

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

Plaintiff,

-and-

THE VULCAN SOCIETY, INC., *for itself and on behalf of its members*, JAMEL NICHOLSON, and RUSEBELL WILSON, *individually and on behalf of a subclass of all other victims similarly situated seeking classwide injunctive relief*,

07-cv-2067 (NGG) (RLM)

ROGER GREGG, MARCUS HAYWOOD, and KEVIN WALKER, *individually and on behalf of a subclass of all other non-hire victims similarly situated*; and

CANDIDO NUÑEZ and KEVIN SIMPKINS, *individually and on behalf of a subclass of all other delayed-hire victims similarly situated*,

Plaintiff-Intervenors,

-against-

THE CITY OF NEW YORK,

Defendant.
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MONITOR'S TWENTY-SEVENTH PERIODIC REPORT TO THE COURT

TABLE OF CONTENTS

- I. Executive Summary 1
- II. Recruitment and Attrition Mitigation 5
 - A. Candidate Processing 5
 - B. Attrition Mitigation..... 6
 - 1. Training and Outreach to Groups Called for Processing..... 7
 - 2. Attrition Mitigation Plans for Candidates Outside the Current Processing Group 13
 - 3. Use of Data Concerning Attrition 15
 - C. After Action Analysis 18
 - D. Assignment Issue 19
 - E. Working Group 21
- III. EEO..... 22
 - A. Overview..... 22
 - B. EEO Staffing..... 24
 - C. Policies and Messaging..... 25
 - D. Compliance and Accountability..... 29
 - 1. Increased Accountability within the Chain of Command..... 29
 - 2. Climate Survey..... 31
 - 3. Disparate Impact Analyses 33
 - 4. Inspections 34
 - E. Investigations 35
 - 1. The Monitor’s Report on FDNY EEO Investigations 35
 - 2. EEO Database 36
 - 3. Interim Measures in EEO Cases 38
 - 4. Review of Investigations..... 39

IV.	Medical Exam-Related Issues.....	41
A.	Disparate Impact Analyses of Medical Exam Outcomes	41
B.	Validation of the Stairmill Test.....	42
1.	Background.....	42
2.	Validation Testing.....	43
3.	Other Stairmill-Related Issues	45
4.	BHS Measurement of Candidate Heart Rate	46
C.	Psychological Exam.....	47
V.	Character Screening by the CID and PRB	47
A.	Overview and Statistical Background.....	47
B.	Monitor’s Recommendations, the City’s Response, Follow-Up, and Next Steps	50
VI.	Firefighter Exam	55
A.	Open Competitive Exam.....	55
1.	Current Milestone: Technical Report.....	55
2.	Optional Survey Administered to Former Exam 2000 Candidates	56
3.	Optional Survey Administered to Exam 7001 Candidates	58
VII.	Additional Issues.....	58

I. Executive Summary

This report summarizes activities relating to compliance by the City of New York (the “City”) with the Modified Remedial Order during the period from February 8, 2019, the date of the Monitor’s Twenty-Sixth Periodic Report (Dkt. # 1896), to May 15, 2019. The report also summarizes activities relating to the implementation of the Parties’ settlement of Plaintiffs-Intervenors’ disparate treatment claims (the “Disparate Treatment Settlement”), which the Parties agreed would fall within the Monitor’s authority as defined in the Modified Remedial Order. *See* Stipulation and Order dated June 5, 2015 (Dkt. # 1599); *see also* Memorandum & Order dated June 5, 2015 (Dkt. # 1598) at 10.

Part II of the report summarizes activities relating to FDNY hiring efforts following the most recent recruitment campaign. The “eligible list” for Exam 7001 (the rank-ordered list from which candidates are called into the hiring process) was formally established February 27, 2019; and the first Academy class to include Exam 7001 candidates began May 13, 2019. The FDNY’s Office of Recruitment and Retention (“ORR”) has engaged in outreach to an initial group of about 2,500 candidates and maintained data regarding its communications with candidates and their outcomes at various steps of the hiring process, and it has made some progress in formulating plans for outreach to non-traditional candidates who remain to be called off the eligible list. However, the City has not yet provided a detailed, long-range plan for sustaining the commitment of the many additional non-traditional candidates who are projected to be called off the list in the later portion of its four-year term. The City is in the process of preparing such a plan and has agreed to provide it to the Monitor by May 29, 2019. Other major projects also remain to be completed. These include data analyses intended to inform the FDNY’s attrition mitigation efforts, which the City is designing and executing with input from

the Monitor and the Parties; the City's after action analysis of the Exam 7001 recruitment campaign, which the City has completed in part, but for which essential components are in process; and the Department's plans for future campaigns.

Part III reports on activities relating to the FDNY's EEO function. Much of the activity since the last periodic report reflects the Monitor's focus on the vital role of the FDNY's operational commanders in the City's compliance with the Modified Remedial Order. For the City to achieve compliance with the Court's Order, it is critical for FDNY uniformed leadership, at every level, to demonstrate its commitment to diversity and inclusion and to the Department's EEO policies. Accordingly, the Monitor has continued to work with the City and the other Parties on an array of initiatives relating to officers' involvement in EEO messaging, their role in fostering a favorable EEO workplace climate, and mechanisms to ensure officer accountability for compliance with EEO policy (including the FDNY's workplace professionalism initiative and its EEO performance metric for officer evaluations).

The Monitor has also continued to evaluate the City's EEO investigative function. The Monitor has observed a recent improvement in the duration of EEO investigations, but it remains to be determined whether the trend will be sustained. In addition, the City recently demonstrated version 2.0 of its EEO case management database, which addressed several suggestions from the other Parties and the Monitor, but which continues to record some important types of information in fields that are not text searchable. The Monitor continues to discuss a number of EEO-related issues with the City regarding the substance of investigations, BITs¹ record-

¹ The Bureau of Investigations and Trials, the Department's disciplinary unit, prepares charges, conducts investigations, and prosecutes disciplinary cases for violations of Department policy including hazing and workplace violence.

keeping, communications with both complainants and the broader community, and other topics addressed in Party meetings and correspondence.

Also as reported in Part III, the Parties and the Monitor continue to make progress on the development of an EEO climate survey, and on plans for its administration. In particular, the City has worked closely with the United States' expert, who has taken the lead in drafting the survey instrument, with input from the Monitor and the Parties. The current work plan calls for the survey to be distributed in June. The survey is expected to be an important tool in assessing, among other things, the effectiveness of the FDNY's EEO messaging, firefighters' perceptions of their leadership's commitment to diversity and inclusion, and their confidence in the Department's willingness and ability to enforce EEO policy and law.

Part IV reports on efforts to analyze and reduce disparate impact on black and Hispanic candidates in the Medical Exam and to ensure that the FDNY's medical screening process is job-related and otherwise compliant with applicable laws.² The Monitor has continued to participate in and oversee the City's efforts to validate the stairmill component of the Medical Exam, and the City has completed a round of physiological testing of candidates for the validation study. Experts for the City, the Monitor, and the other Parties have continued to review the data, to discuss preliminary analyses, and to refine plans for further analyzing the data.

Part V reports on efforts by the Monitor and the Parties to determine whether the FDNY's character review process (conducted by the Candidate Investigation Division ("CID") and the Personnel Review Board ("PRB")) has an adverse disparate impact on black and/or Hispanic candidates; and it recounts follow-up activities from the December 12, 2018 meeting at which the Parties and the Monitor discussed a series of Monitor recommendations for reforms

² The Medical Exam is administered by the Bureau of Health Services ("BHS").

intended to reduce the risk of any such impact and eliminate screening criteria and procedures that are not job-related. As previously reported, while the City has implemented some of the Monitor's proposed changes in character review procedures and in the information and instructions provided to candidates, it has largely rejected any further changes in the substantive criteria that govern the CID's referral of candidates to the PRB. The City contends that the process as currently constituted is valid as job-related, and that the City's analyses thus far have not shown (1) that the process has a disparate impact on black or Hispanic candidates or (2) that the proposed changes in referral criteria would effectively target the causes of any such impact. The City has also rejected a set of instructions proposed by the Monitor as guidance for PRB deliberations and for the record keeping associated with PRB decisions.

As the Monitor has previously noted, in light of its position, the City must, and has agreed to, conduct a number of analyses as Exam 7001 candidates undergo character review – in order to establish whether the process has an adverse disparate impact on black or Hispanic candidates. And if such a disparate impact is found, the City will be required to implement further changes or validate the process as job-related.

Part VI discusses the Technical Report produced by the City's testing experts, PSI Services LLC ("PSI"), which describes the development, administration, and analysis of the results of Exam 7001 (the open competitive exam given in September and October 2017).

Part VI also includes updates about the survey administered to certain Exam 2000 candidates, and plans to re-administer the Exam 7001 survey.

Part VII lists a range of additional issues addressed by the Monitor and the Parties during the period covered by this report.

II. Recruitment and Attrition Mitigation

A. Candidate Processing

The City has confirmed that the eligible list for Exam 7001, the most recent open competitive firefighter examination, was established on February 27, 2019; and the first Fire Academy class from the Exam 7001 list commenced May 13. Since the last periodic report, candidate processing for the upcoming class has continued – including all the distinct steps of the FDNY hiring process: candidate intake, character review, and the components of the Medical Exam. As previously reported, the first group of candidates called off the eligible list, with adjusted final average scores of 102 and above (including claimed credits), numbered more than 2,400 candidates, including at least 355 black candidates and 579 Hispanic candidates. Monitor’s Twenty-Sixth Periodic Report at 10. After the initial call up, the City supplemented this group with an additional 94 candidates in the same scoring range, including 20 black candidates and 36 Hispanic candidates, who joined processing for the first Academy class.³ *Id.*

The City has continued to provide statistical reports on candidate processing on a bi-weekly basis. Now that the appointment process for the new class has been completed, it will be possible for the City to perform a comprehensive series of analyses to assess the rates of voluntary attrition and disqualification at each step in the process for candidates in different demographic groups. The Monitor expects that these analyses will provide important guidance for the FDNY’s ongoing efforts to minimize attrition (both voluntary and involuntary) among black and Hispanic candidates.

³ This group included candidates who asserted claims after the initial round of invitations for additional credits that raised their adjusted exam scores above the cutoff score, as well as some candidates whose applications had previously been pending.

B. Attrition Mitigation

The newly established Exam 7001 eligible list will be active for four years. As noted by the Court, the long life of the list creates a need to reach out to candidates, maintain their interest in becoming firefighters, and prepare them for the hiring process. As the Court has noted, these efforts are especially important for candidates who do not have prior familiarity with the FDNY and are not encouraged to remain in the process through a network of friends and family.

The Monitor has continued to receive updates on the City's communications with candidates who have already been called off the eligible list for processing, and on the training and resources that the City has made available to them. It has also reviewed the status of the City's planning to reach out to candidates who have not yet been called off the list – many of whom will have to wait years to enter processing. The Monitor has repeatedly emphasized the importance of a robust, long-range plan for this latter category of candidates, as long wait times increase the risk that they may drop out of the hiring process, or may not learn of their opportunity to begin the process if they fail to keep contact information current. To date, the plans produced by the City have listed events and communications only in the early life of the eligible list and have not included plans for messaging tailored to those who will be called off the list only in the last year or two of its four-year term. The City is currently working on a more extensive and comprehensive plan, which the Monitor has asked it to provide by the end of May.

The Monitor has also continued to emphasize that the City's attrition mitigation efforts must be guided by rigorous data analysis; and the Monitor has accordingly worked with the City and the other Parties to ensure that, as candidates are called off the list and appointed to Academy classes, the City is capable of identifying disparities in attrition, assessing the effectiveness of its communications and programs, and making needed adjustments.

