

UNITED STATES OF AMERICA, Plaintiff, vs. CITY AND COUNTY OF SAN FRANCISCO, et al., Defendants. FONTAINE DAVIS, et al., Plaintiffs in Intervention, vs. SAN FRANCISCO FIREFIGHTERS LOCAL 798, et al., and CITY AND COUNTY OF SAN FRANCISCO, et al., Defendants in Intervention.

Case No. C-84-7089 MHP (consolidated)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

OPINION BY: MARILYN HALL PATEL

OPINION

FINAL STIPULATED ORDER TERMINATING
CONSENT DECREE

STIPULATED ORDER

WHEREAS, this Court has considered the Fourth Report of the Office of the Special Master, the Joint Motion for Final Approval of Stipulated Order Terminating Consent Decree, and the arguments and agreement of the parties to the above action, and finds that good cause appears; and,

WHEREAS, under *U.S. v. City and County of San Francisco*, 696 F. Supp. 1287, 1300 (N.D. Cal. 1988), *affirmed*, *Davis v. City and County of San Francisco*, 890 F.2d 1438 (9th Cir. 1989), voluntary conciliation [*2] and settlement are the preferred means of dispute resolution, and the parties have resolved to settle their dispute over whether the existing Consent Decree should terminate as scheduled or be extended; and

WHEREAS, this Court issued a proposed Order which provided for notice and an opportunity to be heard on whether the stipulated terms are fair and reasonable to all class members and affected parties before entry of a Judgment dismissing the action; and

WHEREAS, the Court held a fairness hearing on September 10, 1997, and has considered the comments, testimony and written submissions of persons who responded to the notice of pending termination of the Consent Decree,

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

I. STATEMENT OF PURPOSES AND GOALS

A. Purpose.

Plaintiffs Plaintiff-Intervenors and defendants agree that the City and the Department, particularly under the current City administration, have made significant strides

in eliminating workplace harassment and in integrating the San Francisco Fire Department workforce. The parties further agree that this Stipulated Order is nonetheless necessary to fully effectuate the goals and policies underlying [*3] the Consent Decree, to eliminate vestiges of past discrimination, and to continue the process of diversifying the Department. The factual basis for the relief contained herein is contained in the Fourth Report of the Office of the Special Master, dated April 18, 1997, and in the Court's opinion at 696 F. Supp. 1287 (1988), *affirmed*, *Davis v. City and County of San Francisco*, 890 F.2d 1438 (9th Cir. 1989), which are incorporated into this Stipulated Order by reference.

B. Long Term Goals.

1. Eradication of Vestiges of Discrimination.

The parties agree that new hires made pursuant to paragraph III.A.4. (p.5) and promotions made pursuant to paragraph III.B. (p.6) are necessary to eradicate effects of past discriminatory employment practices with respect to minorities and women. The parties further agree that the Cadet and Officer Candidate Programs described in paragraph III.A.2. (p.5) and paragraph III.A.3. (p.5) are necessary to fully effectuate the Consent Decree's long term goals of forty percent (40%) minority and ten percent (10%) female representation in sworn personnel of the Department. The above goals are not considered to be a maximum cap on the numbers of protected [*4] class members that may be hired or promoted. The City agrees to make best efforts to develop and implement Cadet and Officer Training programs which support the above long term goals to the extent allowed by law.

2. Goals for Future Workforce.

The City agrees that, to the extent allowed by law, it shall use best efforts to attain a workforce that reflects the percentages of racial minorities in San Francisco as established by the most recent U.S. Census civilian labor force data. The City recognizes that providing linguistically appropriate services enhances public safety, and

will continue to seek input from community-based organizations familiar with the delivery of bilingual services.

3. Definition of Best Efforts.

"Best efforts" means that the City shall provide appropriate and necessary funding, staffing, and other resources to carry out its obligations under this Section I.B. "Best efforts" may also include race and gender-conscious selection and hiring criteria.

