminated in a RIF, it can study the impact of those factors on the relevant workforce before finalizing their inclusion in the RIF program. If it determines that one or both factors have an adverse impact based on race and gender, Ricci permits the employer to decide not to implement those factors as part of its “affirmative efforts to ensure that all groups have a fair opportunity (Ricci,p.267).

In many RIFs, however, employers may desire to have managers complete ratings on similarly situated employees as either one factor or the sole factor in determining whom to include in the RIF. Although Ricci arguably would permit an employer to decide not to use manager ratings as part of the pre-implementation design of the RIF program, an employer that simply changes managerial decisions based on race or gender to avoid statistical disparities
adverse to women and minorities runs the risk under Ricci that this could result in a finding of disparate treatment. As set forth below, employers can best position themselves to avoid the potential quagmire created in this circumstance by undertaking individualized assessments of managerial decisions in situations in which manager ratings were not consistent with business practices and making changes based upon these individual reviews, rather than because of race or gender.

e. Ricci and Affirmative Action Laws/Programs

Some commentators have expressed concern about the potential impact Ricci could have on affirmative action laws and/or employers’ affirmative action programs. The Court in Ricci did not specifically address the parameters of employers’ consideration of race and gender in voluntary affirmative action and diversity programs under Title VII. Ricci established a separate defense to race or gender-based actions, establishing only when employers may take such actions as an effort to avoid otherwise violating discrimination laws. Where an employer’s defense to race or gender-based actions rests upon a desire to engage in voluntary affirmative action, the existing Supreme Court precedent in that area should continue to control. Humphries v. Pulaski County Special School Dist., 2009, noting that Ricci requires an employer that makes a race-based decision to assert a “valid defense,” and applying
longstanding affirmative action defense, rather than “strong basis in evidence” test, to claim of reverse discrimination.

The standards for legal voluntary affirmative action programs under Title VII were announced in *Johnson v. Santa Clara County*, 1987 and *Steelworkers v. Weber*, 1979. Under the Johnson/Weber framework, an employer may take race conscious action pursuant to a voluntary affirmative action program under Title VII only if the program is designed to “eliminate manifest imbalances in traditionally-segregated job categories,” and it does not “unnecessarily trammel the interests of white employees. The most recent affirmative action cases decided by the Supreme Court, *Grutter v. Bollinger*, 2003, approved diversity as a justification for voluntary measures in the education context under a constitutional analysis. In the private employment sector, courts continue to utilize the traditional Title VII framework established in *Weber* to analyze voluntary, remedial affirmative action plans, recognizing the laudable goal of achieving diversity and proportional representation in the workplace.

Courts have viewed affirmative action efforts along a spectrum, generally approving measures that expand opportunities for consideration and inclusiveness (i.e., recruiting) but requiring justification for exclusive forms of affirmative action and diversity, i.e.,
decision making….See, *Hill v. Ross*, 1999, …Affirmative action plans may be arranged along a spectrum. On the one end are detailed hiring quotas designed to overcome past discrimination. On the other end are the sort of plans that all federal contractors must adopt . . . . Plans of the latter kind promise to search intensively for minority candidates and to ensure equal opportunity by clearing away barriers to employment; they do not entail preferential treatment for any group in making offers of employment…. *Hondale v. Univ. of Vermont and State Agric. Coll.*, 1999, racial classification that does not confer a benefit or impose a burden on an individual would not implicate the equal protection clause. This description supports a distinction between ‘inclusive’ forms of affirmative action, such as recruitment and other forms of outreach, and ‘exclusive’ forms of affirmative action, such as quotas, set asides and layoffs. Inclusive as opposed to exclusive forms of affirmative action serve to broaden a pool of qualified applicants and to encourage equal opportunity, not to subject persons to unequal treatment in employment….This distinguishing between inclusiveness and exclusiveness seems consistent with the Court’s expressions in *Ricci*. Therefore, it is unlikely that *Ricci* will have a direct impact on affirmative action law or employers’ corresponding programs (Dichter and Evans 2010: 16-22).
As in the recent court case decision, *Cleveland Fire Fighters for Fair Hiring Practices v. City of Cleveland* (2009), consent decrees may be subject to greater scrutiny in light of *Ricci*. Most consent decrees are justified as a form of voluntary affirmative action and are not directly affected by *Ricci*. However, in considering the need for continuation of a consent decree that called for hiring quotas in a public fire department since the 1970s, the Northern District of Ohio recently noted that *Ricci* “reminds us of how far we have come from the origination of affirmative action in 1960s.” The Court noted that progress has been made, but the judiciary continues to struggle to find the proper balance to ensure equal opportunity between minorities and non-minorities. And, the necessity or propriety of race-based remedies has a wide ranging impact on everyone's lives, regardless of the color of their skin” (p.C73-330).

Conversely, the Consent Decree for the City of Cleveland and its fire department presents a legal, representative, and process appropriate remedy to creating workplace diversity in the City of New Haven and its fire department. The historical record of the city’s “good faith” effort follows a process begun with the first lawsuit filed in April 3, 1973 in the City and identified by the court. Whether decision makers learn lessons from this example of policy process, is still to be determined. One would think that this long, litigious policy history would set a precedent for a deliberative and balanced process in decision making. You would think that a city such as New Haven would have conducted research on comparable, employee diversity practices. It is really important that we compromise and attempt varied and equitable approaches in the policy process as exemplified by the City of Cleveland. If segments of our society, whether it be citizens
or decision makers or stakeholders are excluded from the process, these individuals will feel alienated and will ultimately reject the process and the outcome. What is promised by our Courts and the Constitution is public engagement and transparency in major decisions.

According to a summary of the Consent Decree for the City of Cleveland (Bennett, 2009):

In the 1970s, when the Consent Decree was first put into place, blacks accounted for .4% of the firefighters in the City…but consisted of 40% of the population living in the City….The evidence presented in this matter before the two District Court Judges preceding the undersigned District Court Judge reflected that the hiring practices and statistical disparities of the 1970s caused a near total absence of opportunity for minorities in the City’s Fire Department. …. Headen v. City of Cleveland, 1975, required that no new firefighters would be appointed unless there was available to the firefighters: “An entrance examination which is demonstrably job-related in a manner consistent with EEOC Guidelines on Employment Selection Procedures; a plan for the concentrated recruitment of minority candidates to take such an examination, and all subsequent examinations; a method whereby residents of the City…shall be awarded bonus points for their residency on all future examinations in the same manner as is presently being
done for the Cleveland police department; revised screening procedures…such as are job related, objective and non-discriminatory, to be utilized as part of all future entrance examinations for the fire department….all subsequent examinations shall be demonstrably job-related (p. 4).

In 1997, the city and the plaintiffs entered in a Consent Decree in 1977, an Amended Consent Decree in 1984, with each decree having a goal of 33 1/3 % minority firefighters.

In September, 2008, the City filed a motion for an extension of time until 2014 to reach this 33 1/3% goal. It advised the court of the following timeline:

- November 1998: Fire entrance examination held;
- September 1999: The 1999 fire eligibility list established;
- September 2000: Court orders the 1999 fire eligibility list reconstituted and orders that the Headen ratio for hiring be one minority for every two Caucasians hired. Court also extends Fire eligibility list until September 2002;
- October 2000: Fire eligibility list reconstituted as ordered by the court;
- 2003: The Ohio Police & Fire Pension Fund establish the DROP program to encourage retirement;
• January 2004 to April 2007, all firefighters requesting return from lay-off due to a previous budget cut are re-hired to fill vacancies in the fire department;

• March 2008- September 2008, the division of fire meets with public safety and civil service to announce that a fire training academy is created and to plan for a 2009 fire entrance exam to establish a new eligibility list. Letters are sent to all candidates to determine interest in attending the academy.

• As a result, the trial judge determined that the Consent Decree could be terminated, “A review of the City’s good faith effort to comply with the Second Amended Consent Decree reflects that the City currently has in place a foundation that will lead to increased minority representation in the Fire Department …Using a bona fide job-related examination that is nondiscriminatory and continuing with its minority recruitment efforts, ….these Consent Decrees…created a framework that allows the City to establish a hiring procedure and process that is nondiscriminatory and fair to all applicants…” (p. 5).