On February 14, 2019, the Monitor and the Parties held a special purpose meeting (the “February 14 Meeting”) to discuss the City’s current attrition mitigation activities and its plans for future communications and programs, and the Monitor and Parties have exchanged follow-up inquiries and responses (from the City) regarding the issues and proposals discussed at that meeting.

1. Training and Outreach to Groups Called for Processing

At the February 14 Meeting and in other, related communications, the Monitor has continued to receive updates on the attrition mitigation initiatives serving candidates who have entered post-exam processing, and on the FDNY’s communications with those candidates.

Throughout processing, ORR communicates with candidates by text, email, and phone to remind them of appointments for training, practice sessions, and testing, to follow up with no-shows, and to publicize recruitment resources and events. As previously reported, ORR tracks and manages its email, text, and phone communications with its ARCS data system. *See, e.g.*, Monitor’s Twenty-Fifth Periodic Report (Dkt. # 1877) at 15-16; Monitor’s Twenty-Sixth Periodic Report at 14-15.

These general communication efforts are also supplemented by Recruitment Coordinators assigned to work with and engage in communications with specific demographic groups. Before the Monitor’s last periodic report, the City confirmed that it had appointed a full-time African-American Coordinator and that an additional “detailed” (part-time) firefighter had been added to the African-American Coordinator team. Monitor’s Twenty-Sixth Periodic Report at 16.⁴ In recent discussions about the role of Coordinators, the City has advised the Monitor and the other Parties that their communications with candidates are not automatically tracked in ARCS, but

⁴ Responding to requests from the Monitor and the other Parties, the City provided the job description for the African-American Coordinator on May 13, 2019.

that the Coordinators are instructed to document their communications on log sheets, from which data can be entered into ARCS. The Monitor plans to follow up further with the City to determine whether it would be possible and advisable for Coordinator communications to be tracked automatically.

The Monitor and its expert have also suggested that the FDNY conduct “exit interviews” with candidates who decide to leave the hiring process (based in part on a similar practice employed by the state police). The Monitor believes such interviews would allow the City to gain greater, more detailed insights on the factors driving voluntary attrition. The City has indicated that it has no current plans to conduct such interviews, noting that it expects to gather data relevant to voluntary attrition in the optional survey to be administered to Exam 7001 candidates.

For candidates in the first round of processing, a major component of the FDNY’s attrition mitigation efforts was its training program for the Candidate Physical Ability Test (“CPAT”), the first step in candidate screening following the written exam. As previously reported, data from the first round of CPAT practice and testing confirmed a strong correlation between attendance at CPAT training and success in the CPAT – especially for candidates who attended multiple training sessions. *See* Monitor’s Twenty-Sixth Periodic Report at 15-16.⁵

Accordingly, ORR reached out to candidates via an array of channels to encourage candidates to

⁵ As previously reported, overall rates at which candidates passed successfully through the CPAT phase of the process were 63.4% for black candidates, 64.2% for Hispanic candidates, and 70.6% for white candidates. Monitor’s Twenty-Sixth Periodic Report at 11. Although these figures reflect improvements for all groups over corresponding figures for Exam 2000 candidates, the disparity between rates for black and white candidates, and between rates for Hispanic and white candidates, highlights the need to ensure that black and Hispanic candidates take full advantage of training resources. (The City’s Department of Citywide Administrative Services (“DCAS”), which administers the CPAT, invites candidates to take two “practice” CPAT tests before taking the final test, and a candidate is deemed to have passed the CPAT by achieving a satisfactory performance on either of the two practice tests or on the final test.)

attend training sessions. Notably, however, although the rates at which candidates in each relevant demographic group attended at least one session were comparable to those for Exam 2000 candidates, rates at which candidates attended three or more sessions were lower. In discussions with the Monitor and the other Parties, the City has theorized that the decline may be due to the unusually short duration of the period in which CPAT training sessions were offered to the initial group of candidates, which gave candidates less time to fit in three sessions. The City has undertaken to examine the issue further. If the decline in multiple-session attendance is related to the time frame in which sessions were available, it should be possible to bring attendance back up by providing a longer training window.

Given the apparently beneficial impact of CPAT preparation, at the February 26, 2019 status conference, the Court inquired whether CPAT training could be offered at sites in addition to the Randall's Island FDNY facility. As in the past when this question was raised, the City has informed the Monitor that there are no immediately viable options for such additional sites, but that the City plans to review options for the longer term. Plaintiffs-Intervenors have suggested some specific options for the City to consider, and the Monitor has asked the City to assess the potential additional sites Plaintiffs-Intervenors have identified.

Plaintiffs-Intervenors have asked the City to intensify its efforts to follow up with candidates following CPAT practice sessions, suggesting that ORR should be provided with daily information on candidates who fail their CPAT practice sessions, so that they can receive immediate encouragement from the African-American Coordinator. The City has responded that it would be impractical for DCAS to gather and transmit the necessary information to ORR on a daily basis, and has asserted that gaps between CPAT sessions make daily updates unnecessary. The Monitor and Plaintiffs-Intervenors have asked the City to examine whether the practical

impediments to more frequent updates can be overcome. And Plaintiffs-Intervenors have proposed that, as an alternative, the African-American Coordinator should be asked to follow up with all black candidates after their CPAT practice sessions. The Monitor expects to discuss these proposals further with the Parties.

Another initiative intended to mitigate the rates at which candidates drop out of the FDNY hiring process is the FDNY's mentorship program. The program does not serve the hiring list in general, but rather is made available to candidates once they are called off the hiring list. The City has provided the following data regarding the participation in the mentorship program as of February 28, 2019:

- Black candidates – 341 participating out of 367 offered
- Hispanic candidates – 543 participating out of 583 offered
- White candidates – 1,274 participating out of 1,346 offered
- Total candidates – 2,282 participating out of 2,431 offered

The City reports that it has set up a database to track and analyze information relating to the mentorship program. The mentorship database includes demographic information for both mentors and mentees; the status of mentors and mentees; the historical and active counts for mentees; the candidate list number for each mentee; and the history (including opt-in and opt-out dates and any changes of mentors) for both mentors and mentees. The City reports that a candidate currently can see his or her mentor's tenure in the online candidate portal and that candidates are permitted to specify their preferred frequency and form of communication in their applications for a mentor. Plaintiffs-Intervenors have suggested that the City add features to the database to include more information that might reveal factors contributing to a successful mentor-mentee relationship. The City is considering these additional suggestions.

As shown by the statistics above, the vast majority of all candidates accept a mentor. Plaintiffs-Intervenors have proposed that the City focus the mentorship program on candidates who do not have family members in FDNY, and for whom the mentorship program may be a particularly significant source of information and support. The City has rejected that suggestion, on the grounds that even if it is feasible to determine whether candidates have family members in the FDNY, some candidates' family connections may not provide them with mentoring support.

Another resource that becomes available to candidates once they have been called off the eligible list is the FDNY's online candidate portal, which assists candidates in tracking and managing their progress through the steps of the hiring process. The candidate portal features notifications and reminders of appointments and upcoming events; information showing which background investigation documents have been submitted and have yet to be submitted; information showing which follow-up medical appointments the candidate must attend as well as medical documentation that must be submitted; a progress bar displaying the completed, pending, and upcoming steps in candidate screening; and informational resources such as policies and guidelines. It also permits candidates to revise contact information in a one-step process for multiple City entities involved in the hiring process. On March 20, 2019, the City provided the Monitor and the other Parties with updated figures showing that approximately half of the candidates invited to connect with the portal have done so thus far, and that approximately 65% of CPAT qualified candidates had done so. The City also provided figures showing rates at which portal users successfully completed the CPAT, but the significance of those figures is unclear. The Monitor and the other Parties have posed follow-up questions to the City to ascertain whether any inferences can be drawn from the data about portal usage and candidate attrition.

As previously reported, although the portal is a useful source of information for candidates, neither the portal nor any other FDNY resource permits candidates to schedule and reschedule appointments online. Instead, candidates call or send an email to request to reschedule, and then are offered an alternate time. In response to questions about adding online scheduling to avoid the need for candidates to make repeat phone calls, the City has not devised plans to add such a feature, preferring to leave scheduling within the control of the separate units (such as CID and BHS) that run the different components of the candidate screening process at different stages. (For example, CID runs intake, and BHS runs the Medical Exam.) The City has also asserted that online scheduling would present difficulties where candidates need to be called in approximately list order. The Monitor continues to encourage the City to consider adding online scheduling capabilities to the candidate portal.

Another attrition mitigation program available for candidates who have been called off the list is the FDNY's Fitness Awareness Program ("FAP"), which provides fitness evaluations and advice to candidates who have been called off the eligible list for processing. In its analysis of candidate attrition for the Exam 2000 list, the FDNY found that participation in the FAP correlated with a higher rate of success on the Medical Exam, particularly for black and Hispanic candidates; and in part for that reason the Monitor has encouraged the City to look for ways to increase participation and extend the reach of the program. The City reports that it is examining ways to expand and leverage the FAP.

At the February 14 Meeting, the City indicated that for the first round of Exam 7001 candidates, attendance had fallen short of expectations. The FDNY is considering ways to improve attendance by ensuring candidates are informed about the FAP early and given suggestions on how to prepare for it. The Department is also examining ways of providing

candidates with guidance on assessing and improving their own fitness – even if they do not attend program sessions in person. The Monitor has asked the City to provide updates on these initiatives and any materials as they are developed.

2. Attrition Mitigation Plans for Candidates Outside the Current Processing Group

In previous periodic reports and in numerous communications with the City, the Monitor has expressed concerns about the limited plans the FDNY had made for communications and programs targeting candidates who will not be called for processing until late in the four-year life of the list. *See* Monitor’s Twenty-Sixth Periodic Report at 18-19; Monitor’s Twenty-Fifth Periodic Report at 19. The plan provided to the Monitor before the last periodic report, on December 2, 2018, included no events later than March 2019, and very few events or communications aimed at candidates likely to be called off the list after the first two rounds of invitations. Monitor’s Twenty-Sixth Periodic Report at 19.

Shortly before the February 14 Meeting, the City provided the Monitor and the other Parties with a somewhat more extensive plan for communications and events, which added some events for candidates in lower positions on the eligible list – including an information session scheduled for the fall of 2019, aimed at candidates with scores of 98-99 (likely to be called off the list in rounds three and four), and summer block parties targeting candidates with scores of 98-101 (rounds two through four). The new plan also included “fitness assessment tools” to be distributed by mail and email to candidates with scores of 98-101 in the spring of 2019. (The plan also included information sessions and other communications aimed at candidates in the upcoming round of candidates.) This most recent plan represents an improvement over the previous iterations the City provided. However, it still does not list any events or communications later than the fall of 2019, or indicate whether or how the City plans to tailor its

messaging to groups of differently situated candidates. The City has indicated that the plan disclosed in February covers later years because it is intended to be repeated for later rounds of candidates. But even taking that into account, based on its consultations with experts, the Monitor believes that the plan should include more messages targeting candidates in lower positions on the list (those with scores below 98, who may be called off the list near the end of its four-year term), and that it should include specific, differentiated messaging for candidates with longer and shorter wait times. The City's revised plan does not show whether or how its messages are adapted to the different groups of candidates. In response to the Monitor's continuing concerns, the City is currently working on a further expanded and updated plan, which the Monitor has asked it to deliver by May 29. Plaintiffs-Intervenors are also moving forward with plans to conduct outreach to black candidates farther down the list.