II. TERMINATION OF THE CONSENT DECREE.

A. City To Commence New Duties Under This Order.

The parties, through their respective counsel, agree that the Consent Decree signed on November 12, [*5] 1987, approved by the Court on June 10, 1988, as extended on July 6, 1995, terminates upon final approval of this Stipulated Order by this Court. The Court shall retain jurisdiction over this case until expiration of this Stipulated Order, and entry of Judgment, as set forth in Section V., and it shall retain the power to order lawful actions and appropriate remedies, in addition to those specified in this Order, to accomplish the purposes of this Stipulated Order.

B. Fairness Hearing.

The City provided notice of this Stipulated Order and the fairness hearing to all present firefighters and potential firefighter applicants through the issuance of General Orders and publication of newspaper notices as required by the Court. Subsequent to the fairness hearing held on September 10, 1997, the parties amended the Proposed Order and agreed to this Final Stipulated Order to address comments submitted by interested persons and concerns expressed by the Court.

III. DUTIES OF DEFENDANTS.

A. Hiring and Retention.

1. Continuation of Injunction.

a. Prohibition Against Discrimination.

Defendants are permanently enjoined from engaging in any act or practice that has the purpose [*6] or effect of unlawfully discriminating against any employee of, or any applicant for employment with, the San Francisco Fire Department because of such individual's race, sex, or national origin, and specifically from unlawfully discriminating at any time on the basis of race, sex, or national origin in hiring, promotion, upgrading, training, assignment, discharge, compensation, and term and conditions or privileges of employment. Defendants shall take reasonable steps to assure that no member of the

San Francisco Fire Department retaliates against any person because that person has opposed discriminatory policies or practices or because of that person's participation in or cooperation with the initiation, investigation or litigation of any charge of unlawful discrimination based on race, sex, or national origin, or the administration of this Order.

b. Selection Procedures.

The defendants shall not use any selection procedure that has an adverse impact on African-Americans, Hispanics, Asians, or women in hiring or promotion unless the procedure can be shown to be valid or otherwise justified by business necessity, all in accordance with Title VII of the Civil Rights Act of [*7] 1964, as amended, and the provisions of the *Uniform Guidelines on Employee Selection Procedures*, 29 C.F.R. Part 1607.

2. Cadet Program for New Hires.

During the term of this Stipulated Order the City agrees to develop and implement a Cadet Program for new firefighter applicants as a replacement for the current entry-level selection process. The Department shall accept the first group of candidates into the Cadet Program prior to termination of this Stipulated Order. Plaintiffs' Plaintiff-Intervenors shall be apprised of and provided with meaningful opportunities to comment on the ongoing development of this program. The parties agree that during the term of this Stipulated Order, the relevant geographical labor market for firefighter applicants is the City and County of San Francisco.

3. Officer Candidate Program.

During the term of this Stipulated Order, the Department shall develop and the Fire Commission shall adopt for implementation and submission to the Civil Service Commission an "Officer Candidate Program" which will include clearly defined criteria for eligibility and promotion to officer ranks. The Officer Candidate Program will be a replacement for the [*8] current testing and promotional process. Plaintiffs/Plaintiff-Intervenors shall be apprised of and provided with meaningful opportunities to comment on the ongoing development of this program.

If the City determines that its proposed Officer Candidate Program requires labor negotiations pursuant to existing statutes, ordinances and collective bargaining agreements, the City shall commence the meet and confer process with recognized employee labor organizations prior to termination of this Stipulated Order. This Stipulated Order does not deprive any state court of jurisdiction to review whether the City has complied with relevant state statutes or collective bargaining agreements in implementing the Officer Candidate Program,

nor does this Order confer any jurisdiction on this Court with regard to the City's collective bargaining obligations.