• For the reasons cited herein, the City’s Motion for Extension of Time to Comply with the Headen Decree (ECF#44) and the Vanguard’s Motion to Extend the Terms of the Second Amended Consent Decree (ECF #45), are DENIED. This case is TERMINATED (p.5).
Discussion

From one perspective, the city of New Haven made a sincere gesture to the ethnic minorities in the community by declining to certify the promotion test results. The outcome of the effort would include more promotions of ethnic group firefighters, a new African-American corporate counselor who originally worked for the NAACP and is capable and determined to create a task force to study comparative promotion policies in other cities, and possibly a change in union rules on promotions for firefighters; these are all extremely laudable.

But what are the costs of making a decision not to certify the exams? It took a Supreme Court case, intense media and judicial focus, accusations of political expediency on the part of the mayor by the public and fellow administrators, and expensive litigation to help “right the ship.” The absence of a coherent, consistent process in the City’s decision making invoked all types of animosities and resentments that will likely play out for time to come. An incremental policy process could have produced similar results, provided DeStefano and his administrators with public support and recognition that they were making genuine efforts to help the firefighters who failed as well as the firefighters who succeeded to promotion. In addition, in the long term, the mayor will have to engage in time consuming, symbolic, good will gestures to help the public, the City’s public officials and employees forgive and forget.

In addition, long standing social problems evoke anxiety among the public, political leaders and administrators when we attempt to address these issues. For
example, while there was mass public support for civil rights laws in the 1960s, there were public and underlying major disagreements among policy makers and the public on exactly what those rights should include. The Civil Rights Act of 1964 is characterized as a non-incremental change by most policy makers (Hayes, 2001: 94). But, it took negotiations between President Kennedy’s staff, centrist Republicans, and the incredible negotiating skills of Vice President Johnson to create reform and win concessions from the opposition. As Hayes (2001: 94) concludes:

In the final analysis, the 1964 Act represented an important breakthrough in federal authority, and the American public (then and now) was reassured that the new law addressed the major problems facing black Americans. On a wide variety of important specifics, however, the law reflected classic tapering down from the ideal to the acceptable—a process that was conducted, of necessity, almost entirely out of public view.

Also noteworthy, the Act of 1964 eventually ushered in the Equal Employment Opportunity Commission to enable defendants with employment discrimination complaints to pursue a trial in a federal court.

In sum, as posited at the outset of this case study, eliminating adverse and disparate impact from promotion testing is an important goal, it can be accomplished through an incremental process.
Chapter 8

Conclusions and Policy Recommendations

The purpose of this paper was to provide an in-depth review of the administrative process conducted by government officials of the City of New Haven with regard to the promotion testing process for firefighter civil servants in the City of New Haven and the Ruling of the United States Supreme Court in Ricci v. DeStefano (2009). In an attempt to make the City’s public workforce more diverse, a group of public administrators, including the mayor, John DeStefano, engaged in an unconventional course rather than a deliberative process to create a firefighter department that was more representative of the current ethnic makeup of the City of New Haven. In this case, instead of creating a smart and concrete set of policy recommendations, these administrators instead tossed out an established promotion policy after this mutually agreed upon promotion process had already been implemented. In effect, the process was sacrificed for immediate impact and possible political expediency. As a result, the policy recommendations that resulted from this haphazardly and dubiously conducted process were mightily contested and rejected by the public servants and departments they served to assist and were ultimately ruled on by the U.S. Supreme Court.

The litigation regarding Ricci v. DeStafano and testing studies conducted by the University of California indicate that the use of a defensible cut-off score on an examination is significant in order to prevent adverse impact in testing. There is a
problem when administrations use a “cut off score for promotion” because this method, rather than ranking as suggested by the U of California studies, can produce adverse impact. This was also identified in the lower and Supreme Court testimony to support the City in not certifying the test results. The City, because of an existing local union contract, used as seemingly arbitrary cut-off score of 70 for promotions on the New Haven Fire Department lieutenant and captain promotion tests. The consultant who was retained by the City, Industrial/Organizational Solutions, Inc. (IOS), to develop and administer the exams attempted to establish a cut off score to “establish a content-valid, legally defensible cut –off score for the examination…Although IOS’s proposal to the City had stated that it would use three fire experts from Chicago to perform this very critical process, IOS ultimately skipped it and used the City Charter’s cut-off o f 70…(Respondents’ Briefs on the Merits, Supreme Court Testimony (p.3 ). “ And, “IOS conceded that using the conventional cut-off 70 isn’t very meaningful when you are trying to find…the cut-off score that defines minimally competent or minimally qualified, which is ultimately what you are looking to do in a situation like this(p.3).

Results of the test, likely due to using this arbitrary cut-off score, were more disparate in 2003 than under previous tests. Although previous tests had reflected disparities, the highest ranked African-American candidate for lieutenant ranked third in 1996 and fifth in 1999, but thirteenth on the 2003 test. For captain, the highest ranked African-American candidate had been fifth in 1998, but was fifteenth under the 2003 test. Recognizing that the process used by the City to create and implement the test was likely inappropriate, the City held five Civil Service Board hearings over a period of two
months to consider whether to certify the test results. The City had decided to hire an outside consultant to create and implement the promotion test, and to forgo internal review of the test because they were afraid of undue influence by the Union and bias among City administrators in text question selection, as well as prior lawsuits over discriminatory promotion practices. The response by the City, supposedly based on the outcome of these Board hearings, was to decide not to certify the test results. And, the City suggested that these Board hearings represented the City’s attempt to conduct a deliberative, open process in declining to use the test results.

Petitioners’ to the lower and Supreme Court, in accordance with Title VII, stated that by declining to certify the test results the City violated their rights by “altering the results of employment tests.” The petitioners’ counsel also suggested that the City decided not to certify simply out of fear of litigation by black fire fighters. But, in reality, it was the narrow decision making process that occurred when the City retained Industrial/Organizational Solutions, Inc. (IOS) to develop and administer the exams that makes the process suspect. IOS also attempted to review the cut-off score internally with the administration and was rebuffed. So, the deliberative open process was rebuffed all along until after the test was given. While the Mayor’s decision to decline to use the test results appears to blaze a trail for racially proportional promotions, it is a decision that comes in the face of an adverse political outcome. The intent to comply with Title VII’s disparate-impact provisions is a “race related reason” which was suggested by the petitioners’ and denied by the City administration and Mayor, cannot be properly defended or abandoned because of the narrowness of the decision making
process. Legally, evidence before the Board of less discriminatory alternatives should have been considered before the test was developed and administered. In this case, the hiring of the consultant IOS is evidence of the administration and Mayor’s attempt to improve the City’s accessibility for minorities in the Fire and Police Departments. But, his motivation for doing so is not apparent from the decision making process.

Justice Ginsburg, in her dissent of the Supreme Court ruling, states that one has to look at the underlying motive of the Mayor and his administration in declining to certify the promotion exam results. She suggests that the Mayor was justified to abandon the status quo because of long standing hiring and promotion discrimination in practice not only in his City but as a normal practice overall:

“The real issue, then, is not whether the mayor and his staff were politically motivated; it is whether their attempt to score political points was legitimate (i.e., nondiscriminatory). Were they seeking to exclude white firefighters from promotion (unlikely, as a fair test would undoubtedly result in the addition of white firefighters to the officer ranks), or did they realize, at least belatedly, that their tests could be toppled in a disparate-impact suit? In the latter case, there is no disparate-treatment violation. JUSTICE ALITO, I recognize, would disagree. In his view, an employer’s action to avoid Title VII disparate impact liability qualifies as a presumptively improper race-based employment decision. See ante, at 2. I reject that construction of Title VII. See supra, at 18–20. As I see it, when employers endeavor to avoid exposure to disparate-impact liability, they do not thereby encounter liability for disparate treatment.
Applying this understanding of Title VII, supported by *Griggs* and the long line of decisions following *Griggs*, see *supra*, at 16–17, and nn. 3–4, the District Court found no genuine dispute of material fact. That court noted, particularly, the guidance furnished by Second Circuit precedent. See *supra*, at 12. Petitioners’ allegations that City officials took account of politics, the District Court determined, simply “d[id] not suffice” to create an inference of unlawful discrimination. 554 F. Supp. 2d, at 160, n. 12. The non-certification decision, even if undertaken “in a political context,” reflected a legitimate “intent not to implement a promotional process based on testing results that had an adverse impact.” *Id.*, at 158, 160. Indeed, the District Court perceived “a total absence of any evidence of discriminatory animus towards [petitioners].” *Id.*, at 158. See also *id.*, at 162 (“Nothing in the record in this casesuggests that the City defendants or CSB acted ‘becauseof’ discriminatory animus toward [petitioners] or other non-minority applicants for promotion.”). Perhaps the District Court could have been more expansive in its discussion of these issues, but its conclusions appear entirely consistent with the record before it.

