

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-SECOND PERIODIC REPORT TO THE COURT**

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**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 September 19, 2017, when the Monitor’s Twenty-First Periodic Report (Dkt. # 1803) was filed, to January 8, 2018. 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 the FDNY’s recruitment campaign for the recently completed open competitive firefighter examination. When the Monitor’s last periodic report was filed, the City was in the process of administering the exam – in an examination period that ran from September 5 to October 28, 2017.<sup>1</sup> The Monitor attended recruitment meetings and made suggestions intended to improve the recruitment process or address shortfalls, as did the Plaintiff Parties including the Vulcan Society, whose members include a number of FDNY recruiters. The City accepted certain of these suggestions and made some adjustments of its own. During the examination period, the FDNY communicated with applicants through a variety of channels including email, text, and social media. And, as in the past, the FDNY provided live exam preparation classes conducted by FDNY personnel, along with online resources including sample exam questions. By prior agreement based on the Parties’ weekly calls, the City provided reports to the Monitor and the other Parties showing the

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<sup>1</sup> The regular examination period ran from September 5 to October 14, and a supplementary period ran through October 28, providing testing opportunities for applicants who missed test dates in the regular period.

rates at which applicants from relevant demographic groups appeared for scheduled test dates, and showing the numbers and percentages of applicants who had attended exam preparation classes. As the exam period proceeded, it became apparent that the attrition or “no-show” rates for black and Hispanic applicants exceeded the rate for white candidates. To address the increasing discrepancy, the Monitor reviewed the City’s then existing outreach efforts, identified some areas that could be strengthened and could offer messaging more specifically targeted to recruitment, and recommended additional measures, in consultation with its marketing expert, intended to improve test-taker rates – in particular among City residents. These included additional social media communications, messages from FDNY senior leadership, and email messages intended to impress on applicants the urgency of appearing for the once-every-four-year open competitive examination. The City implemented most of the Monitor’s recommendations, and accepted the Vulcan Society’s offer of help from its members to make calls to help encourage attendance; and test-taker rates among black and Hispanic applicants improved in the final weeks of the examination period.

By the end of the testing period, 24.6% of total test takers were black, and 26.6% were Hispanic. Black representation among test takers thus fell short of the 28% goal that the Parties had set for the City’s “best efforts” under the Disparate Treatment Settlement.<sup>2</sup> And black representation among test takers (at 24.6%) was also lower than it was among applicants (28.26%). While the City fell short of the agreed upon goal for black test takers, both black

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<sup>2</sup> As previous Periodic Reports described in detail, under the Disparate Treatment Settlement, the City agreed to use its “best efforts to recruit black test-takers in proportions closely approximating the representation of age eligible blacks in the New York City labor market, plus an additional 3%.” The Parties agreed that the target figure for the City’s “best efforts” in recruiting black test takers should be 28% of all test takers for the open competitive examination. Subsequently (in October 2017, during the examination period), the City advised the Monitor and the Parties that it believed (based on its re-examination of demographic data) that the 28% goal was higher than the terms of the Disparate Treatment Settlement called for.

representation and Hispanic representation among test takers exceeded the corresponding percentages among test takers for the prior open competitive examination – showing a 27% increase for black test takers and a 17% increase for Hispanic test takers over the previous exam. Black test takers were 19.3% of total test takers for Exam 2000; and Hispanic test takers were 22.7%. The Parties disagree about whether additional effort by the City or acceptance of certain suggestions by the Monitor or Plaintiffs could have produced a better result. The Monitor expects these questions to be considered in the ongoing post-examination analysis.

Since the close of the examination period, the City has reported that it continues to communicate with test takers through a variety of channels to maintain their interest and encourage them to prepare for the post-exam phases of the screening process, in the event they achieve high enough scores to be called up from the hiring list. This will be a significant task, given the four-year term of the hiring list. At the Monitor’s direction, the City has agreed to conduct a study intended to help identify any trends in hiring patterns from the past list. The City has also continued to urge test takers whose applications are “pending” (typically because fees have not been paid and fee waiver requests have not been completed) to complete their applications.

As the City has acknowledged, it must now embark on a comprehensive retrospective analysis of the recruitment campaign, assessing the effectiveness of its messages and strategies (including its budgeting and allocation of resources) in reaching historically underrepresented groups and persuading members of those groups to apply to the FDNY and take the open competitive exam. The Monitor expects that process to begin now and to ultimately take account of examination results so that it can identify the most effective methods and strategies for attracting successful black and Hispanic firefighter candidates and reducing attrition. The

Monitor plans to work with the City and the other Parties to identify the most informative metrics to assess the City's performance in the campaign.

Part II of the report also summarizes the status of initiatives developed and discussed by the Working Group established under the Disparate Treatment Settlement, including the Fire Cadet Program, the FDNY Explorer program, and the EMS Trainee program.

Part III focuses on the City's development of much-needed and long-awaited data systems that will enable the City and the Monitor to assess the impact of recruitment techniques, hiring procedures, and screening criteria on different demographic groups. In particular, this portion of the report describes the current capabilities of the City's Consolidated Candidate Tracking System ("CCTS") as demonstrated by the City at a December 19, 2017 meeting with the Monitor and the other Parties. Based on the demonstration, it appears that, beginning with the candidates who took the recent open competitive examination, the City will have a data system that compiles information from all the various stages of the recruitment and hiring process – from a prospective firefighter's first contact with the recruitment office through the last qualifying test at the Fire Academy. Such a resource would have been very useful with respect to Exam 2000. However, some important search capabilities appear to be available only to administrators through the "back end" of the system, rather than through screens available to supervisors and other non-IT personnel. The City has said it will work with the other Parties and the Monitor in designing queries that will help assess potential disparate impact, with the goal of having such queries available through screens and filters, so that non-IT personnel can readily access such data and information. But the City has yet to demonstrate the system's ability to run the type of complex queries that may be needed to assess disparate impact – *i.e.* queries that show rates of disqualification for specific reasons or from specific tests for specific demographic

groups. The Monitor will continue to work with the City to ensure that its systems will support precise periodic assessments of potential disparate impact by FDNY personnel in all areas of the hiring process.