4. Defendants' Obligations Re Hiring.

The Department agrees to fill at least ninety-six (96) positions at the Fire Training College with applicants from the current H-2 list prior to the termination of this Stipulated Order. The offers to applicants shall specify commencement dates based on the anticipated dates of Fire Training classes, [*9] and shall include requirements which were in effect when the applicants took the H-2 examination under the Consent Decree. These requirements include continued residence in the City and County of San Francisco, continued medical fitness to perform the duties of firefighter, and maintenance of a police record with no felony convictions. The next three regular H-2 classes at the Fire College shall be filled by these 96 new hires. In addition, the Department may hire an additional Fire College class composed of applicants from the current H-2 list. The Department shall continue to use banding as applied under the Consent Decree to select firefighter candidates during the term of this Stipulated Order. This Stipulated Order shall not expire as stated in the first sentence of Section V. unless the percentage of sworn uniformed members of the Department, exclusive of paramedics transferring from the Department of Public Health, equals thirty-eight percent (38%) minorities and nine percent (9%) women.

B. Defendants' Obligations Re Promotions.

The parties agree that absent banding tied to applicant pool goals, the City's normal rank-order promotional practices would have resulted in [*10] adverse impact against women and minorities on every examination from which promotions were made during the Decree. The parties further agree that the applicant pools for women and minorities for each promotional examination were depressed by prior discriminatory hiring procedures as found by the Court, and that had the Department's current commitment to eradication of the present effects of prior practices been consistent throughout the Decree, the promotional applicant pool would have been higher for women and minorities, particularly in the higher levels of the Department. Thus, as reflected in paragraph A.3., the Department intends to address the present effects of past discriminatory employment practices with respect to the promotion of minorities and women through the development of a non-discriminatory Officer Candidate Program to replace the current promotional process.

Prior to the Department's transition to the Officer Candidate Program, for promotions made from the current lists of eligibles during the term of the Stipulated

Order, the Department shall use banding in promotional procedures to the extent necessary to achieve full compliance with the Consent Decree and with [*11] this Court's Orders prohibiting adverse impact against women and minorities. For the purposes of avoiding discriminatory impact, the goal for the current promotional lists shall be the percentage of minorities and women in the eligible "applicant pool" defined as those who participated in the examination process until its completion or until they were disqualified.

For promotions made from current lists of eligibles during the term of this Stipulated Order, the Department agrees to adhere to the promotional procedures set forth in the Monitor's Order Re Method of Appointments, Use of Secondary Criteria and Assignment of Seniority, dated April 3, 1995, and the Monitor's Supplemental Order Re Method of Appointments, dated November 21, 1995, except that there will be no requirement that the Department perform any reporting or notification requirements with respect to the Monitor or Special Master.

C. Bilingual Program.

The parties agree that linguistic diversity among the residents of San Francisco creates the need for the Department to encourage and increase bilingual capability in its workforce. Therefore, the Department will seek to increase the number of Department members [*12] with certified bilingual capabilities through consideration of bilingual skills in recruitment and hiring. The Department will continue to consider language ability when vacant positions in targeted stations are temporarily assigned and will develop a Bilingual Program to give priority in permanent assignments to certified bilingual personnel. The City shall commence bilingual proficiency testing that will be tailored to serve the needs of the Fire Department.

If the City determines that its proposed Bilingual Program requires labor negotiations pursuant to existing statutes, ordinances and collective bargaining agreements, the City shall commence the meet and confer process with recognized employee labor organizations prior to termination of this Stipulated Order. This Stipulated Order does not deprive any state court of jurisdiction to review whether the City has complied with relevant state statutes or collective bargaining agreements in implementing the Bilingual Program, nor does this Order confer any jurisdiction on this Court with regard to the City's collective bargaining obligations.