It is indeed regrettable that the City’s non-certification decision would have required all candidates to go through another selection process. But it would have been more regrettable to rely on flawed exams to shut out candidates who may well have the command presence and other qualities needed to excel as fire officers. Yet that is the choice the Court makes today. It is a choice that breaks the promise of *Griggs* that groups long denied equal opportunity would not be held back by tests “fair in form, but

Justice Ginsburg’s above noted statement, “.that groups long denied equal opportunity would not be held back by tests “fair in form, but discriminatory in operation” supports the Mayor’s decision to abandon the established testing process in place in the City of New Haven. The historically important and equity aspects tests and workplace diversity demand more reflection in the promotion process. But, it is justification for abandoning an established process and replacing it long before the test is given. It is also justification for an open rather than a narrow decision making process. The courts and the City assert that there must be a ‘strong basis’ on which to conclude that use of tests would violate Title VII. The petitioners in this case assert that the court should certify test results even if there are substantial findings that the tests do violate Title VII, and then make amends afterwards. The City suggests that results of tests that appear discriminatory are enough evidence to not certify those test results. But, neither argument addresses the Justice Ginsburg’s issue of tests “fair in form, but not discriminatory in operation.” Only the incremental research findings such as those gained by the scientific studies of the University of California regarding this issue can offer insight and resolution of this problem. Only an open, policy selection and implementation process that includes inclusive consideration of all the documentation on this issue can give clarity to addressing discrimination in operation. If the Mayor wants to be a trail blazer and encourage others to follow his lead, this is the way to go forward. This ongoing, convoluted drama of litigation and administrative backsliding has exposed
the underlying rifts among the City of New Haven’s administration and officials. Mutually suspicious relations between government bureaucrats and union officials obstructed smooth decision-making. The Mayor turned to outside consultants and a small team of trusted administrators because of well-founded mistrust of a biased system of bureaucrats, union officials and workers. But, by not bringing everyone to the table and making a quick decision in order to stem adverse political impact, The Mayor deprived the City of resources that could have been used to make better-informed decisions.

Justice Kennedy, who delivered the Supreme Court opinion ruling in favor of the petitioners defines from a legal perspective the purpose for an employer to create a deliberative, incremental decision making process; basically to provide strong basis in evidence standard of Title VII and prevent cursory remedial actions:

“Applying the strong-basis-in-evidence standard to Title VII gives effect to both the disparate-treatment and disparate-impact provisions, allowing violations of one in the name of compliance with the other only in certain, narrow circumstances. The standard leaves ample room for employers’ voluntary compliance efforts, which are essential to the statutory scheme and to Congress’s efforts to eradicate workplace discrimination. See Firefighters, supra, at 515. And the standard appropriately constrains employers’ discretion in making race-based decisions: It limits that discretion to cases in which there is a strong basis in evidence of disparate-impact liability, but it is not so restrictive that it allows employers to act only when there is a provable, actual violation.
Resolving the statutory conflict in this way allows the disparate-impact prohibition to work in a manner that is consistent with other provisions of Title VII, including the prohibition on adjusting employment-related test scores on the basis of race. See §2000e–2(l). Examinations like those administered by the City create legitimate expectations on the part of those who took the tests. As is the case with any promotion exam, some of the firefighters here invested substantial time, money, and personal commitment in preparing for the tests. Employment tests can be an important part of a neutral selection system that safeguards against the very racial animosities Title VII was intended to prevent. Here, however, the firefighters saw their efforts invalidated by the City in sole reliance upon race-based statistics.

If an employer cannot rescore a test based on the candidates’ race, §2000e–2(l), then it follows a fortiori that it may not take the greater step of discarding the test altogether to achieve a more desirable racial distribution of promotion-eligible candidates—absent a strong basis in evidence that the test was deficient and that discarding the results is necessary to avoid violating the disparate impact provision. Restricting an employer’s ability to discard test results (and thereby discriminate against qualified candidates on the basis of their race) also is in keeping with Title VII’s express protection of bona fide promotional examinations. See §2000e–2(h) (“[N]or shall it be an unlawful employment practice for an employer to 25 Cite as: 557 U. S. ____ (2009) give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race”); cf. AT&T Corp. v. Hulteen, 556 U. S. ___, ___ (2009) (slip op., at 8).
For the foregoing reasons, we adopt the strong-basis-in evidence standard as a matter of statutory construction to resolve any conflict between the disparate-treatment and disparate-impact provisions of Title VII.

Our statutory holding does not address the constitutionality of the measures taken here in purported compliance with Title VII. We also do not hold that meeting the strong-basis-in-evidence standard would satisfy the Equal Protection Clause in a future case. As we explain below, because respondents have not met their burden under Title VII, we need not decide whether a legitimate fear of disparate impact is ever sufficient to justify discriminatory treatment under the Constitution.

Nor do we question an employer’s affirmative efforts to ensure that all groups have a fair opportunity to apply for promotions and to participate in the process by which promotions will be made. But once that process has been established and employers have made clear their selection criteria, they may not then invalidate the test results, thus upsetting an employee’s legitimate expectation not to be judged on the basis of race. Doing so, absent a strong basis in evidence of an impermissible disparate impact, amounts to the sort of racial preference that Congress has disclaimed, §2000e–2(j), and is antithetical to the notion of a workplace where individuals are guaranteed equal opportunity regardless of race.

Title VII does not prohibit an employer from considering, before administering a test or practice, how to design that test or practice in order to provide a fair opportunity for all
individuals, regardless of their race. And when, during the test-design stage, an employer invites comments to ensure the test is fair, that process can provide a common ground for open discussions toward that end. We hold only that, under Title VII, before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action.”

Specifically, Justice Kennedy identifies not the test itself but the “terms” the City had established for the promotion process as the problem here. So, while some of the City administrators took the narrow step to hire a consultant to create and implement an objective test, they never reconciled this step with the other problematic, potentially biased components of the promotion process. That was the incremental step that still remains unresolved:

“The record in this litigation documents a process that, at the outset, had the potential to produce a testing procedure that was true to the promise of Title VII: No individual should face workplace discrimination based on race. Respondents thought about promotion qualifications and relevant experience in neutral ways. They were careful to ensure broad racial participation in the design of the test itself and its administration. As we have discussed at length, the process was open and fair. The problem, of course, is that after the tests were completed, the raw racial results became the predominant rationale for the City’s refusal to certify the results. The injury arises in part from the high, and justified, expectations of the candidates who had participated in the testing
process on the terms the City had established for the promotional process. Many of the candidates had studied for months, at considerable personal and financial expense, and thus the injury caused by the City’s reliance on raw racial statistics at the end of the process was all the more severe. Confronted with arguments both for and against certifying the test results—and threats of a lawsuit either way—the City was required to make a difficult inquiry. But its hearings produced no strong evidence of a disparate-impact violation, and the City was not entitled to disregard the tests based solely on the racial disparity in the results.

Our holding today clarifies how Title VII applies to resolve competing expectations under the disparate treatment and disparate-impact provisions. If, after it certifies the test results, the City faces a disparate-impact suit, then in light of our holding today it should be clear that the City would avoid disparate-impact liability based on the strong basis in evidence that, had it not certified the results, it would have been subject to disparate treatment liability.