With respect to candidates on the Exam 2000 and 2500 lists, whose data is not included in the consolidated CCTS database, the City continues to encounter difficulties in providing reliable data. For example, in early December, the City advised the Monitor and the other Parties that it had discovered previously unidentified errors in data compiled in the City's Candidate Tracking Spreadsheet ("CTS").<sup>3</sup> Similarly, as recounted more fully in Part V, much of the data relating to the Medical Exam for candidates from Exam 2000 is not available in electronic form, and the Monitor is still in the process of determining how to assemble sufficient data to conduct meaningful analyses of the various component tests in the Medical Exam and their impact on candidates from different demographic groups. Part IV of this report focuses on the FDNY's EEO function, including initiatives relating to messaging, investigations, and compliance. The EEO Office was a focus of the Court's Findings of Fact for reasons including the key role that it is intended to play in assessment of FDNY hiring and employment practices, and its obligation to "timely investigate, and thereby deter, acts of discrimination and retaliation against the black and Hispanic firefighters who will join the ranks of the FDNY in the coming months and years." *United States v. City of New York*, No. 07-CV-2067 NGG RLM, 2011 WL 7661518, at \*44 (E.D.N.Y. Sept. 30, 2011). In addition to the central role with which the EEO Office is tasked, the City agreed to hire a Chief Diversity and Inclusion Officer ("CDIO") as part of the Disparate Treatment Settlement. The job of the CDIO is "intended to facilitate an environment of diversity and inclusion at the FDNY," and the CDIO is to "report directly to the

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<sup>3</sup> The City has stated that its preliminary analysis indicates the errors are limited in scope.



Fire Commissioner, and will be responsible for “promoting diversity in the FDNY and expanding awareness of the value of full inclusion of firefighters from all racial and ethnic groups.” *United States v. City of New York*, 308 F.R.D. 53, 60 (E.D.N.Y. 2015).

In the area of messaging, based on its research in best practices and its consultations with experts, the Monitor has continued to urge the City to develop messaging that conveys a commitment to diversity and inclusion, and to ensure that messages are effectively delivered to all its workplaces and reach all levels of employee. The Monitor believes, and has advised the City, that EEO, diversity and inclusion, and anti-hazing messaging needs to be delivered as vigorously, frequently, and pervasively as operational training messages, with frequent postings of fresh material in high-traffic areas and reinforcement by officers at roll call. To date, however, the City has not adopted this approach. The City publicized the issuance of its revised EEO policy in November 2016, has created eight diversity newsletters that were provided to company officers, and maintains an internal portal on which EEO materials may be accessed by logging into the portal. The City also continues to urge members to be professional in their workplace behavior. In March 2017, the Fire Commissioner also met personally over a two week period with all Captains, Battalion commanders, and Deputy Chiefs in the wake of a hazing incident that received news coverage, to deliver the message that hazing is unacceptable. The Monitor believes these are useful steps. However, it remains unclear whether those messages are communicated broadly enough, and frequently enough, to make diversity and inclusiveness integral features of the culture of the FDNY in the same way that operational training, such as training on new firefighting techniques, is part of the culture. The Monitor plans to convene a series of meetings with the Parties – including uniformed personnel referred

by the FDNY and Plaintiffs-Intervenors – to develop recommendations for enhanced and expanded EEO messaging informed by members of the Department themselves.

Regarding investigations, the EEO Office had been systematically underfunded and under-resourced before Modified Remedial Order, and had been under great pressure to reduce a backlog of investigations without well developed systems in place to do so. It was only in 2015 that the current Commissioner assumed his role, and though progress has been made, much remains to be done. The Monitor has continued to receive and review intake documents and review and comment on draft closing memoranda from investigations that the FDNY EEO Office deems within its jurisdiction, along with more detailed investigative materials in selected cases; and it has continued to provide comments and suggestions for additional fact finding and analysis. This work by the Monitor follows up on its earlier review of EEO investigation materials – based on the City’s production of files for EEO investigations (as identified by the City) going back to 2014 – and the recommendations that emerged from that review. While the FDNY has taken some steps to address the Monitor’s recommendations since they were communicated to the City in June 2017, the City has not yet fully addressed the types of deficiencies that were identified in the Monitor’s earlier review – for example, in some cases failing to gather evidence from all relevant sources or follow all relevant lines of investigation, and in some cases continuing to hold complainants to elevated burdens of proof or unduly high standards of credibility and corroboration, or failing to identify and investigate all possible claims based on the facts presented.

Plaintiffs-Intervenors and the United States have also raised concerns regarding the duration of EEO investigations. Data provided by the City indicates that many investigations continue to take more than 90 days to complete – exceeding the presumptive time limit set by

DCAS and incorporated into the FDNY's Investigation Manual, which states that investigations of EEO matters should be completed within 90 days of the complaint to the extent possible.

These timelines have additional significance because if investigations last too long, the complainant may face federal and state agency deadlines that require external filing for relief – and entitle the FDNY to take an adversarial stance in the ensuing litigation as opposed to completing the investigation and attempting resolution through internal channels. The Monitor has requested additional, more detailed data from the City on the duration of investigations; and later this month it plans to discuss with the Parties possible causes of and remedies for delays in the investigative process, the proportionality in the duration of investigations involving varying subject matter, and whether the resources of the FDNY's EEO Office are sufficient to complete investigations at an acceptable pace. The City recently reported that the FDNY has requested additional staff for the EEO Office in an effort to improve the pace at which investigations are completed. The Monitor will also evaluate the impact of that increased staffing when it occurs.