IV. PROCEDURES DURING STIPULATED ORDER

A. Defendants' Duties of Cooperation.

[*13] During the term of this Stipulated Order, the Department agrees to provide to counsel for plaintiffs plaintiff-intervenors the documents described in Exhibit A according to the timetable set forth therein. In addition, upon reasonable request by counsel for plaintiffs plaintiff-intervenors, the Department agrees to provide in a timely manner all documents and reports that may be relevant to determining whether the Department is carrying out its obligations under this Stipulated Order. The Department's agreement to provide information shall not be construed to require creation of documents or reports which are not in use by the Department at the time of the request.

B. Notice of Inability to Comply

If during the term of this Stipulated Order, the City anticipates that it will be unable to comply with its obligations, the City agrees that it has an affirmative obligation to notify, meet and confer with counsel for plaintiffs plaintiff-intervenors, and the parties shall mutually agree upon appropriate measures to achieve the objectives of this Stipulated Order. The City shall provide the funding and resources required to carry out its obligations under this Stipulated Order.

[*14] C. Departmental EEO Procedures.

Within one week after entry of this Stipulated Order the Department shall provide all of its members with written notice of the authority of the San Francisco Department of Human Resources ("DHR") under the San Francisco Charter to investigate and resolve claims of racial discrimination, and racial or sexual harassment ("EEO claims"). The notice shall include an explanation of the procedures for filing claims with DHR, explain differences between DHR and Fire Department timeliness, deadlines and review processes, and state that DHR's procedures are available as an alternative to any member who wishes to have EEO claims investigated and resolved outside the Fire Department chain of command. The Notice shall clarify that every member of the Department has the right to file claims with DHR, and to complain to DHR about case handling within the Fire Department. Notice may be provided by posting or distribution through the chain of command. Every EEO complainant shall be advised of the DHR's authority, as described above, during any intake interview conducted by the Fire Department EEO Unit.

1. Pending EEO Claims.

The parties acknowledge that [*15] there are a limited number of EEO claims pending before the Department that may not be completed in time to allow an appeal to the Consent Decree Monitor under this Stipulated Order. The City shall provide an appeal to DHR for any

pending cases in which the City previously notified the complainant and respondent of a right to appeal to the Monitor. Any EEO complainant or respondent dissatisfied with the written decision of DHR may appeal to the Court. Appeals to DHR and the Court shall be subject to the same filing and procedural deadlines as were applicable during the life of the Consent Decree.

2. Review Of EEO Deadlines And Processes.

In addition to the EEO disposition reports provided to plaintiffs/plaintiff-intervenors under Appendix A (see above, Section IV.A.), the Department shall provide plaintiffs/plaintiff-intervenors with monthly tracking reports in substantially the same form as the bi-weekly EEO reports provided to the Monitor during the Consent Decree. The Department shall also provide plaintiffs/plaintiff-intervenors with copies of any notices, correspondence and documents from DHR of cases filed against members of the Department, along with notice of the DHR [*16] case processing schedule. Upon written request of the plaintiffs/plaintiff-intervenors, the Department shall explain or justify any failures to meet processing deadlines in EEO cases handled by the Department. If plaintiffs/plaintiff-intervenors are dissatisfied with the Department's response including responses regarding future to meet the processing deadlines they may request appropriate relief from the Magistrate as provided in Section E., below.

D. Funding For Recruitment Programs.

During the term of this Stipulated Order, the City shall not decrease the appropriated funding or staffing below that which existed in fiscal year 1996-97 for the Department's recruitment program directed at increasing the number of qualified African-American, Hispanic, Asian, and female applicants for firefighter positions.

E. Disputes and Consent To Jurisdiction By Magistrate.

Any disputes between the parties, arising under this Stipulated Order, except for motions for contempt and for extension or early termination of this Order and entry of Judgment, shall be referred to Magistrate Edward Infante for resolution. Counsel for plaintiffs/plaintiff-intervenors shall first attempt to informally [*17] resolve such disputes with the City Attorney representing the Department. If such efforts are unsuccessful, the parties agree to attempt to resolve such disputes informally by telephone conference with Magistrate Edward Infante. If further resolution proceedings are necessary the Magistrate will hear the matter and direct the parties in the manner he deems appropriate to effectuate expeditious resolution. Unless appealed to the District Court within ten calendar days of its issuance, the Magistrate's deci-

sion shall be final. Regardless of any other procedures set forth in any section of this Stipulated Order, Magistrate Infante's determinations with regard to all issues concerning discovery matters shall be final.