Petitioners are entitled to summary judgment on their Title VII claim, and we therefore need not decide the underlying constitutional question. The judgment of the Court of Appeals is reversed, and the cases are remanded for further proceedings consistent with this opinion. (pp. 24-34, http://www.supremecourt.gov/opinions/08pdf/07-1428.pdf )."

Hayes(2001) clarifies the distinction between non-incremental, symbolic or “dramaturgical” incrementalism, and incrementalism in policy making which the Supreme Court Justices reference in their opinions. The Civil Rights Act of 1964 is
generally considered a non-incremental policy making because the mass public as well as a majority of Republican and Democratic centrists supported overarching civil rights legislation. But, as Hayes notes, “On a wide variety of important specifics, however, the law reflected classic tapering down from the ideal to the acceptable—a process that was conducted, of necessity almost entirely out of public view (p. 94).” In addition he notes, that when there is strong, concentrated public opinion on an issue or “the balances of forces shift in favor of challenging groups,” political leaders will often provide “symbolic reassurances” or gestures to group members in order to assuage them until other priorities surface. As illustrated in this case study, the Supreme Court Justices propose that administrators and political leaders make substantive public policy changes when possible, in accordance with legal parameters. In this way, the Justices are alluding to an incremental policy making path for policy makers. Recognizing differences in political perspectives as well as the inequities in representation, resources, and access to information among groups and policy makers, the Justices that incremental policy making is likely the path of least resistance for decision makers to achieve substantive and representative policy outcomes.

Getting governance right is based on a pragmatic approach: an emphasis on what works in practice based on abstract theory. In the case of the City of New Haven, city governance has historically lurched between transformation and compromise, especially with respect to process in urban policy. In the years from 1910 to 1980, New Haven illustrates the efforts engaged in by many cities to sustain and revitalize urban survival. The seminal works on policy making in New Haven, *City: Urbanism and Its End* by
Douglas W. Rae (2003), *Who Governs?* by Robert A. Dahl (1975), and *Who Rules America?* by G. William Domhoff (2010), illustrate the dueling forces that are engaged during a public policy decision making process. The theories of elitism, pluralism, and incrementalism, when incorporated expertly and decisively in policy making, can create good public policy within the context of a fairness narrative. In the process where government officials were enabled by a supportive public, bureaucrats focused on innovation while maintaining stability and confidence in public institutions. City mayors were able to wield real authority and usher in considerable change. These leaders commanded respect while they engaged in a policy of modernization and change. This is because they also honored the public and stakeholders’ desire for stability along with incremental reform and modernization. So, while public governance seeks to reform and modernize, it is simultaneously engaged in maintaining stability. But, incremental governance can be transformational. This is because while government entities are ensnared in crisis or preoccupied with tackling deep-rooted problems, they are also seeking to innovate and change. In fact, it seems that while pluralistic, elitist and cultural factors mentioned in these studies did have an overarching impact on decision making, the presence of incremental decision making process helped to enable successful and transformational policy change.

In providing a theoretical perspective of elitists shaping governmental decision making, the theorist Domhoff suggests that there are four overlapping, decision making processes by which elites such as the corporate community shape public policy and
public opinion. Their “expert power is developed within the policy planning network” and processes are centered in four power networks (Domhoff, 2010, pp.18-19):

1. The special interest process: Lobbyists for wealthy individuals and corporate America that can directly influence elected officials;

2. The policy-planning process: Roundtables consisting of think tank academics, researchers, corporate stakeholders and congressional committees that unite to create governmental policy positions;

3. The opinion shaping process: Media, advertisers and corporate operatives unwittingly and formerly work together to create an American narrative…usually a narrative that is favorable to corporate America but is framed as a fair and balanced narrative;

4. The candidate selection process: an elite group of decision makers determine who gets campaign funding and support to be nominated as a candidate for a political party….i.e., an individual who tows the party line and is considered loyal to the party goals.

Policy decision makers nurtured by the processes within this network go on to set governmental policy. Domhoff’s research on power and elitism in cities such as New Haven, suggests that power is contained within a tight network of decision makers whose
first loyalty is to the economic elite and then to their political party elites. The decision makers in both sectors are interested in public opinion and a fairness narrative only in that it is monitored and shaped in accordance with the elites’ long term goals… “The power to invest or not invest, and to hire and fire employees, leads to a political context where elected officials try to do as much as they can to create favorable investment climate to avoid being voted out of office in the event of an economic downturn. This structural power is augmented by the ability to create new policies through a complex policy-planning network, which it was possible to institutionalize over many decades because common economic interests and social cohesion give the corporate community enough unity to sustain such endeavor” (Dumhoff, 2010: 210-211). Corporate disdain for government regulation and lack of respect for most government employees eventually influences attitudes of public sector elites. Government employees are dispensable, are covertly and overtly subservient to party politics, and generally are there to enforce the current status quo.

Government decision makers engage in incremental policy decision making processes in order to conform to the “structural economic power and to participate in the opinion shaping network” to retain political power. But, politically, they also seek to create a fairness narrative so as to fulfill another obligation to their constituents, and occasionally their own personal goals for policy progress. This helps to sustain the fairness narrative which “Despite their lack of power, many Americans feel a sense of empowerment because they have religious freedom, free speech, the right vote, and the hope that they can make more money or rise in the class structure if they try hard
enough” (Dumhoff, 2010: 212). But, I believe, it is precisely because of the promulgation of this fairness narrative that the regular citizen keeps striving to make a difference, occasionally accomplishes this goal, and actually elects a government official that is willing to incorporate all sectors of the public in some aspects of the decision making process.

Domhoff also suggested that pluralistic leaning social scientists are misguided into believing that interest groups and the general public have significant opportunity to influence social policy. The little wiggle room that policy makers have to incorporate public input into the policy making process is really just a token effort by policy makers. Social, economic and political elites really never change the status quo, just marginally adjust it to make themselves more competitive economically, and to maintain the illusion of a fairness narrative. If not, the advocates for interest groups outside the elite circle could create social unrest and more significant demands for change. According to Domhoff (2010: 20-21): “Based on the studies of the relationships between public opinion and government decisions, pluralists argue that the general public has power on many issues through forming into interest groups that shape public opinion and lobby elected officials…Even more important, citizens are said to have the power to influence the general direction of public policy by voting for the candidates and political parties that are sympathetic with their preferences.”

Domhoff asserted that the pluralists regard elite power as an obstacle to change but not one that is insurmountable. He also suggests that citizens are tossed a bone and
then told to go home and are frequently deluded by small tokens provided by the elite that social policy progress is being made. Domhoff noted that the history of the civil rights movement contains several examples of how differently the pluralist and elitist camps conceive power and how incremental policy change works. He added that President Kennedy appointed his younger brother Robert, then attorney general, to assist the FBI in their covert spying of the civil rights leader, Martin Luther King. Meanwhile, the Democratic Party has generally supported the liberal and black community which in turn supported the civil rights movement. President Lyndon B. Johnson, Kennedy’s former vice president, signed the Civil Rights Act in 1964 only after a considerable number of covert and overt compromises and arm twisting activities between himself and various legislators in Congress. Martin Luther King was assassinated shortly thereafter, as was Robert Kennedy as both were perceived to be ardent champions of the underdog and minorities.

The pluralist Robert A. Dahl’s famous discourse on politics and power in the City of New Haven, *Who Governs?* first published in 1975, suggests that “One of the difficulties that confronts anyone who attempts to answer the question, ‘Who rules in a pluralist democracy?’, is the ambiguous relationship of leaders to citizens” (Dahl, 1975: 89). Dahl continues regarding the ambiguity, “in each of a number of key sectors of public policy, a few persons have great direct influence on the choices that are made, most citizens, by contrast, seem to have rather little direct influence. Yet it would be unwise to underestimate the extent to which voters may exert indirect influence on the decisions of leaders by means of elections” (Dahl, 1975: 101).
As Dahl goes on to describe, successful New Haven mayors capitalized on this ambiguity to not only gain more political support but also to create a more representative governing body. For example, he cites the successful mayoral candidacy and election of William Celentano in 1945. Celentano capitalized on the teacher and parent mobilized efforts to improve the New Haven education system by helping them organize and promised to improve schools. He supposedly also benefited from his Italian and religious heritage in that two thirds of New Haven voters were Catholic. Once elected, he created a Citizens advisory Committee composed of a select group of citizens. He also hired a Cornell professor to conduct an education survey that eventually recommended more professional leadership and expenditures in the education system.