The Monitor has continued to urge the City to conduct a workplace climate survey intended to produce a comprehensive assessment of the EEO climate within the FDNY – including the cohesiveness and inclusiveness of its workplaces, the incidence of harassment and discrimination, and perceptions regarding the effectiveness of the EEO Office. The City itself acknowledged the value of a climate survey in assessing the FDNY's EEO compliance and its efforts to foster inclusiveness as early as its 2013 EEO Report to the Court (Dkt. # 1167). The Monitor provided the City with a proposed draft survey more than a year ago – in October 2016 and has identified other survey resources, such as vendors and military personnel survey guidance. Following a series of discussions, including a meeting with Department leadership October 31, 2017, the City provided the Monitor with its own draft of a survey on December 1,

2017, with a more limited scope of questioning. The City has indicated that it plans to conduct the limited survey initially as a limited pilot program focusing on a sample of workplaces. The Monitor has advised the City of its concerns that the pilot program represents an unnecessary source of delay given that workplace surveys are routinely conducted both in the private sector and by civil service agencies, and that the limited scope of questioning seems to diminish the utility of the pilot as a predictor of the likely success or failure of a fuller survey. The Monitor has also communicated that the City must ultimately conduct a full survey of the FDNY to produce a complete picture of the EEO climate within the Department.

Part V reports on efforts to ensure that the various components of the Medical Exam do not have an unlawful disparate impact on black and Hispanic candidates.<sup>4</sup>

The Monitor plans to conduct disparate impact analyses of the Exam 2000/2500 medical results using available data from a combination of sources, including data from electronic sources, paper records, and spreadsheets produced by the City. The Monitor will request further data from the City if this becomes necessary. As previously reported, the City has engaged PSI Services LLC (“PSI”), which has assisted the City with validation of the written examination and the Functional Skills Test, to conduct a validation study of its current stairmill test. The Monitor has been waiting for more than three months for the City’s most recent validation plan, and any further delay may threaten the April 2018 deadline for completion of the study. The Monitor has urged the City to expedite its work on the validation study.

Part VI reports on the efforts by the Monitor and the Parties to determine whether and how the FDNY’s character review process has a disparate impact on black and/or Hispanic candidates, and to develop reforms to minimize any such impact and ensure that screening

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<sup>4</sup> The Medical Exam is administered by the Bureau of Health Services (“BHS”).

criteria are job-related. On October 13, 2017, the City responded to a series of recommendations that the Monitor had provided for further changes in the character review process (based on expert research and analysis), explaining why it was declining to adopt any of the Monitor's recommendations. The Monitor plans to respond to the City's position and convene further discussions on the issues addressed in its recommendations, but its work has been delayed by the City's disclosure, on December 5, 2017, that it had found errors in relevant data provided to the Monitor and the other Parties – relating to referrals to the FDNY's Personnel Review Board ("PRB") and the PRB's decisions. Recently the City provided some clarification of the scope and source of the errors, stating that its preliminary analysis suggested they affected a small number of candidates; the Monitor has requested additional information, and discussions are continuing to determine the impact, if any, on the analysis of PRB-related issues. The Monitor expects those discussions to be concluded soon, and it will then be in a position to complete its analysis of character review outcomes and move forward with discussions of further reforms in the process.

Part VII discusses issues related to Exam 7501 (the promotional exam given in December 2016) and Exam 7001 (the open-competitive exam given in September and October 2017).

Part VIII summarizes 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. Test Taker Recruitment**

When the Monitor's Twenty-First Periodic Report was filed, September 19<sup>th</sup>, 2017, the City had begun administering the latest Open Competitive firefighter examination. The regular testing period ran from September 5 to October 14, 2017; and a supplemental testing period was

offered from October 14 through October 28, providing additional test dates and locations for applicants who had missed scheduled test dates during the regular period.

Throughout the examination period, the City continued to provide exam preparation resources in more than 300 live classes run by FDNY personnel at various locations across the City and in online materials including sample exam questions; and it continued to engage in a variety of efforts to encourage applicants to take the test, and to advise them of exam preparation resources. The City's exam preparation offerings were also supplemented by exam preparation classes provided by the Vulcan Society.

The City attempted to maintain contact with applicants through several channels including emails, text messages, phone calls, and social media, providing information regarding exam prep sessions and reminding applicants of test dates and locations. The City reports that by the end of the examination period, among the 20,515 black applicants, 18,350 or 89% had either opened an email or picked up a phone call; 15,307 or 75% had responded by signing up for an exam prep session; and 4,729 or 23% had attended a session. Among the 19,701 Hispanic applicants, 17,868 or 91% had either opened an email or picked up a phone call; 13,320 or 68% had responded by signing up for an exam prep session; and 4,895 or 25% had attended a session. Among 28,619 white candidates, 37% had signed up for a prep session and 15% had attended.

Under the Disparate Treatment Settlement, the City was required to "use its best efforts to recruit black test-takers for open-competitive firefighter entrance exams in proportions closely approximating the representation of age eligible blacks in the New York City labor market, plus an additional 3% to remedy a history of underrepresentation of blacks in the New York City firefighter ranks." Before the active phase of the recent recruitment campaign began, the Parties agreed that the target figure for the City's "best efforts" in recruiting black test takers should be

28% of all test takers for the open competitive examination.<sup>5</sup> Black applicants constituted 28.26% of total applicants at the close of the application period, leaving little room for any decline in black representation as applicants were converted to test takers. For black test takers to represent 28% of all test takers, the City had to convert black applicants to test takers at a rate no lower than the conversion rate for other demographic groups combined, requiring significant investment of effort from the City in outreach and messaging.

During the examination period, the City provided the Monitor and the other Parties with weekly reports showing the percentages of applicants who had failed to appear for scheduled test dates. By the beginning of October – approximately a month into the testing period – it was apparent from the reports that black and Hispanic candidates, and especially black candidates, were missing scheduled exam dates at considerably higher rates than white candidates. Given the historic demographics of the Department, this discrepancy could be attributable to relative lack of familiarity with the firefighter job and/or with the hiring process, including the fact that the firefighter exam, unlike many civil service exams, is given only once every four years. The Monitor, in consultation with its marketing expert, recommended a number of measures for the City to enhance and expand its outreach to applicants. The City implemented several of the recommendations, including changing its scripts for calls and the language of its emails to convey more urgency to applicants and advise them that the next test was four years away; placing revised and additional messages on FDNY social media; sending targeted messages to applicants by social media; and adding messaging delivered by senior figures in the FDNY.

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<sup>5</sup> Subsequently (in October 2017, during the examination period), the City advised the Monitor and the Parties that it believed (based on a further examination of demographic data) that the 28% goal was higher than required under the terms of the Disparate Treatment Settlement.