In addition, although the Monitor recognizes that the FDNY cannot provide live events or personal contact simultaneously for all candidates who will eventually be called off the eligible list, the Monitor has urged the City to consider ways it can enhance its interactions with candidates farther down the list. Given the multiple-year duration of the list, these candidates require a communications plan that will not grow stale through repetition. The Monitor has also suggested creating and publicizing online resources that will assist candidates in preparing for the hiring process. Among other possibilities, as previously reported, the Monitor has advocated that the FDNY expand the FAP and leverage it by developing and distributing related guidance and communications. *See* Monitor's Twenty-Fifth Periodic Report at 21. The City previously reported that it was developing a video based on the FAP to inform candidates about the level of physical fitness required for the job and provide guidance on how to achieve and maintain it. *Id.*

The Monitor urges the City to include such expanded initiatives in its plans, and hopes they will be reflected in the further expanded plan the City has agreed to provide.⁶

3. Use of Data Concerning Attrition

The Monitor has continued to work with the City and the other Parties to ensure that the City optimizes its use of data from the Exam 2000 hiring process and, eventually, from the early rounds of screening for Exam 7001 candidates, to guide its attrition mitigation efforts.⁷ The City previously provided the Monitor with a set of attrition analyses for Exam 2000, dated October 17, 2018,⁸ which contains calculations of the rates at which candidates dropped out or were disqualified at different stages of the hiring process, rates of participation in programs such as the mentorship program, and the effects of changes in the hiring process on candidate attrition. The City's report also includes some data showing correlations between rates of attrition and some of the City's attrition mitigation initiatives, such as CPAT training and the FAP. However, as previously reported, the City's report does not identify reasons candidates dropped out of the process. Monitor's Twenty-Sixth Periodic Report at 20-21. In addition, although the analysis briefly identifies some apparently effective initiatives, and although ORR personnel have referenced some of its findings in discussions of current attrition mitigation initiatives, the report

⁶ Plaintiffs-Intervenors have also suggested that the City expand the role of Recruitment Coordinators to include contacts with candidates who have not yet been called off the list. The City has declined to do so, stating that such an expansion of the Coordinators' duties would be impractical. The Monitor plans to discuss the issue further and has asked the City to consider whether an expanded role for Coordinators could be part of its long-range plans. Previously, Plaintiffs-Intervenors also suggested that the City make the candidate portal available to all candidates with reachable scores, but the City expressed a preference for using the JoinFDNY website as a resource for candidates who had not yet been called off the list. Monitor's Twenty-Fourth Periodic Report (Dkt. # 1861) at 13.

⁷ Additional sources of relevant data include the survey given to Exam 7001 candidates in connection with the CBT, the optional survey sent to successful Exam 2000 candidates in October of last year, and the further survey that the City plans to administer to Exam 7001 candidates in the near term.

⁸ The City has also provided a version of the analysis, "Review of Candidate Attrition for Exam 2000," to the other Parties.

does not indicate in detail how the City plans to use its findings in formulating new strategies or tactics.

With respect to the attrition analyses the City plans to conduct on the Exam 7001 candidate screening process (presumably in addition to repeating the analyses performed in its retrospective assessment of Exam 2000 attrition), the City previously provided (November 8, 2018) a very brief list of its plans to evaluate the effectiveness of some key attrition mitigation efforts including mentorship, the FAP, and the candidate portal. But it did not indicate how it planned to evaluate them, or what further analyses it planned to conduct regarding attrition at different stages of the hiring process. *See* Monitor's Twenty-Sixth Periodic Report at 21-22.

On May 14, 2019, the Monitor provided the City with a set of comments and recommendations regarding both its Exam 2000 attrition analyses and its planned analyses for Exam 7001 processing.⁹ Among other things, the Monitor recommended that the Exam 7001 analyses should include all the principal components that the City considered in its assessment of Exam 2000 attrition – including rates of voluntary and involuntary attrition for each group at each hiring step and for participants (and non-participants) in each of the FDNY's retention programs (*i.e.* the FAP, CPAT training and other initiatives). The Monitor also recommended that, to the extent possible, the analyses should include more time-frame-specific or list-number-specific analyses of voluntary attrition, disqualifications, and the impact of attrition mitigation initiatives – to facilitate comparisons between Exam 7001 processing rounds and comparable rounds of processing for Exam 2000. (The Exam 2000 analysis already includes some high-level analyses of this type.) Echoing requests from the United States and Plaintiffs-Intervenors, the

⁹ The United States also provided a set of comments on May 14. Plaintiffs-Intervenors provided comments on the City's attrition analyses along with their comments on the After Action analysis, on April 30, 2019.

Monitor also asked the City to include calculations of statistical significance where it found disparities in attrition between demographic groups. The Monitor has also suggested that where possible and relevant, the City's analyses should include correlations between the number of training or practice sessions attended, or the time elapsed since the last session attended, and success on a given screening test. For initiatives such as the FAP, the mentorship program, and the candidate portal (new for Exam 7001), the Monitor has suggested that the City also assess the correlation for each demographic between candidate participation and success on all potentially relevant hiring steps and ultimate appointment. For example, the City's Exam 2000 analysis found a correlation found between the FAP and improved pass rates on the Medical Exam: even though, as described by the City, the FAP was designed to help candidates prepare for and get through the Academy, it had an effect on a different part of the process. *See* Monitor's Twenty-Sixth Periodic Report at 20-21. It may be informative for the City to examine correlations between retention initiatives and overall success in the hiring process, not just the correlation between each program and the most directly relevant hiring step. The Monitor has also suggested that where a hiring step (such as the CPAT) includes multiple components, the City should examine the effect of separate components on candidate disqualifications. Finally, the City's report also notes that the data collected for Exam 2000 candidates is not sufficient for the analysis to identify reasons candidates dropped out of the process (apparently because it could not control for factors other than race, ethnicity, and gender). To the extent possible, and to the extent it is not already doing so, the Monitor has suggested that the City collect data from Exam 7001 candidates that would allow it to perform this type of analysis.

The Monitor plans to continue to work with the City as it analyzes attrition (voluntary and involuntary) for Exam 7001 candidates. As part of that process, it may also ask the City to

demonstrate its analytical methods and/or to provide the Monitor with candidate data so that the Monitor can perform its own analyses.

C. After Action Analysis

In addition to its ongoing work on candidate processing and attrition mitigation, the Monitor has long emphasized the need for the City to perform a comprehensive analysis of the Exam 7001 recruitment campaign to determine which strategies, targeting, and messages were effective in attracting successful black and Hispanic firefighter candidates. *See, e.g.*, Monitor's Twenty-Fifth Periodic Report at 24; Monitor's Twenty-Second Periodic Report (Dkt. # 1821) at 14. As previously reported in detail, the City delivered an "After Action Report" on November 13, 2018 (to the Monitor) and November 14 (to the other Parties), containing a large volume of informative data and analyses on the FDNY's recruitment activities, focusing primarily on the work of the ORR; however, as previously noted, the City's report did not include a number of components essential to a complete assessment of the Exam 7001 campaign, and to the City's efforts to draw guidance from the analysis in formulating plans for future campaigns. Monitor's Twenty-Sixth Periodic Report at 22-23. The City has not yet provided its analysis of budgeting, costs, and benefits associated with different recruiting initiatives.¹⁰ Nor has it provided any detailed examination of the campaign's digital advertising and outreach efforts, or any assessment of its radio and outdoor ad campaigns.¹¹ *Id.* at 23-24. The City's report also does

¹⁰ On February 1, 2019, responding to the Monitor's request, the City provided a set of high-level historical budget numbers for ORR (to the Monitor only); but these numbers do not appear to distinguish between resources devoted to firefighter recruitment and other activities, and they do not reflect amounts expended on specific recruitment initiatives, which the Monitor expects the City to provide in its further after action analyses.

¹¹ Also, the issue of the City's compliance with the Intent Settlement's "best efforts" requirement must be resolved. *See* Monitor's Twenty-Fourth Periodic Report at 17.

not sufficiently focus on whether particular recruitment efforts and targeting are associated with candidates who ultimately obtain reachable scores. *Id.* The City has committed to providing these additional analyses by the end of June 2019.

On May 1, 2019, the Monitor provided the City with a set of detailed comments on the After Action Report.¹² In addition to extensive recommendations concerning specific analyses, the Monitor offered several general recommendations including the following: (1) the City should ensure that the analysis assesses the impact of each initiative or category of recruitment activity on different demographic groups, so that the analysis can be used to identify effective strategies specifically for recruiting black and Hispanic candidates; (2) the report should assess the ability of each category of activity to attract minority candidates with “reachable” scores (*i.e.* candidates likely to be called off the eligible list); (3) the report should assess whether each activity resulted in greater representation of minorities among those candidates with reachable scores; and (4) the report should include regression analyses to identify to what degree multiple variables are driving the results of a particular initiative.

As the City acknowledges, in addition to completing its analyses of the Exam 7001 campaign, it must also develop and share with the Monitor a comprehensive plan for the next campaign, and it intends to do so.

D. Assignment Issue

As discussed in detail in the Monitor’s previous periodic report, Plaintiffs-Intervenors have raised issues regarding the City’s compliance with Paragraph 1(d) of the Disparate Treatment Settlement, which requires the City to give “New York City residents who graduate from the Fire Academy first priority for placement into a fire company within the Division in

¹² Plaintiffs-Intervenors and the United States also provided comments, on April 30, 2019.

which they live, to the extent reasonable, practicable, and consistent with operational needs”; and the Monitor has undertaken an investigation of Plaintiffs-Intervenors’ concerns. Monitor’s Twenty-Fourth Periodic Report at 18.¹³ On November 28, 2018, the City responded to a set of follow-up questions, first posed by the Monitor on August 8, 2018, regarding the stated operational justifications for its assignment decisions, its assignment criteria, and its processes for recording and handling requests for home division assignments. While the City’s response provided some additional clarification regarding the standards and procedures it uses in eliciting, recording, and handling requests from new probationary firefighters, it remains unclear whether and how the Department articulates and records the specific operational needs supporting its decisions when it declines home division requests. On January 29, 2019, the Monitor requested further clarification from the City and recommended procedures to ensure that operational needs are stated in sufficient detail.

At a May 8, 2019 meeting, the Monitor and the Parties discussed the status of the Monitor’s inquiries, and the City committed to provide within the next several days the description the Monitor had requested of its procedures and standards for company assignments from the Academy. However, as of May 15, the City had not yet provided the promised description. Once it is produced, the Monitor plans to analyze the issue further, discuss it further with the Parties, and provide a summary of its inquiries to the Parties within the next few weeks.

¹³ The City has noted that the issues discussed in this section regarding assignments of probationary firefighters are not strictly within the category of “recruitment,” as they concern firefighters who have been appointed (though not yet assigned). For ease of reference and comparison to prior reports, the discussion of these issues remains under the heading of Recruitment. As noted above, the issue regarding assignments under the Disparate Treatment Settlement is within the Monitor’s purview pursuant to the terms of the relevant Stipulation and Order (Dkt. # 1599). As noted below and in previous reports, Plaintiffs-Intervenors’ allegations regarding disparate impact in assignments, and the FDNY’s actions to investigate and address those allegations, are within the scope of the Monitor’s authority under the Modified Remedial Order to monitor the effectiveness of the Department’s EEO function. *See* Monitor’s Twenty-Fourth Periodic Report at 18-19.

Also as previously reported, Plaintiffs-Intervenors have raised additional concerns relating to firefighter assignments, including assignments to engine and ladder companies and to busier fire companies, which Plaintiffs-Intervenors contend demonstrate potential unlawful discrimination or retaliation under the Modified Remedial Order, and are also relevant to the Order's focus on the importance of an effective EEO office within the FDNY. *See* Monitor's Twenty-Fourth Periodic Report at 18-19. Before the last periodic report, the Monitor had remanded the issues to the FDNY EEO Office based on the City's assertions that the EEO office should handle such investigation, with instructions to complete an investigation within 90 days (including certain topics specified by the Monitor) and report to the Monitor on the outcome of the investigation within 120 days. That period expired on November 13, 2018. In subsequent discussions with the Monitor, the City reported that it had completed statistical analyses and other inquiries relevant to the issues raised by Plaintiffs-Intervenors, but that it had not yet completed a report on the conclusions reached in the investigation, citing the need to involve the leadership of the Department in assessing its findings and potential next steps. The Monitor asked the City to provide the complete report of its investigation to the Monitor by January 10, 2019. But despite repeated reminders and follow-up queries, the City has not yet done so. The protracted delays in completing the investigation and reporting the outcome to the Monitor are cause for serious concern about the Department's ability to conduct EEO-related analyses in a timely manner. The Monitor has renewed the request and set a deadline of May 24, 2019 for the City to provide the requested report.