According to some individuals, the process of policy decision making that was as true then as is now, continues to be conducted by an elite group of decision makers and rewards go to individuals who are loyal. For example, “And some of the teachers who had worked actively for Celentano’s election in 1945 were suitably rewarded; one even became a high school principal” (Dahl, 1975: 161). In addition, the ambiguity of the decision making process may have allowed for greater change and more influence of outsiders, but were these outsiders really outsiders? Was this due to the cultural climate which was overwhelmingly Irish and Italian Catholic at the time? Was it due to the fact that elections occurred in a time where the public was more trustful of elected leaders? Were the changes recommended by the Cornell professor given full consideration and were these results communicated to all the decision makers, stakeholders and the public?
Dahl (1975: 161) doesn’t answer these questions, but does explain some of the decision making process:

The relations of influence between leaders and constituents in this struggle involving schools were pervaded by ambiguities. A few people, the leaders, evidently exerted great direct influence on a series of decisions about teachers’ salaries, appointments, appropriations, buildings. But, some of these leaders were elected to office because parents and teachers expressed their discontent with existing policies by voting against the incumbent.

In another example of how politics and decision making worked in New Haven, and from this case study appear to be ongoing, Dahl (1975: 315) notes that the stability of the political system, even a democratic one, is not merely a matter of the number of persons who adhere to it but also of the amount of political resources they use-or are expected to use-in acting on their beliefs. The amount of political resources an individual is likely to use is a function, among other things, of the amount of resources he has access to, the strength or intensity of his belief, and the relevance he sees in political action as a way of acting on his beliefs. Other things being equal, rules supported only by a wealthy, educated minority (money and knowledge being important political resources) and opposed by the rest of the voters are surely likely to endure longer
than rules supported only by a poor, uneducated minority and opposed by the rest of the voters.

In other words, elite forces and their policies tend to prevail in society, even with a leader that is considered a “change agent.” But, this statement also suggests that consensus and interest group input are needed in the process in order for any leader to affect change.

In addition, the comments certainly suggest that the process and policy change are incremental at best. Dahl suggests that voter indifference and lack of cohesion may doom the interest groups’ efforts to alter the status quo. It is more likely their lack of access and mobility in elite circles that minimizes opportunities. It is also the role of the leader to make the policy decision making process more inclusive and the policies more representative to allow interest groups any opportunity to contribute to the process and create change.

Also, the influence of cultural climate of a dominant Catholic majority similar to the mayor, and educated constituents with a history of citizen activism, may have also influenced mayoral decisions to include city residents in the process, and simultaneously conduct an ambiguous decision making process. This process would give the appearance of a fairness narrative, while ensuring insignificant policy alterations. Conversely, while New Haven demographics are no longer characterized by a white, Catholic majority, there is no guarantee that this majority is no longer in the elite decision making circles. There is still the significant influence of the local Yale University in policy matters, the
union leaders, and other stakeholders. But, none of this can be clarified unless a policy decision making process is more than an isolated, ambiguous exercise. The promotion testing policy outcome in the Ricci case indicated that political forces and path dependent processes were still the dominant deciding factors in this outcome. At least Mayor Celentano, over 60 years earlier, put a citizen action committee in place to affect policy change.

Douglas W. Rae, in his book *City: Urbanism and Its End* (2003), described the rise and fall of urban New Haven. He ties the fortunes of the City with the governance by the City’s mayors which included encouraging business development as well as civic engagement in the City. Regardless of how effective these mayors were, however, white, professional flight from the City to homes in the suburbs, to higher paying jobs in nearby and easily accessed New York City, relocation of manufacturers from the City to other locations with cheaper tax rates and labor at cheaper rates, and the influx of unemployed, poorly educated, black Americans seeking jobs, contributed to the urban decay of the City.

During the early 1900s when Frank Rice was the mayor, historians including Rae (2003: 190) have concluded that Mayor Rice “would again and again reach out to business leadership to help him run the difficult apparatus of city government; he made New Haven government function within its very serious limitations by reliance on the instincts and habits of the business community.” City government consisted of a highly structured system of boards, bureaus, commissions, and a legislature that made it difficult
to enact new policies and procedures. Mayor Rice, according to the author, assumed control of the important boards and commissions and simultaneously, implemented incremental policy changes. As Rae (2003: 202) observes: “He used the institutions of city government to the best of his ability, and he used them for tasks they could be made to do. Large, transformational endeavors were not included.” As such, New Haven became a vital, successful manufacturing city. Rae states that Richard C. Lee, elected mayor in 1954 was a real force for change in the management of government in New Haven.

But, his greater goals of revitalizing the city and governance were not achieved because, “This is because the underlying problems faced by Lee’s New Haven were so deeply rooted in its history, so powerful, and so complex, that no mayor and no mayoral administration lasting a mere sixteen years could have overcome them. His principal resources-delivered through the Federal Housing Acts of 1949 and 1954 were, moreover, poorly suited to many of the tasks that needed to be performed (Rae, 2003: 313). Lee also sought managerial talent that, according to him, was not already available among his public servants. He created a redevelopment authority that was considered to have employees with exceptional capabilities and lots of federal funding. But, members of the agency, the ‘Kremlin’ as it was referred to, were not concerned with their careers in New Haven, “Most important of all, perhaps, very few members of the ‘Kremlin’ needed to protect a long-term future in New Haven city government-each was satisfied with establishing an external reputation based more on results than on congeniality or popularity” (Rae, 2003: 322).
Lee’s last mayoral victory in 1967 exposed demographic, economic, and social changes in the City. To date, it also ended the two-party system in New Haven. Following Lee’s decision not to run again, the Democratic Town Committee or DTC became the dominant party in the City. “The DTC is a monopoly institution, a fairly unappealing, oligarchic, and private one for many potential voters. Perhaps, even more decisive, even with nearly four thousand full-time positions, job-seeking is now a weak motive for political activism. Opportunities for new employment in city government are extremely limited. The combination of civil service protection and the accumulated seniority rights of workers covered by election union contracts gives a freshly elected mayor far fewer than one hundred jobs to dispose of, and many of these require advanced professional education. Most of the jobs are not just out of reach for political climbers and insurgents, they are commonly held by comfortable suburbanites” (Rae, 2003: 412).

In addition, as government became less attractive to high achievers and ‘change agents’, economic decline contributed to greater conflicts over funding for public projects. In bids for funding for block grants from the Community Development Block Grant (CDBG) program, “neighborhood rivaled neighborhood, potentate rivaled potentate, and the mayors who followed Lee found themselves ensnared by intractable distributive conflicts. Race and ethnicity became bases of deep division between political elites, even as the mass public ignored these considerations and bigotry against white ethnics became common on the local scene. Urbanism’s sense of commonality and trust was deeply eroded by protracted conflict-and conflict now less and less disciplined by the
work of political parties (p. 413).” In the process, more and more highly skilled and educated individuals also chose to leave the City further reducing tax revenue from property taxes.