F. Attorneys Fees

All attorneys' fees billed by counsel for plaintiffs/plaintiff-intervenors for purposes of negotiating this Stipulated Order from April 21, 1997 to the date of preliminary approval shall be paid fully within 90 days of billing, provided that the total hours for all counsel for plaintiffs/plaintiff-intervenors shall not exceed 750 hours. Fees not paid within 90 days of billing shall bear interest at the federal rate for judgments. All other pending [*18] or future attorneys' fees and costs of plaintiffs/plaintiff-intervenors shall be resolved pursuant to the parties' Stipulation and Order Re Attorneys' Fees, dated August 10, 1994, or any successor Stipulated Orders.

V. TERM.

This Stipulated Order shall expire one year from the date of entry of this Order, unless extended by the District Court. The parties agree that if no objections to expiration are filed, the Court is requested to enter the judgment dismissing the action with prejudice. Defendants may move the District Court for early termination and entry of judgment upon a showing that the requirements of Section III have been met. Plaintiffs Plaintiff-Intervenors may move for extension of this Stipulated Order on the grounds that the requirements of Section III have not been met. The party filing a motion to terminate or extend this Order shall have the burden of demonstrating that the stated requirements have or have not been met by the City.

VI. EFFECT OF THIS ORDER.

A. Entire Agreement.

This Stipulated Order supersedes all other negotiations, understandings, representations and agreements between the parties, and constitutes the complete understanding [*19] and agreement of the parties. This Stipulated Order shall not be modified except in writing by the parties and as approved by the Court.

B. Prior Orders Terminated.

The Amended Order Of Reference, dated November 9, 1994, and the Memorandum & Order On Order To Show Cause, dated July 6, 1995, are hereby terminated. All previous Orders issued in this action by the Court, the Court Monitor, or the Office of the Special Master

are hereby terminated insofar as they may be inconsistent with the provisions of this Stipulated Order.

C. Severability And Duty To Defend.

Should any provision of this Stipulated Order be found by a court of competent jurisdiction to be invalid or unenforceable, then (i) the validity of other provisions of this Agreement shall not be affected or impaired thereby, and (ii) such provision shall be enforced to the maximum extent possible so as to effect the intent of the parties hereto.

In the event the entry of this Stipulated Order generates, either through intervention or separate lawsuits, attacks on the lawfulness of any of the provisions contained herein, the parties hereto agree and warrant that they shall defend said provision against such attacks. [*20] If any such lawsuit is brought in state court against the defendants, defendants shall seek to remove such action to the Federal District Court and the signatories shall support said action.

DATED: 1997

LOUISE H. RENNE

WILLIAM C. McNEILL, III

City Attorney

Employment Law Center

City And County Of San Francisco

Attorney for Plaintiffs/Plaintiff-Intervenors

JOHN D. COOPER

MICHAEL HARRIS

Deputy City Attorney

Lawyers Committee for Civil Rights of the San Francisco Bay Area

City And County Of San Francisco

Attorney for Plaintiffs/Plaintiff-Intervenors

JUDITH KURTZ

JACK W. LEE

Equal Rights Advocates

Saperstein, Goldstein, Demchak & Baller

Attorney for Plaintiffs/Plaintiff-Intervenors

Attorney for Plaintiffs/Plaintiff-Intervenors

DENISE HULETT

MALDEF

Attorney for Plaintiffs/Plaintiff-Intervenors

SO ORDERED. Based on Stipulation of all parties
dated July 9, 1997.

DATED: November 26, 1997

MARILYN HALL PATEL
UNITED STATES DISTRICT JUDGE