E. Working Group

The Monitor has continued to oversee the City's work on initiatives undertaken by the Working Group Committee, which was created pursuant to the Disparate Treatment Settlement for the purpose of "creat[ing] educational and other opportunities that will enhance the ability of

New York City students to pursue careers as New York City firefighters.” Monitor’s Twelfth Periodic Report (Dkt. # 1603) at 7-8 (citing Proposed Stipulation and Order (Dkt. # 1291-1) ¶ 1(e)). These initiatives include the implementation of the Fire Cadet title and the continued operation and expansion of the FDNY’s Explorer Program. The City previously provided an updated timeline for its preparations for the launch of the Fire Cadet program, which brought forward the timing of some of the key steps. Monitor’s Twenty-Sixth Periodic Report at 25-26. The City’s current timeline sets out milestones for additional staffing and training (in 2019), recruitment (June 2019 through February 2020), an application period (March/April 2020), and selection and investigation of prospective Fire Cadets (April 2020 through April 2021), with the anticipated start of the first class in April 2021. *Id.* The Monitor will continue to obtain updates on the City’s progress in implementing the program.

The City has also continued to support the FDNY Explorers Program, which provides training and mentoring at posts associated with City high schools in diverse neighborhoods.¹⁴ The City previously advised that it selected 18 new post advisors in July 2018 for a total of 52. Monitor’s Twenty-Fifth Periodic Report at 27. And as of February 1, 2019, it reported that the program was near capacity, with 207 Explorers were enrolled in the program. Monitor’s Twenty-Sixth Periodic Report at 26 (citing Monitor’s Twenty-Fifth Periodic Report at 27).

III. EEO

A. Overview

The Monitor has continued to work with its experts, the City, and the other Parties on initiatives relating to the FDNY’s compliance with its EEO-related obligations under the

¹⁴ The Explorers Program has been described in detail in previous periodic reports. *See, e.g.*, Monitor’s Nineteenth Periodic Report (Dkt. # 1761) at 16-17.

Modified Remedial Order – including initiatives relating to EEO messaging and training, officer accountability and reporting requirements, the FDNY workplace climate survey, and the Monitor’s ongoing review and evaluation of the EEO Office’s investigative practices. While progress has continued on a number of projects (notably the climate survey) since the last periodic report, in several key areas important initiatives have not yet been implemented or their effectiveness remains to be confirmed. On April 17, 2019, the Monitor and the Parties met to conduct a comprehensive discussion of the City’s efforts to bring its EEO function into compliance with the Modified Remedial Order (the “April 17 EEO Meeting”). And the City provided updates of its progress in several major areas of activity.

The Monitor has continued to focus particular attention on initiatives intended to ensure that operational commanders at all levels effectively communicate the FDNY’s commitment to diversity and inclusion, and that they take an active role in maintaining the Department’s compliance with EEO laws and policies. These initiatives include the Monitor’s longstanding recommendation that the City develop a plan for operational commanders to deliver EEO messages; the implementation of an EEO metric for officer performance evaluations; and the FDNY’s reporting system for workplace professionalism issues, which includes topics relating to potential EEO and hazing violations. These projects are at different stages of development and implementation.

In other areas also, including its handling of EEO complaints and the establishment of an effective system for analyzing hiring practices and other employment actions to identify potentially unlawful disparate impact, recommended improvements remain to be effectively implemented, or their effective implementation remains to be confirmed.

B. EEO Staffing

The City has continued efforts to fill the one position remaining (a Deputy Director post) to complete the current headcount of its EEO Office staff. It now anticipates that the position will be filled soon. As previously reported, once fully staffed, the EEO Office will include 16 attorneys (including the Assistant Commissioner, two Deputy Directors, Investigative Attorneys and contract attorneys) and six non-attorney staff. Because attorneys have the responsibility for conducting investigations, it is the number of attorney positions that has the most direct effect on the ability of the EEO Office to complete investigations promptly and effectively. Current EEO positions include the following:

- The Assistant Commissioner
- Two Deputy Directors
- Eight Investigations Attorneys
- Four intake/second seat contract attorneys
- One training attorney
- Two disability rights coordinators

At the April 17 EEO Meeting and in follow-up discussions, the City reported that the current active caseload for investigators is approximately ten to twelve cases per investigator – reduced from a caseload of 15-20 cases as reported by the City approximately one year ago, before the staffing increases that took place in the latter half of 2018.

The City has also continued to provide the Monitor and the other Parties with updates on its efforts to bring the EEO Counselor program up to full strength. The program was launched in January 2018 with the appointment of a group of 18 Counselors and with plans for a total of 25-30 Counselors from Fire operations. Monitor's Twenty-Fourth Periodic Report at 29. As previously reported, additional Counselor positions were initially posted by Department Order on

February 6. Following a second posting, which extended the deadline, applications closed on April 15, 2019. On April 25, 2019, the City advised the Monitor and the other Parties that it had received approximately 60 applications from Fire Operations, was reviewing applications for the position, and expected to begin interviews during week of May 6. The City now indicates that it hopes to bring on 15-25 additional counselors. The new group of Counselors is expected to include firefighters, addressing a concern expressed by the Monitor and the other Parties that the initial group included fire operations officers but no firefighters. Training for the new Counselors is scheduled for this summer.

C. Policies and Messaging

Since the last periodic report, the Monitor has continued to encourage the City to expand and intensify its EEO messaging – by following through on plans to introduce new content and by broadening the variety of channels through which diversity and inclusion messages are delivered. In particular, the Monitor has continued to advocate forcefully for the FDNY to involve operational commanders in the delivery of EEO messaging. Based on consultations with its experts, and on its review of relevant research, guidelines, and best practices, the Monitor believes it is essential for mid-level operational supervisors (at the firehouse, battalion, and division levels) to personally communicate Departmental commitment to policies of EEO compliance, diversity, and inclusion – and to convey the importance of those policies to operational effectiveness and professionalism. The Monitor has also obtained information indicating that other important FDNY messages are typically communicated through such in-person visits from officers. More broadly, the Monitor and the other Parties have urged the City to develop and present a comprehensive, coordinated messaging plan for all sources of EEO messaging that specifies how the Department plans to disseminate a variety of EEO messages via multiple channels over time. Here again, based on the its consultations with experts, the Monitor

believes it is essential for the FDNY to create and communicate fresh messaging through an array of different channels on an ongoing basis.

In recent discussions, including the April 17 EEO Meeting, the City has committed to providing the Monitor and the other Parties with a comprehensive messaging plan, and the Monitor has asked the City to provide a draft by May 29, 2019, with a view to finalizing the plan by the end of June. The City has also assured the Monitor that the plan will include provisions for operational commanders to be involved in EEO messaging. The City has advised the Monitor that battalion commanders routinely visit firehouses on a bi-weekly basis, and that division commanders do so monthly. The Monitor has suggested that in some of those visits the officers should be directed to deliver EEO-related messages – including, for example, reminders regarding aspects of EEO Policy or information regarding EEO resources such as the Counselor program. The Monitor looks forward to reviewing the City’s plans in this area.

The Monitor also expects that the City’s plans will incorporate and build upon other existing and long planned EEO messaging and training initiatives, which have been discussed in previous periodic reports. *See, e.g.*, Monitor’s Twenty-Sixth Periodic Report at 30. These include the Department’s program of “voice announcement” (recorded video) diversity and inclusion messaging, which the FDNY launched in September 2018, and for which it has previously committed to developing additional content. *Id.* The City previously reported that additional videos for the program were in production, *id.*; and the Monitor has asked the City to provide any additional content that has been developed. The messaging and training programs to which the City previously committed also include the launch of a new online training platform, and the development of new content for that platform. *Id.* The City initially outlined plans for the new platform in a March 10, 2018 message; and before the last periodic report, it anticipated

that the new system would be launched in the Spring of 2019. *Id.* More recently it has revised that projection, and now plans to launch the system in the summer of this year. The Monitor will continue to follow the City's efforts to develop and launch the new system; it will request a demonstration of the system once launched (including mechanisms for verifying firefighter attendance and retention of program content); and it requests that content for the new platform be provided to the Monitor as it is created. The City's comprehensive messaging plan is also expected to include additional messaging through conventional media such as posters and newsletters.

At the April 17 EEO Meeting, the Monitor and the Parties also continued previous discussions regarding two particular types of EEO messaging content: (1) messaging addressing public reports that raise concerns about the FDNY's EEO climate and compliance or criticize the Department's efforts to promote diversity¹⁵ and (2) messaging regarding investigations and disciplinary action arising from EEO complaints. The Monitor and the other Parties have noted that public reports of incidents with EEO implications can provide an important opportunity for the Department to re-emphasize its commitment to diversity and inclusion and to EEO compliance – in public statements and/or in internal Departmental communications – and that the FDNY could do so in general terms without compromising the confidentiality or fairness of ongoing investigations. At the April 17 EEO Meeting, while the City noted that decisions regarding such messaging would have to be made on a case-by-case basis, it acknowledged that where possible such public reports should be met with statements reinforcing the Department's commitments to upholding EEO law and FDNY policy. The Monitor continues to urge the city

¹⁵ A recent example is a media article incorrectly characterized the hiring process for Priority Hire candidates.

to consider strategic messaging both externally and internally regarding the Department's commitment to diversity and inclusion and the benefits of a diverse workforce.

Regarding messaging on investigations and disciplinary action, the Monitor and the other Parties have suggested that the Department could bolster employee confidence in the EEO Office, and send a message of deterrence to potential violators, by publicizing findings of substantiated EEO violations and any resulting disciplinary action. While the Department has issued brief internal statements in the past to publicize disciplinary action in some cases, it has not generally publicized the findings and actions arising from EEO complaints, and it has expressed concerns that such statements may compromise the confidentiality of investigations. At the April 17 EEO Meeting, the Parties and the Monitor discussed ways in which the City could publicize the activities more broadly and more frequently without raising confidentiality concerns – for example, by issuing periodic statements about the cumulative activities of the EEO Office, such as the number of complaints and inquiries investigated, the number closed, and the number of complaints substantiated. The City is considering the suggestions raised at the meeting, and the Monitor looks forward to hearing more from the City on its plans for such messaging. The Monitor asks that the City consider including such communications in its comprehensive EEO messaging plan, for which the Monitor has requested a draft by May 29, 2019.

As previously reported, at the December 17, 2018 status conference, the Court directed the City to develop means of confirming that EEO messages are delivered effectively and whether they are well received. Monitor's Twenty-Sixth Periodic Report at 30. The Monitor expects that substantial information on the effectiveness of the FDNY's EEO messaging will be obtained via the EEO climate survey, discussed below in Part III.D.2, which will contain

questions specific to the topic. The Monitor also plans to explore other options with the City for gathering feedback, including potentially the observation of selected voice announcement messaging and other EEO presentations by EEO personnel.