The seminal works on policy making in New Haven discussed above by Rae, Dahl and Dumhoff, provide evidence of how policy processes and outcomes in the public sector have consequences for multiple policy areas. In addition, the theorists present evidence of the elite, pluralistic and incremental influences on governance at varying times in the history of the City of New Haven. Domhoff’s business elite appear to have been influential during the turn of the century when New Haven was considered an important manufacturing center. Dahl could find no evidence of a cohesive business elite involved in governance because the business elite have primarily abandoned the City since the 1960s. Rae supports Dahl’s earlier conclusion about New Haven politics and governance, that “In the political system of today, inequalities in political resources remain, but they tend to be noncumulative. The political system of New Haven, then is one of dispersed inequalities…Within a century a political system dominated by one cohesive set of leaders had given way to a system dominated by many different leaders, each having access to a different combination of resources. It was, in short, a pluralist system” (Dahl, 1975: 38). Dahl and Rae suggest that while a single DTC dominates politics, there is a subgroup or subgroups that have competing influence. It also can be concluded that an incrementalist form of governance is all that can be achieved at this point because of the lack of unity among residents and individuals in city government.
Dahl might refer to the most recent system of governance in New Haven as a form of pluralism, but that seems to be a less than accurate perception of what appears to be dysfunctional government. As Rae (2003: 420) notes on the current state of government in the City:

The ‘unending competition between political parties’ which was for Dahl a hallmark of New Haven’s pluralistic democracy is gone, replaced by street-fighting pluralism within the formal structure of the DTC. Turnout in the primaries is often very modest, as in the 1999 race between DeStefano and challenger James Newton, where the two combined for fewer than 10,000 votes. Many voters are unable or unwilling or both to discern the programs, allegiances, and affinities of the candidates of the DTC primaries. Incumbents are often pleased to leave it that way, and accountability is frequently blurred. This is not at all the work of the powerful and manipulative elite within the DTC, or anywhere else. It is the result of one-party rule in a city where the incentive to control city politics has been diminished for many residents, where business has almost entirely vanished from the field of political combat, and where a different kind of regime has long since begun to replace the grounded politics of historical urbanism.

Based on the theories and studies reviewed here, DeStefano and his administration’s decision making process with regard to promotion testing of firefighters
can be then explained by any number of possibilities. These include an attempt to revitalize and reinvent government, or conversely an inexpert policy making process. Or, it can be attributed to a desire to gain political support from a particular subgroup, a lack of respect for the bureaucrats that currently occupy the various boards, commissions and unions, and a genuine concern that the firefighters of ethnic origin cannot seem to be promoted in greater numbers. The ambiguity of the process and desired outcome of the policy decision making exhibited here has only contributed to criticisms of city government in New Haven. One fair conclusion is that Mayor DeStefano, like the other City mayors that preceded him, was trying to unify City government and the various neighborhoods and make progress in diversification and representativeness with a sincere gesture of equity and justice in job promotion policy.

Public sector decision makers continue to struggle to develop promotion testing policy that creates a representative, qualified and talented workforce and that meets government guidelines for equitable practices. In addition, research indicates that an incremental policy decision making process serves to create good policy within the context of a fairness narrative that is desired by political leaders, policy makers, stakeholders as well as the general public. The major findings of this case study were that an inexpert policy making process contributed to the decision to leave the test results uncertified. According to conversations with City administrators and other decision makers, the high court ruling was both frustrating and disappointing. The administrators assumed that by hiring a contractor to create and implement the promotion test, they were fulfilling their obligation to promote the best test scorers in the most unbiased and fair
manner. However, research for example, would have revealed that cities, including the neighboring city of Bridgeport had abandoned written promotion tests for firefighters and instead began using assessment centers for promotion testing.

It is clear that the promotion policy for firefighters needs significant revision. The major findings of this case study were that an inexpert policy making process rather than an incremental policy decision making process contributed to the decision to leave the test results uncertified. According to conversations with City administrators and other decision makers, the high court ruling was both frustrating and disappointing. The administrators assumed that by hiring a contractor to create and implement the promotion test, they were fulfilling their obligation to promote the best test scorers in the most unbiased and fair manner. The consideration of relevant research data, for example, would have revealed that cities, including the neighboring city of Bridgeport had abandoned written promotion tests for firefighters and instead began using assessment centers for promotion testing. In a thoroughly conducted policy analysis, DeStefano would have committed himself and his administrators to entire process of change.

One fair conclusion in this study is that Mayor DeStefano, like the other City mayors that preceded him, was trying to unify City government and the various neighborhoods and make progress in diversification and representativeness with a sincere gesture of equity and justice in job promotion policy. Mayor DeStefano’s decision to conduct a policy process that was isolated and ambiguous rather than incremental created a policy scenario that was suspect of political favoritism, in violation of a fairness
narrative, and basically unlawful. This finding was confirmed by the high court decision. In an effort to burnish his credentials as a reformer, he tripped over his own efforts by not respecting time honored, traditional, political processes and public expectations.

Judging from prior research on New Haven, there appears to be a long history of strong mayors who instituted significant changes to city structures in order to accommodate the changing demography of its’ citizens and the political pressures that came along with it. But, these mayors, unlike DeStefano, worked incrementally in implementing governmental change unless it related to big business (e.g., housing development corporations created by Mayor Lee). They understood the political, business and community anxiety about government interference, respected cultural influences, and attempted to fix fundamental problems in the City before redefining socially acceptable policy practices. Promoting social mobility is a concern for a select group of interest groups in the City of New Haven, but creates anxiety for other elite groups who have held power for a long time in the City. Mayor DeStefano’s ambition to promote more ethnic firefighters could have been successful, for example, had he engaged experts in the planning stages of the decision making process. Testing experts could provide evidence that not all ethnic groups perform equally well on written tests and created a test preparation program to ensure equity in the test preparation stage of test taking. As another example, he could have engaged in a roundtable of other city leaders and administrators to seek out what they consider appropriate testing tools for promotion.

The ongoing promotion policy process remains problematic for the City as well as for other public sector employers regarding this issue even after the high court ruling. There remains a dilemma for public sector officials in fulfilling the responsibility of
complying with the various provisions of Title VII so as to avoid discrimination, and, to create a representative and most qualified workforce. Shortly before the high court ruling, the City of New Haven hired an informed, experienced and highly educated corporate counselor by the City six months prior to the high court ruling. Victor Bolden, hired in January 2009 as the Corporation Counsel for New Haven, Connecticut, currently serves as the chief legal advisor and attorney for the City, and all of its officers and departments in matters related to their official duties. He oversees a staff of twenty-five and an active caseload of more than several hundred matters, involving federal, state and local law on constitutional, statutory, regulatory issues. Before working for the City of New Haven, Mr. Bolden was the General Counsel for the NAACP Legal Defense and Educational Fund, Inc. (LDF). In that capacity, he served as LDF’s chief advisor on legal matters affecting the organization, providing advice to LDF’s legal staff on the organization’s civil rights cases, and provided administration oversight of LDF’s New York and D.C. offices. Mr. Bolden is also a member of the Executive Committee of the New Haven County Bar Association and is also past Commissioner of the City of New Haven’s Commission on Equal Opportunities and a past Chair of the Board of the International Center of New Haven. Hopefully his combination of insider and outsider perspective and the scope of his leadership potential will usher in deference to federal law instead of specious policy making, and, more respect for proactive thinking and policy implementation by government officials for the City’s residents and employees.

According to Rae (2003: 430), New Haven’s
city government can get better, stronger, and more agile than it has been in recent decades. Frank Rice’s city is gone, and the present one will not work on the basis of a sidewalk republic. Mayors can be given more authority and held accountable for their actions. City boards and commissions can be simplified and put more firmly under the control of top elected officials. The endless waste associated with public-sector union contracts, and the filigree of work rules built up over decades, can be renegotiated. If it cannot be renegotiated, it must become an issue at the state level. The ponderous red tape of civil service systems can be reduced.

In other words, process consists of inputs and outcomes. Getting governance right is based on a pragmatic approach: an emphasis on what works in practice based on abstract theory. On the input side are political pressures, complex decisions, a vast number of unknowns including how ethnic groups perform on tests, and most importantly healthy debate. The outcome is to promote ethnic group firefighters and as a long term goal, social mobility. DeStefano thought he could straddle between prior, old agreements with i.e., the unions, the fire department, the civil service board, and hiring a new consultant to create a new test. He would make everyone happy in the short term by promoting more ethnic fire fighters, create a fair promotion test, and create more social mobility in the long term. In order to carry out these significant changes, DeStefano needed to gather a wider spectrum of perspectives in the process of selecting a new promotion test and gain buy in from the participants in this process.
As previous policy experts have observed and experienced, a course of change involves an incremental learning and implementation process. Public policy is more nuanced than it generally appears because it is created in a gradual, deliberate process in order to meet public, political and historical expectations and standards. On the other hand, government has much work to do in order to reduce inequalities in the public workforce. That means early and constant interventions so everyone has a chance to participate. Public entities also create a collaborative environment where individual skills can be integrated cooperatively to create solid policy. So, while public governance seeks to reform and modernize, it is simultaneously engaged in maintaining stability. Getting governance right is based on a pragmatic approach: an emphasis on what works in practice based on abstract theory. But, incremental governance can be transformational. This is because while government entities are ensnared in crisis or preoccupied with tackling deep-rooted problems, they are also seeking to innovate and change. Our complex society operates within the context of personal and shared ideals, values and visions. And, people for the most part prefer compromise rather than confrontation, stability but not stagnation. So, policy then has to reflect reality and capture the essence of these competing concepts. Public policy has to be a pragmatic, sophisticated mix that provides stability, reflects what works and creates incremental change, simultaneously.