Following the City's implementation of the Monitor's recommendations, as the examination period progressed, the rates at which black and Hispanic candidates failed to appear for their test dates declined. But they continued to exceed the rate for white candidates. By the end of the examination period, 24.6% of test takers were black, and 26.6% were Hispanic. Accordingly, black representation among test takers fell short of the 28% goal that the Parties had established for the City to attempt to achieve with its "best efforts" under the Disparate Treatment Settlement. However, both black representation and Hispanic representation among test takers exceeded their representation among test takers for the prior open competitive examination. Black test takers were 19.3% of total test takers for Exam 2000; and Hispanic test takers were 22.7%. Accordingly, black representation among test takers increased by 27%, and Hispanic representation increased by 17%.

During the supplemental testing period (October 15-28), the Monitor expressed concern that, given the large number of applicants who had missed test dates, the City might not have enough testing capacity to accommodate a late surge of applicants wishing to take the exam during the supplemental period. And in fact, for some exam sites and dates, the number of applicants seeking to reserve places did exceed capacity. However, after discussing the issue with Plaintiffs-Intervenors and the United States, together with the Monitor, the City addressed the shortfall by instituting a stand-by policy – encouraging those who could not reserve places in advance to appear at testing sites on the assumption that a number of applicants with reservations would not appear. The approach proved successful, and the City reported that no applicants who sought to take the test were prevented from doing so by a lack of space.

With the testing period concluded, the City has now turned to efforts to maintain contact with the pool of test takers, to sustain their interest in the FDNY, and to encourage them to



prepare for the later phases of the hiring process that they will enter if called off the hiring list generated by the exam. The City plans to stay in touch with test takers through a variety of channels including email and text messages. The City also plans to assist candidates with access to a candidate portal that was demonstrated for the Monitor and the Parties at a December 19, 2017 meeting. The portal, still under development, will offer an additional means of engaging and communicating with candidates.

The City is also continuing its efforts to ensure that test takers whose applications are still “pending” (in most cases because they have neither paid the application fee nor completed applications for a fee waiver) finalize their applications in time for their scores to be counted and for them to be included on the hiring list. On December 14, 2017, the City reported that 550 black applicants and 337 Hispanic applicants remained pending.

#### **B. Post-Campaign Analysis**

The City has advised the Court that it intends to conduct an “after action” analysis to evaluate the success of different aspects of the recent recruitment campaign. With the completion of the examination, the City is now in a position to conduct some of the analyses it must perform to examine the effectiveness of its recruitment campaign and lay the foundation for data driven decision making in future campaigns. The City will need to assess, among other things, the messaging, communications channels and targeting it employed to attract black and Hispanic test takers. The analyses should also include assessments of the resources and budgeting, along with an evaluation of survey data collected in the course of the campaign and in connection with the exam. Later on, once the examination has been scored, the City should also look for patterns or correlations that may allow it to identify successful strategies for attracting high scoring black and Hispanic test takers in future campaigns.

This after-action analysis is a critically important step in the City's fulfillment of its obligations under the Modified Remedial Order and the Disparate Treatment Settlement. The City must demonstrate not only that it has fulfilled its "best efforts" obligation under the Disparate Treatment settlement in the recent campaign, but also that it is capable of running effective, data-driven campaigns to attract black and Hispanic candidates in future. The after-action analysis must ultimately generate viable, data-driven plans for future campaigns to attract successful black and Hispanic candidates to the FDNY.

### **C. Firefighter Assignments**

In an area broadly related to recruitment, in an October 2, 2017 letter, Plaintiffs-Intervenors requested that the Monitor assess whether the City was in compliance with Paragraph 1(d) of the Disparate Treatment Settlement, which requires the City to place new firefighters who are also New York City residents in the FDNY divisions in which they live – "to the extent reasonable, practicable and consistent with operational needs." Based on an analysis of placements in prior Academy classes, Plaintiffs-Intervenors expressed concerns that the placement of black and Hispanic City-resident firefighters outside their home divisions indicated that the City may not be in compliance.<sup>6</sup> For its part, the City asserts that assignments outside home divisions were prompted by firefighter preferences or other operational needs. Plaintiffs-Intervenors asked the Monitor to examine the planned assignments of firefighters about to graduate from the Fire Academy on October 18 to confirm that they were consistent with the Disparate Treatment Settlement. The Monitor requested, and the City provided, data showing the assignments, home divisions, and expressed preferences of firefighters for that class and two prior Academy classes. While the data indicate that the majority of firefighters who express

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<sup>6</sup> Plaintiffs-Intervenors also raised additional concerns relating to other aspects of firefighter assignments.

preferences for their home divisions are assigned to them, in some cases they are not (in these instances usually receiving their second choice assignments). The Monitor has asked the City to state the practical or operational reasons for these assignments outside home divisions, and is awaiting the City's response.

**D. Working Group**

Since the last periodic report, the City has continued 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 Stipulation and Order (Dkt. # 1599) ¶ 1(e)). And the City has continued to update the Monitor on the initiatives.

The Working Group initiatives include the development and implementation of the new Fire Cadet title, based on the program approved by the New York State Civil Service Commission (the “CSC”) at a public hearing held on June 16, 2016. *See* Monitor's Seventeenth Periodic Report (Dkt. # 1714) at 11-12.

The FDNY Fire Cadet program, which will be open to college-age New York City high school graduates (or graduates of equivalent GED programs), will provide two years of paid service while participants undertake hands-on training and related coursework. The curriculum, which is still under development by the FDNY, is expected to include fire-prevention training and first-hand experience providing assistance within firehouses and other FDNY facilities. At the conclusion of the two-year program, participants who have satisfied the program's requirements will be eligible to take the promotional examination to become entry-level firefighters.