D. Compliance and Accountability

1. Increased Accountability within the Chain of Command

a) *Performance Evaluations*

The Monitor had continued its efforts to review the FDNY's implementation of an EEO performance metric for officers performance evaluations,¹⁶ and to determine whether the Department's evaluation system effectively assesses the performance of officers in supporting its policies of diversity and inclusion. In particular, as previously reported, the Monitor intends to examine whether the EEO Office provides input for evaluations in every case where it possesses relevant information about an officer's performance (including his or her communication of EEO messages, relevant information from firehouse inspections, failures to report violations or potential violations, failures to cooperate with the EEO Office, or negligent oversight and supervision of firefighters within his or her command). *See* Monitor's Twenty-Sixth Periodic Report at 33. The City has previously represented that the EEO Office would provide input in such cases. *Id.* More generally, the Monitor intends to assess whether and how raters appropriately consider the several EEO-related criteria that the FDNY has identified as contributing to evaluations and included in its instructions to raters.

As an initial step in its review, before the last periodic report (on December 19, 2018), the Monitor asked the City to provide a compilation of all the ratings issued in the 2018

¹⁶ The metric was first introduced for Lieutenants' reviews in February 2018, and later in 2018 as a component of performance reviews for Captains. Monitor's Twenty-Fourth Periodic Report at 32; Monitor's Twenty-Third Periodic Report at 29.

performance review (which assessed performance during 2017), along with samples of performance review materials. The City provided an initial set of sample material on March 8, 2019, and it provided the comprehensive compilation of ratings on April 25, 2019.¹⁷ In response to a separate Monitor request (April 5, 2019), on April 10, 2019 the City also provided a copy of the complete written instructions given to raters who prepare the evaluations. In a discussion on April 24, 2019, the City informed the Monitor's team that approximately 500 officers (out of approximately 1600 evaluated) mistakenly received evaluations on obsolete forms that did not include the EEO metric. The City informed the Monitor that it has responded with increased efforts to ensure that raters use the correct forms; and to the extent that any obsolete forms have been used for 2019 reviews (which are in progress), raters will be directed to redo the evaluations to include the EEO metric. The Monitor is now in the process of reviewing the materials produced by City. Based on that review (and any additional materials the Monitor may request) the Monitor may recommend changes in the performance review system. The Monitor expects that further review of additional rounds of evaluations will be necessary for it to confirm the effectiveness of the system.

b) *“Workplace Professionalism” Reporting*

As previously reported, in December of 2018, in response to longstanding Monitor recommendations and the Court's direction at the September 13, 2018 status conference, the City made a number of important changes in the reporting system (established July 12, 2017) that requires officers to meet with their superiors to discuss conduct and issues affecting workplace professionalism – including but not limited to potential EEO and hazing-related issues. *See* Monitor's Twenty-Sixth Periodic Report at 31; Monitor's Twenty-Second Periodic Report at 34;

¹⁷ Both items were provided to the Monitor but not to the other Parties.

see also City Letter to Court dated January 19, 2018 (Dkt. # 1828) (listing “anti-hazing, bullying, and other important initiatives implicating workplace professionalism” as intended topics of discussion). The changes responded to the Monitor’s recommendation that the City give officers more detailed instructions and use a reporting form to ensure that all consultations are memorialized and that the reports reach essential issues. *See* Monitor’s Twenty-Sixth Periodic Report at 31. The FDNY issued new instructions listing topics to be covered in the required conferences, including topics relating to EEO and hazing or bullying, and providing examples of conduct that should trigger reports. *Id.*

Given that the system calls for monthly reports from most officer ranks, and that the revised instructions have been in place for approximately five months, the Monitor expects that the system has now generated enough written reports to support a meaningful, informative review. Accordingly, the Monitor plans to ask the City to produce reports generated by its workplace professionalism reporting system since the revised instructions were issued.

At the April 17 EEO Meeting, the Monitor also confirmed that the Assistant Commissioner for EEO is provided with workplace professionalism reports (although these reports are not included in the EEO database), and can therefore compare those reports to records of firehouse inspections and EEO complaints and inquiries, and identify any discrepancies that suggest either a failure to observe or a failure to report conditions or conduct that may constitute or be conducive to EEO violations. The Monitor intends to make further inquiries to confirm that the Assistant Commissioner regularly conducts such a review.

2. Climate Survey

The Monitor and the Parties have made further significant progress on the development of a workplace climate survey, and on plans for administering the survey. As previous periodic reports have recounted, the need for a climate survey has been recognized since at least 2013,

when the City itself acknowledged the importance of the survey in its EEO Report to the Court. For most of the intervening time, work on the survey was either dormant or impeded by a variety of false starts and changes in course. But since the fall of 2018, the City, the other Parties, and the Monitor have worked diligently and expeditiously to complete development of survey content, and to finalize plans for administration of the survey and the messaging that will accompany it. The United States, along with its expert, has taken the lead in drafting the survey itself, with substantial input and comments from the Monitor and the other Parties; and the City plans to use its own resources (including resources from the Mayor's Office of Data Analytics ("MODA") and from DCAS), along with a commercially available survey tool, to administer the survey. Monitor's Twenty-Sixth Periodic Report at 34. The FDNY will not have access to raw data and will receive analyses prepared by MODA that ensure anonymity is protected.

Work on the survey was impeded during the shutdown of the federal government (because the United States and its climate survey expert were prevented from working on drafts of the survey instrument or participating in calls and meetings regarding the project). But since that time, and since the last periodic report, the work has proceeded steadily, with the Monitor and the Parties exchanging drafts and comments on the survey instrument. The United States circulated a draft of the survey on February 21, 2019; the Monitor, the City, and Plaintiffs-Intervenors provided comments on the draft; and on March 22, 2019, the Parties and the Monitor convened on a conference call to go over the draft and the issues raised in the comments. The United States circulated a further draft on April 8, 2019, and the Monitor and the other Parties provided further comments in subsequent emails and at the April 17 EEO Meeting. On April 22, 2019, the City, the DOJ, and its expert met with FDNY affinity groups to brief them on plans for the survey and obtain input on the City's plans for survey administration and the messaging that

will accompany its launch. On May 13, 2019, the City circulated its draft messaging plan for the survey, which the Monitor and the other Parties are currently reviewing.

As detailed in the Monitor's previous report, the analysis of survey data will be conducted primarily by MODA. The City has confirmed that the EEO Office will be involved in setting the goals of the analyses and have the opportunity to pose follow-up queries, Monitor's Twenty-Sixth Periodic Report at 35; but the EEO Office will not have access to raw survey data and will not be able to link answers to specific individuals within the Department. In addition, the Parties and the Monitor plan to task a small group of representatives to work with MODA in designing and reviewing analyses. *Id.* The City has also previously confirmed that it plans to administer the survey regularly and use its results in the development of EEO initiatives. *Id.*

The current work plan calls for survey administration to begin in June.

3. Disparate Impact Analyses

Since the last periodic report, the Monitor has continued to develop a detailed set of recommendations for the structure and timing of regular analyses for the City to conduct in order to detect potentially unlawful disparate impact in the component steps of its hiring process and in other decisions affecting the terms or conditions of FDNY employees. The Monitor expects to deliver the recommendations to the City within the next several days. The ability to conduct such analyses is an essential component in the City's compliance with the Modified Remedial Order. *See* Monitor's Twenty-Sixth Periodic Report at 22 (quoting Modified Remedial Order ¶ 19).

The City has previously provided assurances that it plans to conduct periodic disparate impact analyses; and on October 5, 2018 it provided a list of the analyses it planned to conduct regularly. Monitor's Twenty-Fifth Periodic Report at 31. Subsequently, the City also pointed to its Review of Candidate Attrition for Exam 2000 as a further illustration of the types and

methods of analysis it plans to execute. But the City's assurances and its list of analyses did not clearly describe an analytical plan sufficient to bring it into compliance with the Modified Remedial Order. In its previous periodic report, the Monitor expressed concerns regarding a lack of detail in the City's plans, regarding the timing of the analyses (which in some areas called for analyses at intervals that appeared too infrequent for the City to detect and attempt to remedy any issues identified) and regarding the need for provisions specifying the role of the EEO Office in following up on analyses. Monitor's Twenty-Sixth Periodic Report at 36.

As part of the process of evaluating the City's capacity to conduct the relevant assessments, the Monitor also plans to observe its procedures in action over time and review the reports generated by the analyses.

4. Inspections

At the April 17 EEO Meeting, the City updated the Monitor and the other Parties on the procedures for EEO inspections. The EEO Office conducts two series of inspections per week, with each series covering several firehouses at diverse locations. Inspections are generally conducted when personnel are present in the firehouse, although the inspectors have the ability to access firehouses when the company is out of the house on a run. Inspections are conducted by teams of three, with one inspector typically remaining with firefighters in the firehouse kitchen (and available to respond to questions or discuss issues) while the others conduct the inspection. At the meeting, the Plaintiffs-Intervenors suggested that the EEO Office develop talking points for the inspectors who remain with firehouse personnel during inspections, so that the inspection can be used as a communication opportunity if members do not have questions; and the City is considering the proposal.

In advance of the April 17 EEO Meeting, Plaintiffs-Intervenors and the Monitor asked the City to provide figures showing the number of inspections conducted in 2017 and 2018 and

the results of those inspections. At the meeting, the City agreed to provide the requested information, along with the checklist used in inspections; but as of May 15, it had not yet been produced. The Monitor asks the City to produce the requested data concerning inspections no later than May 24, 2019. The Monitor plans to review the checklist when produced, to determine whether it provides sufficient guidance for inspectors to identify conditions that may be indicative of violations.

E. Investigations

1. The Monitor's Report on FDNY EEO Investigations

As of its last periodic report (on December 17, 2018) the Monitor had provided the Court with a draft of its report, pursuant to the Court's November 17, 2017 Order, regarding the EEO Office, its staffing, its investigative procedures, and its performance in the completion of EEO investigations – with a particular focus on the duration of investigations as measured against the presumptive 90-day time limit for investigations set forth in the City's EEO guidelines and the FDNY's own EEO Policy.¹⁸ That draft included revisions based on the Parties' comments. On February 15, 2019, the Monitor provided the Parties with a further draft, which included updates based in part on the City's January 7, 2019 production to the Monitor of updated and expanded EEO investigation statistics. The Parties communicated further comments on February 21 and 22, and the Monitor provided an updated draft to the Court on March 15, 2019 (although the Monitor has not shared that draft with the Parties). In connection with the

¹⁸ In relevant part, the Court's Order stated as follows:

The court monitor is respectfully DIRECTED to provide the court with a report on the New York City Fire Department's Equal Employment Opportunity ("EEO") Office. This report should address, in particular, (1) how the EEO Office investigates and resolves complaints; (2) how the staffing of the office has changed over time; and (3) the speed with which the office investigates and resolves complaints.

April 17 EEO Meeting, the City provided additional updated statistics, and the Monitor plans to prepare a further revised draft of the report accounting for the update – which it will briefly circulate to the Parties for a final round of comments.

In addition to the topics specified in the Court’s November 17, 2017 Order, the report includes a discussion of data produced by the City, in response to the Court’s direction at the March 13, 2018 status conference, showing the rate at which complainants and respondents in EEO investigations have been reassigned to desk duty, and the duration of those assignments.

2. EEO Database

At the April 17 EEO Meeting, the City demonstrated version 2.0 of the FDNY’s EEO case management database. The initial version of the database was launched in 2016, and first demonstrated to the Monitor in April of 2018. Monitor’s Twenty-Sixth Periodic Report at 40. Version 2.0 has been operational since December 2018.

At the April 12, 2018 demonstration and in follow-up communications, the Monitor and the other Parties recommended that the City add a number of features to the database. *See* Monitor’s Twenty-Fourth Periodic Report at 36-37. The Monitor’s recommendations included a suggestion that the FDNY integrate each case’s activity log more closely with the mandatory investigative plan and use the log as an active planning tool, with a presumptive timeline for each case incorporating deadlines based on the EEO Policy and applicable law, and that the City minimize the use of text entries (as opposed to data fields) to facilitate searches, enable efficient reporting, and enhance the effectiveness of the database as a tool to identify patterns of conduct.