Those individuals who were directly involved with this case on one level or another may agree or disagree with the above stated conclusions. And, it is well known that several of the current Supreme Court membership who ruled on this case are
philosophically conservative. In other words, some of the members can be considered strict constitutionalists. However, one has to incorporate this perspective with the concept of deliberative decision making that occurs in a democracy, such as we have here. The question being considered here is how do we achieve diversity/representativeness via social policy, in this case workplace diversity in the public sector over the long term. From an outsiders perspective, the decision making process seems to be ridiculously methodical, preserving the status quo to enable the ruling elite to keep power and limit access to outsiders. To cynics, the democratic decision making process is as Joseph Heller’s famed book *Catch 22* (1961) describes government process, “… government officials too often trivialize important matters and make trivial matters important. More significantly, they engage in circular thinking to the point where they exist in a double bind or catch 22. Limitations on their performance are mandated by specific laws, but may also be imagined or created by inappropriate, outside influences.”

But keep in mind that in this country a political leader is also an administrator with a democratic structure to work in. No political leader or public administrator is sacrosanct; the goal of a public official is to learn lessons from policies that worked and those that failed. Some political scientists such as Marx suggest that groups within society are born from conflict rather than playing specific functional roles; social relationships are based on power, exploitation and groups conflicting to better their social status; those in power or the elite, place rules and laws around policy processes in order to reinforce their
power. Other political scientists suggest that “Governance is based on authority that is generated by trust or fear” according to Israeli political theorist Yaom Esrahi.

Researchers also suggest that a deliberative process is a significant factor for incremental change, especially for the administrative leader. The theorist Philip Selznick, in his classic *Leadership in Administration*, suggests that the leader serves as a catalyst in an administration for a metamorphosis among administrators from technical efficiency to value policy premises. The leader accomplishes this by channeling information via participation and communication of the organization’s basic goals and values, “…leadership is not only to make policy but to build it into the organization’s social structure…It means shaping the character of the organization, sensitizing it to ways of thinking and responding, so that increased reliability in the execution and elaboration of policy will be achieved according to its spirit as well as its letter” (Selznick,1957:63). And, of particular relevance to this case, the leader must comprehend and utilize appropriate laws in the process, “In addition, the leader must know how to use law to neutralize belief by splitting it from behavior; and to employ law as a creative agency restructuring environments to foster desired understandings. The effort of the military to abandon racial segregation has involved both of these techniques”(Selznick,1957:96).

Representative Democracy theorists suggest that one can enable learning and change by establishing a deliberative process. In his paper, *Does Deliberative Democracy Work*, David M. Ryfe(2005:35), suggests that “Successful deliberation seems to require a form of talk that combines the act of making sense (cognition) with the act of making meaning (culture)….instilling a normative commitment to civic identities and values”. While
these theorists are referring to the context of public decision making, one can infer this premise to administrative decision making. And, the author notes that researchers have found that three conditions have to exist to motivate individuals to adopt a deliberative frame of mind: accountability, high stakes, and diversity. Minority group members can offer novel views that spur majority members to learn.

Organizational behaviorists propose that according to participative management theories, democratic process is the means of achieving consensus between workers and organizational goals. Workers are more loyal and productive if they are involved in the decision making process that affects them. And, administrators consider changes in policy to eliminate adverse effects on workers that are most effective and produce the least disruption. The question is, is the Mayor of New Haven an administrator or an advocate or some mix of the both? For example, based on the systematic, political system in this country, the policy formation and implementation factors an administrator considers are:

• Introducing the change in small steps;
• Making the change relevant to the goals of the organization;
• Making the change possible to be reversible, subject to alteration, or compromise;
• Making the change as simple as possible;
• Making the change operational and cost effective;

Conversely, and advocate considers the following to reduce the adverse effect of a particular policy on a group or groups:
• Representing and defending individuals and communities;
• Direct intervention on behalf of workers/citizens;
• Empowerment of the workers/citizens;
• New and/or controversial steps vs. drive towards consensus;
• Equilibrium/status quo vs. dramatic social change.

From a political perspective, the Mayor of New Haven was reelected the following year for doing what he wanted to do because of political realities, behaved controversially and fired up the fire fighter union. But, the bottom line for workplace diversity proponents and practitioners is, did his policy overreach have any positive impact on workplace diversity in the public sector in the long run. Without proper research and consultation with regard to not certifying the tests, the Mayor responded to misconceptions rather than real diversity needs of the public workforce/citizens. This in turn created the wrong impression among insiders and outsiders of his real motives for not certifying the results. Public officials, in creating policy that is equitable and progressive, bob between isolationist and communicative decision making, hasty action, incremental gestures, or postponing major decisions. The goal is to create an atmosphere within one’s administration of cooperation and communication to generate new ideas and initiatives and to prevent unintentional consequences of policy actions. Whatever Mayor DeStefano's decision, his position would have been strengthened with both the courts and the various constituencies to which he was responding had he engaged in a deliberative process. As it was, he turned the case over to the City's Civil Service Board. Although the
Board was divided and held hearings, given its political makeup, the outcome of these discussions was never really in doubt. The function of these hearings, then, was to bypass a genuinely deliberative process rather than to facilitate it. This process might have led to the same conclusion— to reject the test. And given its conservative makeup, the Supreme Court might still have found that the City was in violation of the law. Even so, the City's case would have been far stronger and it might have set a precedent for other cities to follow, allowing an incremental process to lead to a more representative city workforce.

**Shortcomings of the Research**

The research conducted for this study can be considered qualitative research in that it is an analysis from a non-statistical perspective. It is a case study designed to understand the decision making phenomenon from the perspective of the members of the administration as well as respondents to the interviews. This case study can be considered an ethnographic study in that the research seeks to understand individuals in their own social or cultural context. The purpose of this qualitative study was to obtain multiple, personal perspectives on the decision making process concerning fire fighter promotion test certification. Administrators involved in program formation and implementation can expose the nuances of the process to the qualitative analyst. And, “qualitative methods are capable of capturing the subtle nuances of program drift that quantitative measures cannot” (Royse et al.2010: 86). Conversely, as Yin (2009: 135) points out, case study data can reflect investigator bias, the results can be based on
chance circumstances, and there are threats to validity such as the historical context of the case.

Yin (2009: 102) discusses the pros and cons of using multiple sources of information in conducting a case study as noted in the following table:

<table>
<thead>
<tr>
<th>Source of evidence</th>
<th>Source of evidence: Pros</th>
<th>Source of evidence: Cons</th>
</tr>
</thead>
<tbody>
<tr>
<td>Documentation</td>
<td>Not created specifically for the case study, accurate data that covers the case from start to finish; Reliability and Validity.</td>
<td>Data may hard to retrieve if not part of public record, or data is withheld in order to obscure interpersonal behavior and motives;</td>
</tr>
<tr>
<td>Archival records</td>
<td>Reflects legal information, quantitative data; Reliability and Validity.</td>
<td>Data may be withheld or redacted for legal reasons, or desire to obscure interpersonal behavior and motives;</td>
</tr>
<tr>
<td>Interviews</td>
<td>Targeted –focuses directly on case study topics; Insightful–provides perceived causal inferences and explanations; captures interpersonal behavior and motives.</td>
<td>Bias- due to poorly articulated questions, response bias due to participant/observer’s manipulation of events; Inaccuracies–due to poor recall; Reflexivity–interviewee give the interviewer what they want to hear; Liability-interviewee withholds information due to concerns over litigation, restrictions placed on employees by management.</td>
</tr>
</tbody>
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Qualitative researchers do not necessarily follow a rigid protocol when collecting data. For example, structured questions were prepared for this study, but they were only to direct the interviewees towards exposing the nuances of policy making, rather than straightforward responses regarding their particular situation. The public policy domain covered by the interview questions are based on previous research and theories on this subject matter. This study was designed to collect three basic forms of qualitative research data: verbatim transcripts of public hearings, legal documents, and interview responses. The stakeholders in this study, key administrators and officials from the City of New Haven, were generally able to speak but were unwilling to provide specifics of what had happened. In addition, the Corporate Counsel, while willing to be interviewed, pointed out that most of the interviewees were restricted to what they could expose in the interviews because of the litigious nature of the Ricci case. In fact, there are currently several ongoing lawsuits related to Ricci and the City of New Haven. The City Counsel and the interviewees also noted that the verbatim transcripts captured much of what I was interested in analyzing. Plus, the Corporate Counsel provided me with City documents that were not normally distributed publically, although they could be obtained by open record requests. Therefore, this study relied heavily on documentation and verbatim transcripts. Future researchers may be able to gather more in-depth interview information in the future once current law suits have been completed.