The Parties and the Monitor held a conference call on September 20, 2017 to discuss a revised timeline circulated by the City reflecting input from DCAS and from additional personnel engaged to provide services in connection with the development of the Fire Cadet title. The City's revised timeline shifts the commencement of the program to May 2021 to align with the administration of the next anticipated promotional examination in June 2022.<sup>7</sup> The City also stated that given scheduling of the promotional exam, and the need to match the timing of the Cadet classes to that schedule, the Cadet program would not operate continuously. The City's timeline also provides for additional staffing and training in 2019, recruitment of Cadets from September 2019 through May 2020, an application period in May 2020, and selection and investigation of prospective Cadets from May 2020 through March 2021.

Other initiatives undertaken by the Working Group have been pursued by the Department's Youth Workforce and Pipeline Programs Unit, whose mandate includes introducing diverse New York City youth to career opportunities in the FDNY and EMS. These initiatives include a revived and expanded FDNY Explorers Program, which provides training and mentoring to City high school students through posts associated with schools in diverse neighborhoods. The program prepares and encourages program participants to join the EMS and provides a path for participants to eventually become firefighters through promotion from the EMS. *See* Monitor's Nineteenth Periodic Report (Dkt. # 1761) at 17-18. On a call with the Monitor and the other Parties October 12, 2017, the City reported that the Explorer program now operates with a staff of 45 post advisors serving 136 Explorers, and that it currently has the

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<sup>7</sup> To be eligible for promotion to Firefighter via the promotional exam, Cadets must be in the Cadet Title both when they apply to take the exam and when they are appointed – after the exam is scored and produces a hiring list. Accordingly, Cadet classes must be timed to allow Cadets to take the promotional examination approximately half way through the two-year program. The City had previously projected that instruction in the program would begin in September of 2018. *See* Monitor's Twentieth Periodic Report (Dkt. # 1784) at 20. But that timeline was based on the assumption that the City would offer the next promotional exam at an earlier date.

capacity to serve a maximum of 180. The FDNY has also continued to work on the rollout of the EMS Trainee title, which, although available to applicants of any age, establishes an additional pathway into EMS for qualified candidates including FDNY High School graduates and FDNY Explorers. *See id.* Plaintiffs-Intervenors have encouraged the City to explore the expansion of the program and examine ways it might be linked to New York City residency.

The Monitor has asked the City to offer dates for the next meeting of the Working Group and expects the meeting to take place within the next few weeks. The Monitor expects to receive further updates from the City regarding the continued development and implementation of Working Group initiatives at that meeting.

### **III. Data Collection and Analysis**

Since the last periodic report, in consultation with the other Parties and the Monitor, the City has continued its work with several data systems developed under the Monitorship. These include (1) a recruitment database; (2) an end-to-end database tracking candidates through the recruitment and hiring processes; and (3) a Candidate Tracking Spreadsheet (CTS) containing available data from each step in the hiring process for candidates who took Exams 2000 and 2500 (which will be superseded going forward by the databases described in items 1 and 2).

#### **A. Recruitment Database**

As described in detail in previous Periodic Reports, the City's recruitment database, developed by its consultant Vanguard Communications, manages data relating to potential candidates gathered by the recruitment department from the candidates' first contact with the FDNY through the written examination. *See, e.g.,* Monitor's Fifteenth Periodic Report (Dkt. # 1669) at 7-8. The database, known as "ARCS" was used to gather data, provide reports, and manage communications with recruitment contacts before, during, and after the application

period (until the conclusion of the recent examination) – maintaining data on recruitment contacts and coordinating communications with applicants regarding exam preparation and logistics. *See* Monitor’s Twentieth Periodic Report at 21-23; Monitor’s Twenty-First Periodic Report at 20-21.

Now that the examination period has concluded, the ARCS system will also be one of the main sources of data for the City’s retrospective analysis of its recruitment activities in the recent campaign – which will assess the effectiveness of its recruitment strategies with particular groups, in an effort to improve the reach and refine the targeting of future campaigns.

**B. End-to-End Hiring Database**

The City has continued work on its Consolidated Candidate Tracking System, (“CCTS”). From the beginning of the Monitorship, the Monitor has stressed the need for the City to be able to analyze the hiring process promptly, without lengthy delays to collect data from different sources and without the need to gather it from paper sources. The CTS (discussed in Part III.C below) was adopted as an interim measure to provide the Parties and Monitor with a degree of insight into the hiring process for Exam 2000, but the City has described the process of assembling the collected data as onerous, and the spreadsheet has suffered from a number of inaccuracies over time. The CCTS is intended to be a permanent, comprehensive, reliable data management solution – retaining and facilitating analysis of data from the various phases of the hiring process. While the City has made progress in developing the CCTS, the selected database format has certain limitations; and additional work remains to be done to more closely approximate the capabilities needed for the City to identify discriminatory components of the process and track its progress in reforming them.

As described in detail in the Monitor's previous Periodic Reports, the CCTS is a central repository of data from several different department-specific FDNY databases, along with data from external sources, such as DCAS. *See* Monitor's Nineteenth Periodic Report at 21-24; *see also* Monitor's Sixteenth Periodic Report (Dkt. # 1694) at 13-14; Monitor's Twentieth Periodic Report at 23-24; Monitor's Twenty-First Periodic Report at 21-22. Data from internal department-level databases automatically populates fields in the CCTS. Data from DCAS, such as candidates' application status and examination results, is imported into the CCTS at specified intervals.

On December 19, 2017, the City provided the other Parties and the Monitor with a live demonstration of the CCTS, displaying a number of operations on a selection of user interfaces and providing an overview of the database's capabilities.

As demonstrated to the Monitor, the CCTS enables users in supervisory positions with appropriate access rights to filter the database using a variety of criteria relating to candidate status and to results from different phases of the hiring process, and it also allows them to view the history of events in the screening process for each candidate. However, the search options available to users do not extend to all the categories of data maintained in the database. (For example, although the database retains data on reasons for PRB referral and disqualification, these fields are not displayed in the user interface, and are not available to users as search criteria.) While it is possible to set up custom queries beyond the pre-set fields, such queries must be created by administrators working on the "back end" of the database – a process that the Monitor was advised takes time.