Version 2.0 of the database includes features that either implement recommendations offered by the Monitor and the other Parties or attempt to address the concerns underlying them. As updated, the database is able to generate automatic deadlines, generate form correspondence, and provide both investigators and supervisors with overviews of their schedules. While the

system does not link to Outlook or other external calendar applications, the database does provide investigators with the ability to view and manage standard “Tasks” (such as required correspondence) across multiple cases – including required tasks that populate the database calendar automatically when a case is assigned; and the City reports that investigators use the database as a planning and scheduling tool. Other, more detailed steps in the investigation (including records relating to compliance with the FDNY’s Statement of Principles regarding the detailing or reassignment of complainants) are maintained in free text fields in the database’s activity log. The City also demonstrated the ability of the database to retain, and display to supervisors, data in numerous essential fields. The database is capable of providing search results based on (among other things) types of alleged violation, workplaces, or the names of individual personnel.

One recommendation that the City is unable to implement (at least on its current platform) is the proposal that documents uploaded to the database (such as interview notes and closing memoranda) should be text searchable. The City advised that such documents are not text searchable within the database.¹⁹ In addition, the database does not include standard data fields for some apparently significant categories of data – for example, whether a complainant or a respondent has been detailed or reassigned in connection with an investigation, and whether any other interim measures have been taken. (The City has indicated that these types of information would be recorded in the database’s “activity log,” but they are not retained in standard data fields.) The database also does not include information obtained or generated in inspections or performance reviews; and although it records the activities of the EEO Office in investigations conducted jointly with BITs, it does not include data from investigations

¹⁹ Even if documents are themselves made text searchable, the database is not capable of performing text searches within uploaded materials.

conducted solely by BITs. At the April 17 EEO Meeting, the Monitor, Plaintiffs-Intervenors, and the United States asked the City to consider including several additional categories of data as standard, searchable fields in the database, along with information relating to inspections and performance reviews, to facilitate searching and cross referencing.

3. Interim Measures in EEO Cases

Before the Monitor's last periodic report, Plaintiffs-Intervenors and the United States had raised concerns that the FDNY makes insufficient use of interim measures to address conflicts within a house or possible violations while an investigation is still ongoing – such as targeted messaging, supplementary training, counseling, or guidance to the chain of command; and they asked for assurances that the EEO Office considers interim relief not only at the start of an investigation but also as it proceeds, and that it considers a broad range of interim measures. Monitor's Twenty-Sixth Periodic Report at 41. As the Monitor noted in its last report, especially in complex and time-consuming cases, such interim measures are an important component of the FDNY's response to EEO issues. *Id.*

Addressing these concerns, the City offered assurances that interim measures are considered in the course of an investigation, and that the EEO Office operates with a broad “tool box” of interventions, *id.*; and on December 14, 2018, the City circulated a draft revision of the FDNY EEO Investigation Manual intended to reflect those assurances. The Monitor and the other Parties provided comments on the draft, and the City circulated a revised draft on March 15, which was discussed at the April 17 EEO Meeting. The United States and Plaintiffs-Intervenors asked for the Manual to include language specifically requiring that interim measures be considered at specified regular intervals in the course of a case. The City was not disposed to include such a specific requirement. But it agreed to consider a further revision that would call for interim measures to be considered in the regular case reviews in which investigators meet

with the Assistant Commissioner and or Deputy Director; and on May 14, 2019, the City circulated revised draft language specifying that the issue of interim measures should be raised “at a minimum [in] periodic (bi-weekly / monthly) case status meetings,” or whenever facts and circumstances warrant. The Monitor and the other Parties are considering the revised language.

4. Review of Investigations

The Monitor has continued to receive, review, and comment on intake documents and closing memoranda from EEO investigations that the City has identified as requiring substantial investigative activity in fire suppression matters.

As previously reported, in a June 6, 2017 set of recommendations, the Monitor identified a number of deficiencies in the FDNY’s EEO investigative practices, based on an historical review of complete investigative files. *See* Monitor’s Twenty-Second Periodic Report at 32-33. Subsequently, at the Monitor’s direction, the City has continued to produce intake documents and closing memoranda from EEO matters (involving fire suppression personnel) identified by the City as requiring substantial investigation. And in a small number of specific cases the Monitor has also asked for and received additional investigative materials and periodic updates on investigations in progress. In a December 12, 2018 message, the Monitor requested that, in future, the City provide full investigative files from all investigations for which it provides closing memos, to ensure that the Monitor has access to complete information for its reviews and comments. *Monitor’s Twenty-Sixth Periodic Report* at 42. The City has begun producing files with closing memos.

As previously noted, the Monitor’s comments and suggestions on draft memoranda are intended to provide the EEO Office with guidance in adhering consistently to investigative best practices; and the Monitor does not dictate results in particular cases or require the City to obtain Monitor approval before issuing findings. *See* Monitor’s Twenty-Third Periodic Report (Dkt. #

1844) at 31. However, in some instances, the City has conducted additional investigation based on comments made by the Monitor. Monitor's Twenty-Fifth Periodic Report at 49.

Although the EEO case materials reviewed since the June 6, 2017 memorandum generally reflect some improvements in the EEO Office's investigative practices, they have also continued to exhibit some of the deficiencies identified in the Monitor's earlier evaluation. Closing memoranda from cases reviewed by the Monitor since the last periodic report continue to reflect instances in which investigators failed to analyze all possible claims under the appropriate legal standards, where they displayed disproportionate reluctance to draw inferences favorable to complainants, or where they appeared to impose heightened standards of credibility and corroboration on complainants. The Monitor will continue to work with the City to address these issues.

Regarding the duration of investigations (addressed in detail in the Monitor's EEO Report), based on the cases for which materials have been provided to the Monitor, the City has continued to show improvement in its ability to complete investigations within 90 days, as required by City policy – particularly since staffing increases in 2018. But the number of cases provided to the Monitor in 2018 and thus far in 2019 is still too small for the Monitor to conclude that the trend will be sustained.

In addition to the materials produced to the Monitor, the City has also circulated comprehensive lists of EEO matters showing intake dates, case numbers, dispositions, dates of dispositions, numbers of witness interviews, and the date of the first interview in each matter. As discussed above in connection with the Monitor's report on EEO investigative practices, the City produced updated and expanded data in these categories on January 7, 2019; and before the April 17 EEO Meeting, the City provided a further updated list of cases, dispositions, opening

and closing dates, and the number of interviews in each case. The Monitor is conducting an analysis of the accumulated data, and will include a discussion in the revised draft of its report on EEO investigative practices.

The Monitor is also continuing the process of contacting a selection of complainants to gather information regarding their experiences with the EEO Office, as discussed in previous reports. *See* Monitor's Twenty-Fourth Periodic Report at 37.

IV. Medical Exam-Related Issues

Pursuant to the Modified Remedial Order, the Monitor continues to address concerns raised by Plaintiffs-Intervenors and the United States that certain steps in the Medical Exam may have a disparate impact on black and Hispanic candidates. *See, e.g.*, Monitor's Nineteenth Periodic Report at 29-37; Monitor's Fifteenth Periodic Report (Dkt. # 1669) at 17-23; Monitor's Thirteenth Periodic Report at 11-17 (citing Modified Remedial Order ¶¶ 15, 19); *see generally* Monitor's Eleventh Periodic Report (Dkt. # 1575) at 13-14. As previously reported, the Monitor has confirmed that the Medical Exam has a disparate impact on black and Hispanic candidates. Monitor's Twenty-Fourth Periodic Report at 38-41. In its own analyses of candidate attrition from the Exam 2000 eligible list, the City reported that the Medical Exam was responsible for the greatest number of disqualifications among Exam 2000 candidates; that black candidates failed the Medical Exam at twice the rate of white candidates; and that Hispanic candidates failed it at a rate that was 50% higher than the rate for white candidates. Special attention must therefore be paid to this step in the hiring process.

A. Disparate Impact Analyses of Medical Exam Outcomes

As reported in the Monitor's Twenty-Fourth Periodic Report, an analysis completed by the Monitor and shared with the City on May 8, 2018 confirmed that the Medical Exam has a

disparate impact on black and Hispanic candidates. *Id.* at 38-41. On February 21, 2019, having received no response from the City to the analysis, and having received several requests from the other Parties to review it, the Monitor asked the City to either respond to the analysis or permit the Monitor to circulate it. On March 25, 2019, the City provided a brief written response but chose not to provide its own disparate impact analysis of the Medical Exam data. The Monitor does not believe the City's response adds to, changes, or undermines the Monitor's findings. The Monitor is preparing a reply to the City explaining its views and will circulate it to the Parties, along with the May 8, 2018 disparate impact analysis and the City's March 25, 2019 response.

In the meantime, the Monitor, aided by its experts, Manitou, Inc., is continuing statistical analyses to identify which specific components are responsible for the disparate impact of the Medical Exam. This type of analysis is essential to developing potential mitigation strategies specific to those components that are found to be causing the disparate impact, and the City will need to show that it has the capacity and an established plan to continue to conduct these kinds of analyses in the future.

B. Validation of the Stairmill Test

The Monitor, in consultation with its expert, Dr. Denise Smith, and with the United States, Plaintiffs-Intervenors, and their respective experts, has continued to work with the City on its efforts to validate the stairmill component of the Medical Exam, which analyses show accounts for the bulk of Medical Exam disqualifications and is a significant driver of disparate impact.

1. Background

In February 2017, the City reported its intention to engage PSI, which assisted the City in developing the written examination, to assist the City to either validate the existing stairmill test

or identify another validated screening test for cardiopulmonary fitness. *See* Monitor's Nineteenth Periodic Report at 6. In May 2018, at the request of the United States and Plaintiffs-Intervenors, the City agreed to permit experts for the United States and Plaintiffs-Intervenors to participate in stairmill validation discussions with PSI, BHS, and the Monitor's expert, Dr. Smith.²⁰ PSI also retained an exercise physiologist to assist with the validation.

As reported in the Monitor's Twenty-Fifth Periodic Report, because of the short time frame between March 2018 – when the City first circulated a high-level proposal to the other Parties – and the beginning of processing for the upcoming Exam 7001 class, the validation study will not be completed until after the first group of Exam 7001 candidates has been tested using the current stairmill protocol, which has been in place for many years but has not been validated. *Id.* at 52. The City has agreed that, if the stairmill protocol that is validated differs from the stairmill protocol currently in use, the City will permit candidates who do not pass the current stairmill protocol to retake the stairmill test, using the validated protocol.²¹ The Monitor will work with the City and other Parties to ensure that the validated protocol, if different from the current protocol, is put in place as expeditiously as possible, and that no Exam 7001 candidates will be disqualified by a stairmill protocol that has not been validated.

2. Validation Testing

The goal of the validation study is to verify that the stairmill test is related to the skills and abilities required to perform the job of a New York City firefighter, and does not represent

²⁰ As noted in earlier periodic reports, Plaintiffs-Intervenors and the United States reserved their right to raise objections to the validation study. *See, e.g.*, Monitor's Twentieth Periodic Report (Dkt. # 1784) at 33. In the interest of avoiding disputes and delay after validation, the City agreed to allow the other Parties to be heard as PSI develops and conducts the validation study.

²¹ The specific criteria that will determine which candidates will be given the opportunity to retest remain to be determined.

an unrelated or arbitrarily determined barrier to hiring. The current validation protocol attempts to associate the oxygen cost of performing the Fire Academy's Functional Skills Test ("FST") with the oxygen cost of climbing on the stairmill at a particular step rate for a specified period of time.