Verbatim transcripts were analyzed for a wide variety of the City’s key administrators and those who testified in public meetings in order to gain insight on the all aspects of the City’s fire fighter promotion testing processes and outcomes. The
object was also to remain neutral and objective in presenting the data findings, “although no evaluator can promise a rose picture, the qualitative evaluator must somehow maintain a position of neutrality even as he or she seeks to make stakeholders feel comfortable enough to participate in interview and to be observed over a period of time” (Royce and Padgett, 2010: 88). While a mixed method approach to this study, such as obtaining comparative promotion policy data for other cities, may have been useful to gain a more universal picture of practice, the point of this study was solely to evaluate how administrators responded to the demands of creating workforce diversity and creating an equitable and legal promotion testing process for the City of New Haven’s fire fighters.
References


*Ricci v. DeStefano,* 129 S. Ct. 2658 (2009), Respondents Brief on the Merits [Doc. # 07-1428 & 08-328].

*Ricci v. DeStefano,* 129 S. Ct. 2658 (2009), and the mandate subsequently issued by the Second Circuit[ Doc. # 144].


APPENDIX A

Proceedings of the City of New Haven Civil Service Board

Regarding the Fire Captain and Fire Lieutenant Promotional Examinations
Curriculum Vitae

Gwyn A. Sondike, MSW, PhD

2010-2011 Department of Veteran Affairs, New Jersey Health Care Systems, East Orange, NJ
Social Work Intern, Veteran Hospital

Provide individual and group interpersonal therapy to veterans in the hospital acute psychiatric ward and on an outpatient basis. Conduct comprehensive psychosocial assessments of veterans to create treatment plans and goals. Assess veterans for suicidal and homicidal risk, utilize crisis intervention skills as needed, and design and implement psycho-educational groups. Collaborate with primary care staff and mental health specialists. Utilize the computerized medical record system, recording all assessments, treatment plans, interventions, and progress notes. Assist the veterans in navigating community and veteran entitlements and resources. Become familiar with and inform veterans of staff responsibilities, patients’ rights, benefits, and advance directives.

2009-2010 Department of Veteran Affairs, New Jersey Health Care Systems, Bloomfield, NJ
Social Work Intern, Veteran Center

Provided individual and group interpersonal therapy to veterans on an outpatient basis. Conducted comprehensive psychosocial assessments of veterans to create treatment objectives. Assessed veterans for suicidal and homicidal risk, utilized crisis intervention skills as needed, and designed and implemented psycho-educational groups. Assisted the veterans in navigating community and veteran benefits, entitlements and resources. Collaborated with primary care staff and mental health specialists. Utilized the computerized medical record system, recording all assessments, treatment plans, interventions and progress notes.

2008-2009 Rutgers University – School of Public Affairs and Public Administration, Newark, NJ
Director, Municipal Performance Measurement and Community Public Performance Measurement and Reporting Network

Served as liaison between Rutgers University and municipal and state government in the development of a national network on performance measurement and reporting. This is a data based network that helps officials collect budget and program data in a variety of service sectors, track the data, develop benchmarks, and report levels of service and progress to stakeholders. Conducted research on performance measurement tools and data gathering for
government services that includes law enforcement, parks and recreation, land use, and public health.

Policy Advisor and Principal Inspector

Developed policies and procedures for Office of Animal Welfare, New Jersey State Department of Health and Senior Services, which I helped establish in 2004. Created inspection procedures for animal shelters, pet shops and kennels. Oversaw staff of three inspectors and developed daily schedules and programs for inspectors. Reviewed and revised state regulations for animal facility operations and animal welfare legislation. Served as legislative liaison between animal welfare community and elected representatives. Conducted meetings with local health departments to create animal welfare programs and enforcement. Advised municipalities on budgets, staffing and shared services related to animal control and animal welfare issues. Created and implemented surveys to provide computerized, statistical data and general information for state government websites.

2000-2004  Four Paws Animal Rescue and Shelter, Stillwater, N J
Owner and Manager

Managed a staff of three that assisted with the housing and adoption of homeless cats and dogs. Responded to residents’ calls regarding municipal and state policies regarding animal facility regulations, care and handling of stray animals. Maintained membership in related organizations including the Petfinder website, Animal Welfare Federation of shelters and rescues in New Jersey, and the Metropolitan ASPCA. Participated in nonprofit advocacy efforts to draft and develop legislation and create animal welfare programs. Provided animal control assistance to communities upon request of municipal officials.

1998-2000  Communities on Cable(Channel 36)  Summit, NJ
Volunteer/ Producer

Produced and co-produced shows for local access cable channel.
Created and co-hosted talk show with a veterinarian.

1989-1990  Johnson& Johnson  New Brunswick, NJ
Compensation Analyst

Designed and implemented executive compensation packages for foreign and
domestic employees. Advised offices on tax and compensation issues.

1987-1989  KPMG Peat Marwick  Short Hills, NJ
Compensation Consultant

Created executive compensation programs for a variety of industries.

1984-1987  KPMG Peat Marwick  Montvale, NJ
Personnel Coordinator

Managed program for senior accountants working in international assignments. Advised offices on staffing needs, compensation issues, selection and orientation of candidates.

Rutgers University, School of Social Work

Rutgers University, School of Public Affairs and Administration
PhD in Public Administration, September 2007- October 2011

Seton Hall University, Graduate School of Arts and Sciences
Masters in Public Administration, May 2005

New York University, College of Arts and Sciences
Bachelor of Arts, June 1982

Ocean County Police Academy
Certification for Animal Cruelty Enforcement, April 2005

Morris County College
Certification for Animal Control Officers, December 1999
Millburn Township Environmental Commission
Appointed September 2007 to township environmental commission. Work with eight appointed members including town mayor to create environmental laws and regulations and provide environmentally friendly options and open space for township.

New Jersey Animal Control Officers’ Association- Member as of January 2000. Responsible for reviewing legislation, advocacy initiatives with animal control officers to assist them in pursuing state and local government initiatives.

New Jersey State Chamber of Commerce
Original and only non-profit member of the New Jersey State Chamber of Commerce effective July 2001.

New Jersey Policy Perspective (NJPP)
Member of the New Jersey Policy Perspective effective January 2001 which is a nonprofit research and educational organization.

New Jersey Department of Environmental Protection Outdoor Women’s League
Member of organization of environmental and wildlife professionals where we participate in educational programs from September 2004.

Sussex County Agricultural Association
Member effective 2004 of organization that promotes open space, agriculture, and provides scholarships to students seeking careers in agriculture.

Union County Health Officers Association
Member of Union County Health Officer Association effective July 2004.

Union County Sheriff’s Council
Vice President of coalition for the Union County Sheriff’s office, effective January 2000 to the present.
Develop and establish the new Union County animal shelter and education center.

Governor James E. McGreevey Animal Welfare Task Force
Co-chair of animal shelter subcommittee
Member of animal welfare task force effective July 2002 –July 2004
Responsible for reviewing and recommending new animal welfare regulations and initiatives in New Jersey including enforcement, sheltering, municipal
budgets and shared services relating to animal welfare and control.