At the December 19 meeting, the Monitor, Plaintiffs-Intervenors, and United States recommended that a number of data fields currently invisible to regular, non-IT users be

included in “front-end” user interfaces, and the Monitor plans to work with the City and the other Parties further to determine what additional data fields should be made more readily accessible so that FDNY leadership and the EEO Office can fulfill their responsibilities to assess FDNY practices and track the impact of the various steps in the hiring process on different demographic groups. For the City to identify areas of disparate impact, determine its source, and craft suitable remedies, it is essential for the system to be able to run queries showing rates of disqualification for specific reasons or from specific tests for specific demographic groups. The City has agreed to collaborate with the Monitor and the other Parties to create such queries.

In addition, as time passes, as new procedures are implemented, and as new types of data are collected, old search queries will become obsolete. The onus will be on the City to ensure that it maintains the necessary searches to scrutinize the impact of its hiring practices, and that personnel are trained to work with administrative staff to generate new queries as part of a careful consideration of patterns of data that may reveal trends in outcomes at different stages of the hiring process.

The Monitor has asked the City to provide a comprehensive data dictionary for the CCTS, showing all data fields, the available values for each field in the database, and which fields can be viewed in the current user interfaces. Once the data dictionary is produced, the Monitor, Plaintiffs-Intervenors, and the United States will be in a position to work with the City to craft queries that the City can run to analyze potential disparate impact in the various components of the hiring process. The Monitor may also make further recommendations for changes in user interfaces that might enhance the ability of supervisory personnel and the EEO Office to check hiring results for potential disparate impact in future. The database is capable of running queries on a repeated, periodic basis; and the Monitor, Plaintiffs-Intervenors, and the



United States may also work with the City to develop such standing periodic queries. The Monitor will also consider asking the City to export data from the CCTS and provide it to the Monitor so that the Monitor can run its own queries.

The December 19, 2017 demonstration confirmed that the City now possesses an operational, comprehensive database for its hiring process that can be built upon as needs change and new issues arise. However, in some respects, the CCTS still requires some refinements and improvements. The Monitor plans to work with the City and the other Parties to effect those changes. The ability to perform detailed and reliable analyses of disparate impact for all components of the hiring process is essential for the City to fulfill its obligations under the Modified Remedial Order. And the Monitor will continue to work with the City on the CCTS to ensure that it is capable of performing such analyses.

In addition to the CCTS, the City also demonstrated a new web-based candidate portal that will allow candidates to track and manage their own progress through the hiring process. The portal shows which requirements candidates have fulfilled and which they have yet to complete,<sup>8</sup> lists required documents for their candidacies, and operates as a source for forms and instructions. The Monitor, Plaintiffs-Intervenors, and the United States praised the new portal for its ability to help candidates navigate the hiring process and help ensure that they know if there are any loose ends that need to be addressed.

### **C. Candidate Tracking Spreadsheet**

As detailed in previous Periodic Reports, the CTS is a compilation of data for candidates on the hiring lists produced by Exams 2000 and 2500, as well as Priority Hire candidates –

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<sup>8</sup> The portal does not communicate notices of disqualification, as the FDNY determined that it wished to inform candidates of disqualification with direct, detailed communications.

showing each candidate's status and his or her results from each step in the hiring process, from the written examination through the additional required screening tests (*e.g.*, medical, character review). As noted in the Monitor's Twenty-First Periodic Report, in a September 1, 2017 email preceding the production of the CTS, the City proposed that the Parties and the Monitor use the CTS data to identify any further areas in the hiring process in which changes may be required, and formulate a plan to implement any remedial measures before the candidates from the next open competitive hiring list (generated by the recent exam) begin to enter the hiring process, in June or July 2018. The Monitor has also received comments from the United States and Plaintiffs-Intervenors on the City's proposal. While the Monitor agrees that it would be desirable to implement any further changes in candidate screening before the new group of candidates enters the process, that goal may be unrealistic given long-standing and still lingering deficiencies in the City's data for Exam 2000 and 2500 candidates. As discussed more fully in Part V.A., efforts to assess disparate impact from the Medical Exam have been hampered by the City's inability to produce detailed Medical Exam data from a single reliable source, and the Monitor has had to develop a patchwork approach to its analyses. In the area of PRB/CID, as noted below, the City has recently notified the Monitor and the other Parties of inaccuracies in relevant data fields in the CTS, and it is currently working to identify the exact nature and scope of the problems.<sup>9</sup> In addition, because the standards and procedures governing PRB referrals and outcomes were changed in mid-2016, the statistical sample of candidates who have gone through the current process is small. For these reasons, any revised standards or procedures implemented before the new group of open competitive candidates enters processing may be based on imperfect data analysis and therefore likely to require further revision. In any case, the effect of

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<sup>9</sup> The City reports that its preliminary analysis indicates the problems are limited in scope.

any reforms will have to be evaluated considerably later, by analyses performed after a sufficient number of candidates have completed the hiring process. The City does not expect even the first groups of candidates from the new open competitive hiring list to enter the Academy until December 2018 or June 2019. And it remains to be determined at what later point sufficient data will be available for an analysis of the revised hiring process.

Early versions of the CTS were marred by gaps and inconsistencies. *See* Monitor's Twentieth Periodic Report at 24-25. But the most recent versions, produced August 5, 2016, January 23, 2017, and September 5, 2017, appeared to have remedied the most significant of these deficiencies. The most recent version, compiled following completion of the hiring process for the last class to enter the Fire Academy from the Exam 2000 and 2500 lists, includes complete hiring-process data for all candidates on those lists through entry into the Academy. The City has advised the other Parties and the Monitor that it plans to produce a further iteration of the CTS that will add some data from candidates' progress through the Academy.

On December 5, 2017, the City also notified the Monitor that it had found some previously unidentified flaws in the CTS data fields relating to PRB referrals and results (which it states are limited in scope, based on a preliminary analysis). The City is currently working to determine the exact nature and scope of the newly discovered data issues. The Monitor has requested that the City provide revised data for the affected records once it has a complete understanding of the problems, and it plans to continue discussions with the City to determine the impact of the errors, if any, on relevant data analyses.