The City's experts, Joel Stager and PSI, in conjunction with collaborators from Rutgers University, have made substantial progress on the validation study. The team collected data during physiological testing of Academy trainees on December 7-9 and 14-16, 2018 and February 11-22, 2019. The City's team measured trainee oxygen consumption in three different activities: (1) on a stairmill machine at three different step rates, (2) on an incremental test to maximum VO₂ expenditure on a treadmill, and (3) during a timed trial of the FST.

PSI has performed extensive data cleaning and transfer from the equipment to build a dataset that includes 94 trainees who completed the three tests and for whom there appears to be sufficient data available for analysis. For some trainees there are gaps in the data, and the expert group is considering whether the missing data can be imputed (*i.e.* statistically estimated) so that these participants can be included in the database. PSI has shared the study data with the other experts and has performed some preliminary analyses. The experts met in person on April 18 to review data integrity and to discuss initial analyses. During the meeting, the experts reviewed data regarding the oxygen cost of each component of the FST, and a general consensus emerged that using the average oxygen consumption of the FST course overall was a reasonable way to define FST oxygen cost (rather than using peak oxygen cost during each FST task).

The experts determined additional exploratory analyses to be undertaken. Some questions still need to be addressed in more detail. It will be necessary to determine the stairmill level of oxygen consumption that is most closely related to FST performance, and to describe the

oxygen consumption response to the three stairmill step rates to identify whether and when oxygen cost levels reached a steady state during the testing, which will inform the determination of the duration of the stairmill test. Additional statistical information related to these questions, as well as additional analyses, insights from relevant literature, clinical experience, and professional judgement will all be drawn upon to determine the stairmill rate, the duration of the test, and the stairmill passing standard to be used by BHS.

The experts continue to be concerned about the demographic makeup and sample size of the trainee participants. Because of attrition in the Academy and difficulties with the data collection system, the database includes several participants for whom data for one or more of the three tests is missing, which reduces the total number of participants who can be included in the analysis to fewer than 100, with final sample size potentially even smaller, depending on the experts' pending decisions about imputing data. Additional analyses are being performed to better understand the demographic composition of the group of trainees for whom the data is incomplete. The group is considering the possibility of conducting additional testing on future trainees to ensure that the standards established from this validation study are equally applicable across race/ethnicity and gender.

Experts for the Monitor and the Parties continue their regular email correspondence and conference calls. The Monitor will continue to report on the validation process, including the most recent meeting held on May 16, in the next periodic report.

3. Other Stairmill-Related Issues

After the stairmill validation study is completed, the overall process for screening for cardiopulmonary fitness will need to be studied. Current BHS practice is to allow three stairmill test attempts, with the requirement that a candidate failing the second attempt obtain a negative methacholine challenge test and a normal echocardiogram before being permitted to make a third

attempt. It is also current practice for BHS to permit a candidate to demonstrate adequate aerobic fitness by taking and passing an exercise stress test to 12 METs, in lieu of a third stairmill test. It will be necessary to determine whether this process will remain the same or whether the stairmill validation study indicates that a change is appropriate. Materials describing the Medical Exam, and the stairmill test in particular, will need to be updated.

4. BHS Measurement of Candidate Heart Rate

The City has assured the Monitor and the other Parties that, unlike the stairmill protocol used during Exam 2000, the new stairmill protocol will not use heart rate to determine whether or not a candidate passes the stairmill test. Heart rate on the stairmill test had historically been used by BHS as a preliminary screen to determine which candidates were required to get a methacholine test (to rule out asthma and other respiratory problems) and an echocardiogram (to rule out underlying cardiac disease). The City has indicated that it may continue to screen for these underlying conditions because they carry an unacceptable risk of sudden incapacitation during firefighting. But the City has not yet indicated what role heart rate might play in this screening and what other measures might be used.

It remains critical for the City to clearly state its position on this issue so that the Monitor and the other Parties can determine whether the use of heart rate or any other screening procedure will present a concern about disparate impact or job-relatedness. The Monitor has cautioned the City that any change in the hiring process, including a new use of candidate heart rate, must be approved by the Monitor and, specifically, that any use of heart rate as a screen for further testing possibly leading to medical disqualification would need to be validated before it could be considered for use in the medical examination of candidates.

C. Psychological Exam

As previously reported, the City has revised its Psychological Exam protocol for Exam 7001 candidates. *See* Monitor's Twenty-Fifth Periodic Report at 56; Monitor's Twenty-Sixth Periodic Report at 50. The City now uses a new, shorter preliminary questionnaire that candidates take at BHS on the same day as the Medical Exam. The Monitor informed the City on November 14, 2018 that it would not object to the City's use of the new protocol, provided that the City develop a plan for conducting adverse impact analyses of future Psychological Exam outcomes. Monitor's Twenty-Sixth Periodic Report at 52-53. The Monitor also requested that the City apply these analyses retrospectively to Exam 2000 psychological evaluation results to provide a baseline from which to compare results as Exam 7001 candidates move through the new protocol. *Id.*

On December 6, 2018, the City sent the Monitor its adverse impact analysis plan, which sets out the various analyses that will be conducted with the establishment of each firefighter class. *Id.* at 53. The City shared its plan with the other Parties on February 13, 2019. The retrospective analysis of Exam 2000 data remains outstanding, and the Monitor expects the City to provide it soon. The Monitor also plans to review results of the City's disparate impact analyses for the new Psychological Exam once data becomes available and the analyses have been performed.

V. Character Screening by the CID and PRB

A. Overview and Statistical Background

The Parties and the Monitor, with the assistance of its expert consultants, Manitou, Inc., have continued work with the City to analyze the character review portion of the FDNY's hiring process (in which the FDNY assembles and examines background information such as candidate

arrests or convictions, employment history, and driving record) and to consider further reforms in the standards and procedures governing referral of certain candidates' files by the CID for additional consideration (and potential disqualification) by the PRB.

As the Monitor reported in September 2015, analyses of the character review process as it existed at that time, which reflected a number of reforms under the Modified Remedial Order but pre-dated the most recent round of changes,²² showed that minority candidates were referred by the CID to the PRB for further, discretionary screening (and potential disqualification) at a higher rate than white candidates. Analyses of the same data set also showed that minority candidates referred to the PRB were disqualified by the PRB at higher rates than white candidates who had been referred. *See, e.g.*, Monitor's Thirteenth Periodic Report (Dkt. # 1636) at 20-21 (discussing findings). As described in detail in the Monitor's Twenty-Fifth Periodic Report, in 2018 the Monitor completed updated analyses of all character review outcomes for Exam 2000 candidates – including analyses focusing on candidates who went through the process after the latest round of revisions in the summer of 2016. Monitor's Twenty-Fifth Periodic Report at 59-60. Although the sample size for this latest group was too small to support a definitive conclusion, the available data (assuming continuation of existing trends) indicates that the process, even as most recently revised, may still have an adverse disparate impact on disqualification rates for black and Hispanic candidates. *See* Monitor's Twenty-Sixth Periodic Report at 57. The analysis also found that, in the period since the current procedures and standards were implemented, the rate at which black candidates were either (1) disqualified or

²² As previously reported in detail, beginning in 2012, and in consultation with the Monitor and the other Parties, the City issued a series of guidelines for the CID and PRB; the most recent modifications to the guidelines were issued in the summer of 2016. Monitor's Sixteenth Periodic Report (Dkt. # 1694) at 29-31; Monitor's Seventeenth Periodic Report (Dkt. # 1714) at 29-30. As noted in prior periodic reports, the revisions were agreed upon by the Parties with the understanding that they might be subject to additional changes based on further analysis. *Id.* at 30.

(2) hired with extended probation (combining the percentages for both results) exceeds the same rate for white candidates to a statistically significant degree. *Id.* at 58. And the Monitor's analysis also found differences between the processing times for candidates who had been referred to the PRB and for those who had not. *Id.* Among candidates who are ultimately appointed to the FDNY, both median and mean processing times were longer for those who were referred to the PRB than for those who were not, and a higher percentage of the referred candidates had processing times longer than 500 days.²³ *Id.*

As recounted in previous periodic reports, over the past two years the Parties and the Monitor have exchanged a series of communications and held meetings to consider additional potential reforms in the character review process – first proposed by the Monitor at a meeting July 27, 2017, based on consultations with its expert, Alison Wilkey of John Jay College. *See* Monitor's Twenty-Sixth Periodic Report at 55. As background for those discussions, on September 28, 2018, the Monitor also circulated its updated statistical analysis of PRB referrals and outcomes, and on October 25, 2018 the United States circulated an addendum to its expert's January 5, 2017 report on PRB outcomes.

In the most recent meeting, December 12, 2018, the City agreed to implement some of the Monitor's proposed changes in procedures and instructions, and to continue considering others. *Monitor's Twenty-Sixth Periodic Report* at 56. The City also agreed to drop two items from its list of criminal offenses that trigger referral to the PRB. *Id.* (It later agreed to drop a third minor offense.) However, at the December meeting and in a series of follow-up communications, the City has rejected the majority of the Monitor's recommendations regarding

²³ At the December 12 meeting, the City suggested that the Monitor's analysis did not account for some factors relating to the sequence of candidate processing and that the Monitor's findings may not accurately reflect the real impact of referral on processing. The Monitor asked the City to provide details of its own analysis, and is awaiting the City's response.

the criteria for referral to the PRB – taking the position that the analyses conducted to date have not demonstrated the need for further changes, and also that changes in PRB referral criteria are not necessary because PRB review ensures that disqualifications are job-related. *Id.* The City has also rejected the Monitor’s recommendations for changes in PRB decision-making procedures.

At the December 12, 2018 meeting and in numerous other reports and communications with the City, the Monitor has noted that if further analysis, based on sufficient statistical samples,²⁴ shows that the process has an adverse disparate impact on black or Hispanic candidates, the City will be required either to make further changes in the process (and show they are effective in eliminating disparate impact) or to validate the process as job-related; and in either case the City’s timeline for establishing compliance with the Modified Remedial Order will be extended. *See, e.g.*, Monitor’s Twenty-Sixth Periodic Report at 56. The City agreed to continue to maintain and analyze data as Exam 7001 candidates go through the character review process, to identify any adverse disparate impact on black or Hispanic candidates, and to enable identification of the specific factors in the process that are producing such impact.

B. Monitor’s Recommendations, the City’s Response, Follow-Up, and Next Steps

The Monitor’s recommendations (first communicated to the City in July 2017, as discussed above) included revised procedures intended to relieve unnecessary burdens on candidates relating to the compilation and disclosure of criminal histories; revised standards for referral to the PRB intended to eliminate referral triggers that are not job-related; and (as

²⁴ It remains to be determined whether an appropriate sample could combine data from Exam 7001 candidates with data from the Exam 2000 candidates who went through the process under the current criteria, or whether it will be necessary to wait until enough Exam 7001 candidates have passed through character review to provide a sufficient sample from the current eligible list.

discussed in detail below) changes in PRB decision making and record keeping intended to ensure consistency and facilitate analysis of PRB outcomes. Monitor's Twenty-Second Periodic Report at 45-48. To assist candidates in providing accurate disclosures of their criminal histories, the Monitor recommended that candidates be provided with criminal history information obtained by the City from the justice system before completing their own disclosures, and that they be provided with additional information on the process for rectifying errors. The Monitor also proposed that some criminal offenses (a small number of non-violent offenses associated with disproportionate rates of arrest in black and Hispanic populations) be eliminated as grounds for PRB referral, and that the City adopt limited look back periods for the use of criminal convictions as referral triggers. (The City has already accepted limited look back periods for arrests, and it uses look back periods in assessing prospective residents' fitness for public housing.) The Monitor also recommended that the City modify and expand the procedures and record keeping associated with PRB decision making to ensure that the reasons for all PRB decisions are properly considered, articulated, and recorded. (In recent rounds of PRB meetings, the FDNY has recorded the reasons for disqualifications, but not for other outcomes.) The Monitor also recommended that the City explore ways for candidates to include additional positive information about their background and character in materials provided to the PRB.

At the December 12 meeting and in subsequent communications, the City has accepted some (though not all) of the Monitor's suggestions for changes in procedures and in the guidance provided to candidates, but it has largely rejected the Monitor's proposals for changes in the substantive criteria for referral to the PRB. The City has agreed in principle to provide candidates with additional guidance on obtaining, and correcting errors in, their criminal

histories (though it will not provide them with the reports it obtains from the justice system²⁵), and the Monitor's expert has provided the City with further suggestions for materials that the City could offer to candidates and resources to which they can be directed. The City has also further clarified candidate instructions to make it clear that they may provide favorable information about positive influences in their histories.

Since the December 12, 2018 meeting, the City has also considered and rejected specific proposals from the Monitor for changes in PRB deliberations and record keeping. After the last periodic report, the Monitor provided the City with recommendations (based on consultations with its expert) for procedures designed to encourage and structure PRB deliberations and to record the reasons for all PRB decisions. The Monitor's recommendations included a series of questions for the PRB to consider in evaluating candidates' files, along with a checklist of decision-making criteria intended to ensure that the PRB would include a full range of valid factors (both positive and negative) in its deliberations and record the bases for its decisions. (The Monitor's proposed forms also included an open field that could be used to record reasons not included in the checklist.) The recommendations were based on research indicating that the effect of unconscious bias in employment decisions can be reduced, and the consistency of decisions enhanced, by encouraging deliberative decision making and by requiring decision makers to record the reasons supporting their decisions. The City rejected the Monitor's recommendations in an April 25, 2019 message. It contends that because the candidate files reviewed by the PRB do not directly reveal demographic or other identifying information, there is no need to implement measures to reduce unconscious bias, which are generally applied to

²⁵ According to the City, it is not permitted to share the reports according to the terms under which it obtains them. The Monitor's recommendations included a suggestion that the City explore negotiating a change in those terms to allow it to share the reports with candidates.

processes that are not similarly race blind; and it expressed concerns that the Monitor's recommended procedures would interfere with the PRB's assessment of each candidate as a "whole person" and could increase disparate impact adverse to black and Hispanic candidates. The City also restated its position that further changes in the character review process are not required unless analyses reveal definitively that the process in its current form has a disparate impact adverse to minority candidates. Although, as the City notes, PRB files are anonymous and attempt to exclude direct references to race and ethnicity, the Monitor remains concerned that materials reviewed by the PRB are likely to include references that suggest the race or ethnicity of candidates and may become the basis for unconscious bias in decision making.

With respect to substantive criteria for CID referrals to the PRB, the City has also rejected the majority of the Monitor's proposed changes in the process and agreed to except only three offenses (jaywalking, operation of a bicycle on sidewalks, and operation of roller skates / in-line skates and skateboards) from the general rules governing referrals for felony and misdemeanor convictions and arrests.²⁶ The City has also rejected the Monitor's recommendations for the application of limited look back periods that would eliminate some older criminal convictions and employment incidents as grounds for referral to the PRB.

In rejecting the majority of the Monitor's proposed changes in referral criteria, the City relies on the fact that analyses of PRB disqualification rates conducted to date have not definitively demonstrated that the process has an adverse disparate impact on black or Hispanic candidates, and it contends that, in any case, the Monitor's proposed reforms would not address the causes of any such impact. In addition, although the Monitor's analysis already shows

²⁶ The current rules call for PRB referrals for any misdemeanor conviction, for a felony arrest within the past five years, and for two or more misdemeanor arrests within the past three years. A felony conviction automatically disqualifies a candidate unless he or she has obtained a Certificate of Good Conduct.

statistically significant disparities between the rates of PRB referral for black candidates compared to white candidates and for Hispanic candidates compared to white candidates, the City asserts that referral to the PRB, in itself, does not disadvantage candidates (for example, by materially slowing their progress through the hiring process or by increasing rates of voluntary attrition). Similarly, the City believes that the disparity in rates of extended probation (applied to black candidates at a significantly higher rate than to white candidates) does not warrant further changes in the substantive criteria for PRB referral.

To support its decisions, the City must produce, and share with the Monitor and the other Parties, a number of essential analyses and explanations. Most critically, it must continue to analyze PRB outcomes to confirm whether the character review process produces an adverse disparate impact on black or Hispanic candidates. Once a sufficient statistical sample of candidates have passed through the process under current rules, if analysis reveals disparate impact, the City will have to validate the process as job-related or introduce further reforms. The City must also produce support for its view that PRB referral in itself does not have an adverse effect on referred candidates, and that disparities in rates of extended probation do not require further reforms in the character review process. At the December 12, 2018 meeting, the City agreed to provide these analyses and explanations. And the Monitor has asked the City to provide them by the end of this month. The Monitor will review and evaluate the City's analyses and explanations once they are produced.

The City has acknowledged that, given its decision to adhere substantially to current referral criteria, it must analyze disparate impact in the character review process as Exam 7001 candidates go through screening, to determine conclusively whether the process produces an adverse disparate impact on black or Hispanic candidates, and to identify and remedy (or

validate) any components of the process that cause such disparate impact. As the Parties and the Monitor have discussed, this process may require more detailed data tracking than the City currently conducts – encompassing data on the specific criminal offenses and alleged conduct involved in candidates’ cases.

VI. Firefighter Exam

Pursuant to Paragraph 7 of the Modified Remedial Order, the Monitor is charged with overseeing the current computer-based test (“CBT”) for the position of entry-level firefighter. Consistent with the provisions of the Modified Remedial Order, the City and its testing consultant PSI have continued to work in coordination with the Monitor, the other Parties, and their respective experts to analyze and report on the examination process. The Monitor continues to be assisted by its testing expert, Dr. Shane Pittman of The Pittman McLenagan Group, L.C.

A. Open Competitive Exam

The Exam 7001 scores were released on June 13, 2018. The City established the Exam 7001 list on February 27, 2019, and the first class drawn from the list entered the Academy on May 13, 2019.

1. Current Milestone: Technical Report

The current step in the exam analysis and reporting process (Step 204, “Technical Report”) requires PSI to complete a report documenting all the steps taken in the development, administration, scoring, and analysis of Exam 7001. PSI circulated its first draft of the report to experts for the Monitor and the other Parties on July 23, 2018. Previous periodic reports provide a full description of PSI’s report on its work, including its confirmatory job analysis, development of new exam forms, equivalency testing, exam administration, scoring, and

analyses of results. *See* Monitor’s Twenty-Fifth Periodic Report at 61-62; Monitor’s Twenty-Sixth Periodic Report at 62-65. The Monitor and other Parties submitted comments on the report in August 2018. These comments are also summarized in the previous periodic reports. *Id.*

On December 24, 2018, PSI circulated a second draft of the Technical Report, and the Monitor and Parties circulated further suggested edits in February and March of 2019. PSI circulated the latest draft of the report in April 2019. The Monitor and other Parties may provide another round of edits, but the Monitor believes that the Technical Report will be finalized soon.

2. Optional Survey Administered to Former Exam 2000 Candidates

In May 2017, the Monitor directed the City to administer a recruitment-focused survey to all individuals who (a) were hired by the FDNY from the Exam 2000 list or (b) were called off the list for further processing but dropped out at some point. The survey is intended to identify characteristics that candidates who performed well on the exam and other hiring steps might have in common and to provide insight into the reasons some candidates with high scores left the hiring process before completing it. The Monitor expects the survey data will be used to inform a recruitment plan that specifically targets those minority applicants most likely to succeed and to develop attrition mitigation strategies to keep them in the process through FDNY hiring.

After the City incorporated input from the Monitor and the other Parties, the City’s vendor, ideas42, launched the 33-question anonymous and confidential survey on October 10, 2018. Although the response rate was lower than expected, ideas42 reported that it was sufficient to reflect the views of the overall population to whom the survey was sent.

On February 6, 2019, the City provided the Monitor and the other Parties with three documents:

- “Understanding Psychological and Behavioral Barriers to Firefighter Diversity,” a research memo prepared by ideas42 that reviews the academic literature on stereotype threat, its consequences, and how to mitigate it, and that “summarizes

findings from previously collected quantitative and qualitative data related to minority and female persistence through the firefighter recruitment process,” including “appearance and qualification metrics from the eligible list for Exams 2000/0001 and 2500; results from the optional exam survey administered to applicants who appeared for Exam 7500; and findings from focus groups conducted by [one of the authors] in 2016 with active firefighters and non-firefighters.”

- “Optional Former Candidate Survey Results,” which summarizes the purpose of the survey and reports the aggregate statistics from each survey question.
- A set of appendices collecting all text responses given by respondents in response to questions that permitted comments.

On April 16, 2019, the City provided the Monitor and the other Parties with the fourth and last document prepared in connection with the survey:

- “Optional Former Candidate Survey Results Part 2; Hypothesized Psychologies” – This document reports on the tests ideas⁴² ran to determine significant differences in responses across appointed and attrited groups, as well between different racial/ethnic groups and gender, where the survey had achieved a large enough sample; and it provides “hypothesized psychologies” to explain these differences.

The Monitor expects that information gleaned from this survey will inform the next recruitment campaign and subsequent attrition mitigation efforts. The “Understanding Psychological and Behavioral Barriers to Firefighter Diversity” document suggests ways the FDNY might overcome barriers to entry, including by helping minorities to cope with real and perceived threats to their success and by making changes to eliminate or reduce the threats themselves.

The individuals to whom this survey was sent achieved very high scores on Exam 2000 – some who were hired and some who attrited at various points in the process before being disqualified by any hiring step. It is hoped that by learning more about these two groups of candidates, the City will gain insights on how to recruit others like them in the future and how to keep them in the process.

3. Optional Survey Administered to Exam 7001 Candidates

A separate optional survey was administered to Exam 7001 test-takers at the time of testing. Their responses have been aggregated and analyzed and have already been used by the City, including in its first draft of the After Action Report. Because the survey was performed on a confidential and anonymous basis, the City is not able to tie back specific answers to specific individuals. The City has determined that this more specific information would be useful in informing attrition mitigation efforts and future recruitment and has decided to re-administer the survey to all test-takers. The Monitor and other Parties agree that this is a valuable undertaking. The City's current plan is to send the survey to test-takers via email, with text and email reminders sent weekly to individuals who have not responded during the first thirty days after launch. After the initial thirty-day period, the City proposes to make the survey available to candidates currently being processed, via a link on the candidate portal. The content of the survey, its administration, and the City's plans for sharing survey data with the Monitor and the other Parties – including both response/completion rate data and substantive data – are still under discussion.

VII. Additional Issues

On an ongoing basis, the Parties and the Monitor consider a range of issues and perform an array of additional tasks relating to enforcement of the Modified Remedial Order. During the period covered by this report, these activities have included the following:

- Discussions regarding individual candidates who are or claim to be entitled to relief under the Court's Orders, including their interactions with the FDNY, documents they have received, and their rights and remedies;
- Addressing questions and disagreements among the Parties regarding the status of specific candidates and other issues that are not addressed elsewhere in this report and that fall within the Modified Remedial Order or Disparate Treatment Settlement;

- Frequent calls, meetings, and correspondence with the Parties regarding the full range of issues related to implementation of and compliance with the Modified Remedial Order; and
- Performing the remaining duties of the Special Master appointed by the Court in its Order filed May 22, 2012 (Dkt. # 883). The Court assigned these duties to the Monitor in an order dated August 17, 2016.

Dated: May 16, 2019
New York, New York

/s/

Mark S. Cohen