The doubts the City has raised about PRB related data have put the Monitor's and the United States' analysis of PRB referrals and outcomes on hold and cast doubt on the analyses they have conducted to date; and the deficiencies in the data relating to the Medical Exam

(described in Part V) have prevented the analyses that would be necessary for a fully informed attempt to reform the Medical Exam. For these and other reasons, ongoing analysis of the Exam 2000 hiring process has not been possible as that hiring process unfolded, in part because City data systems did not permit it. In addition, even if the City's retrospective data for the Exam 2000 hiring list were complete and accurate, some changes in the hiring process are recent and have impacted only a small number of candidates – providing a small statistical sample for analysis. As discussed above with reference to the City's proposal to finalize changes in the hiring process this year – for the Monitor to confirm that reforms actually remedy any disparate impact and do not have unintended consequences, it will likely be necessary to observe and analyze the effect of any reforms on the *next* group of open competitive candidates.

#### **IV. EEO**

##### **A. Overview**

Since the last Periodic Report, the Monitor has continued to work with the City and the other Parties on all aspects of the FDNY's EEO compliance. On December 18, 2017, the Monitor and the Parties met to review the City's overall EEO efforts to date (the "December EEO Meeting"). The City provided the Monitor and the other Parties with a number of updates on several areas of EEO compliance including investigations, training, and messaging. These updates are noted in the specific areas of EEO compliance discussed more fully below.

The Monitor and Parties also discussed some of the areas where work remains to be done. In particular, following up on the meeting, the Monitor is gathering additional information regarding the time frames in which EEO investigations are completed, and what factors contribute to delays in obtaining evidence or reaching conclusions. The Monitor is also planning to meet further with all Parties to solicit input on what methods and frequency of messaging will

most effectively convey that the Department is committed to diversity and inclusion. The Monitor has also expressed concerns about the City's "pilot" approach to climate assessment, given the delays that have already occurred in taking the survey; and the United States, Plaintiffs-Intervenors, and the Monitor have provided initial general suggestions about survey content and methods.

**B. Policies and Messaging**

As noted earlier, the CDIO's role pursuant to the Disparate Treatment Settlement is to promote diversity and inclusion within the FDNY. At the December EEO Meeting, the Monitor requested an update from the City about its efforts in messaging related to EEO, diversity, and inclusion. The City also updated the Monitor and other Parties on its broader initiative to encourage and reinforce a sense of professional identity and ethic within the FDNY, which includes (although it is not limited to) professional and respectful conduct toward fellow members of the Department.

The City informed the Monitor and other Parties that it had issued two recent communications that it characterized as EEO Communications. The first of these is a Departmental Order, dated September 21, 2017, which was described as prescribing limits on the use of social media for FDNY business. In a number of cases reviewed by the Monitor, it has become apparent that members of the FDNY communicate informally via group texts and other forms of personal messaging and social media accounts for FDNY-related communications. In particular, group texts appear to be a commonly used means of arranging overtime coverage. Such use has in some instances been associated with offensive or harassing messages circulated among firefighters. In addition, where communications regarding overtime opportunities and mutual exchanges of shifts are conducted via personal group chats or other

personal social media to which not all members of a house necessarily have access, firefighters may be selectively excluded and prevented from taking advantage of opportunities that should be generally disseminated. Use of informal social media and personal accounts can also create additional burdens in EEO investigations. For these reasons (among others), the Monitor had previously encouraged the City to take steps to better manage and monitor FDNY-related communications conducted via social media channels.

The September 21, 2017 Departmental Order regarding social media consists of a reminder of selected provisions of the previously issued Social Media Policy, reminding employees that the policy applies to both official and unofficial conduct, and listing a number of examples of types of prohibited conduct. The Order states (as did the original Social Media Policy) that “all FDNY related social media platforms” are required to be registered with and authorized by the Department and adds that platform administrators who are FDNY employees are responsible for complying with this requirement, with the possibility of discipline for failure to comply. The Departmental Order is useful as a general reminder of the Social Media Policy. However, it does not directly address the use of social media channels for staffing or other FDNY business, including the overtime staffing that has arisen in investigations. The Monitor is concerned that merely reminding personnel of the Social Media Policy will not be enough to disrupt established patterns of overtime staffing or to incentivize registration of groups that to date appear not to have complied with that policy.<sup>10</sup>

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<sup>10</sup> On September 22, 2017, the Department also issued a “buck slip” titled “Firefighter Overtime Authorization,” which sets out a variety of rules regarding overtime staffing that are unrelated to EEO (e.g., “Each Battalion should have a sufficient number of standbys available to meet anticipated staffing needs),” as well as the following provision: “Under no circumstances are Battalion Aides authorized to contact individual members outside their Battalion for the purpose of overtime hiring. The use of social media platforms for this purpose without authorization is prohibited as per [the Social Media Policy.]” As with the Departmental Order, the “buck slip” takes the form of an administrative communication covering a number of subjects, which does not foreground the ongoing

Beyond the Departmental Order, the Monitor, the United States, and Plaintiffs-Intervenors have asked the City to consider additional steps to address these issues more directly, such as establishing authorized chat forums with prescribed lists of invitees (including officers and/or representatives of the EEO Office), which the Department could monitor in order to prevent abusive or exclusionary behavior. The City has indicated that it does not view such authorized chat groups as a viable or effective solution – noting that private communications could still take place outside the authorized groups; and the Monitor plans further discussions on the proposal. The City reports that it plans to step up enforcement of existing rules that prohibit the awarding of overtime through unofficial channels. And the Monitor has suggested that it should also take all possible steps to ensure that notifications regarding overtime opportunities are communicated promptly and comprehensively to all eligible employees. The Monitor has directed the City to provide the Monitor and the other Parties with further proposals and a detailed statement of its views on these issues, and the City has agreed to do so by mid-January.

At the December EEO meeting, the City also reported that it had sent instructions down the chain of command to company officers in each firehouse through the issuance of a December 1 “buck slip” placed into training binders, urging the officers to emphasize anti-hazing policies in their communications with personnel. Plaintiffs-Intervenors noted that “buck slips” reflect a recommendation but are not mandatory, leaving it unclear how many officers followed the guidance. Thus, while these directives are a positive step, the extent to which they have

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use of social media for staffing prior to that point or reference the Social Media Policy by name. It does not address equal opportunity in overtime staffing or convey that exclusion of members or harassing conduct on social media used for FDNY business are inimical not only to operational rules but to values the FDNY espouses in its official policies or diversity mission statement.

produced more, or more robust, anti-hazing and anti-bullying communications at the firehouse level is not clear.

The City also reported that it has continued working with the United States Army's Center for Army Profession and Ethics ("CAPE") to develop a workplace professionalism policy for firefighters and a related messaging campaign, which will incorporate diversity and inclusion as aspects of professionalism. The City reported, however, that these efforts are still at an early, developmental stage, and the City has not even projected a date by which it expects to issue any new policies or disseminate any new messaging relating to its professionalism initiative.

Official communications such as the recent Departmental Order and "buck slips" are important steps in sending the message that the FDNY remains committed to its social media policies, to prohibiting hazing, and to more professional and ethical workforce conduct. Since the Modified Remedial Order, the City has also issued formal policies, most notably the issuance of its new EEO Policy in late 2016. The City has made diversity and inclusion content available on an online portal, for those who choose to seek it out, posted eight diversity newsletters, and offered annual EEO training as well as a diversity training session.

At the December EEO meeting, the FDNY's Chief Diversity and Inclusion Officer ("CDIO") also provided an update regarding her own recent activities since her appointment in April 2016.<sup>11</sup> She reported having conducted numerous meetings with FDNY leadership to hear concerns and gather input regarding EEO issues, and to convey diversity and inclusion messages to management level members of the Department. She also reported that the EEO Office had generated eight diversity and inclusion newsletters, that it had created a poster with the

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<sup>11</sup> The CDIO was appointed pursuant to Paragraph 1.b.i of the Disparate Treatment Settlement, which requires the appointment of a CDIO to, *inter alia*, "promote[ ] diversity in the FDNY and expand[ ] awareness of the value of full inclusion of firefighters from all racial and ethnic groups."



Department's vision statement for diversity and one anti-hazing poster, and that it had planned events publicizing and celebrating diversity within the FDNY, such as a first-ever Seder. The CDIO also stated that she is working on a campaign to highlight diversity within all units of the FDNY, which she estimated will launch in approximately five months, in the spring of 2018.

Overall, the Monitor is concerned about the approach the City has taken to messaging. Operational initiatives designed to minimize harassment and formal training and policies are all important components of an effective EEO approach. But more is needed. The increasing diversity of the Department since the issuance of the Modified Remedial Order makes effective EEO messaging even more challenging and even more critical than it would be for an ordinary employer under ordinary circumstances. In that context, it is critical for all levels of the Department to understand that diversity, inclusion and equal opportunity are core values of their employer, particularly the individual firehouse level. As noted in the Disparate Treatment Settlement, this message must be conveyed not only to those who resist change, but to those who are new entrants to the ranks of the FDNY. And this messaging must be express and directly state that diversity and inclusion are just as important to the FDNY as other values.

The Monitor remains concerned that – despite longstanding recommendations by the Monitor – the FDNY has not yet engaged in the kind of consistent, repeated, firehouse level communications needed to ensure that messages of diversity, inclusion, and EEO compliance, as a core FDNY value, are conveyed regularly and forcefully to all levels of FDNY personnel. On several occasions, on the advice of its experts, the Monitor has advised the City that EEO and anti-hazing messaging should be communicated as forcefully and insistently as operational training messages. Frequent, prominent postings should be reinforced by officers at roll call and at other opportunities, and communications should include not only statements of policy but also

complementary, positive messaging about the Department's increasing diversity and the contributions of its minority members. Both types of messages need to be delivered frequently and directly to all firefighters via a variety of channels to show that the FDNY is serious about the mission of building a diverse workforce where all members have equal opportunities to succeed.

The Monitor has asked the City to provide a complete set of its EEO materials, including posters, newsletters, and any other print or online communications, so that it may conduct a fuller evaluation of the FDNY's messaging. But overall, the City's progress in articulating a commitment to diversity and inclusion seems inconsistent at best. New messages are developed and disseminated infrequently; the FDNY's professionalism initiative is a long term project that has not yet produced any results, and is not projected to do so at any specific time in the future; and although the current CDIO was appointed more than 18 months ago, as reported her activities continue to consist primarily of meetings with FDNY leadership in an effort to identify goals, gather information, and formulate the outlines of long term initiatives – rather than specific messaging and communications reaching personnel at the firehouse level.

With these concerns in mind, the Monitor intends to conduct a series of further meetings in January, including meetings with uniformed fire officers identified by the City and the Plaintiffs-Intervenors to gather suggestions for ways in which the FDNY could improve the content of its EEO and anti-hazing messaging, speed the process for producing EEO communications, and ensure that they penetrate every level of the Department. The Monitor continues to emphasize the importance of affirmatively directing officers to deliver such messages regularly and holding them accountable for any failure to do so.

The Monitor has proposed that all the Parties convene for a general meeting on EEO issues in early February. And the Monitor expects that meeting will include discussion of messaging proposals that the Monitor plans to generate based on the Parties' input.

### **C. Investigations**

Following on the Monitor's review of certain materials provided by the City from the FDNY's EEO investigations over the past several years (detailed in the Monitor's Twentieth and Twenty-First Periodic Reports), the Monitor and the City have continued to discuss the detailed recommendations that the Monitor sent the City on June 6, 2017, identifying deficiencies and proposing improvements in the City's investigative practices. The Monitor has also continued to receive periodic updates and materials from current EEO investigations, including intake documents, draft findings, and (for some selected cases) investigative files and interview memos. It has also conducted regular calls with the Assistant Commissioner for EEO (accompanied by counsel for the City), in which the Monitor has received updates on ongoing investigations. While the Monitor does not prescribe the outcome of any investigation, it has provided the FDNY with comments identifying areas where additional investigation or inferences may be warranted. At the December EEO meeting, the Monitor provided the United States and Plaintiffs-Intervenors with a general update summarizing the Monitor's recommendations and the City's responses, while maintaining the confidentiality of specific investigations. While the Monitor has observed some improvement in FDNY investigations, consistent with the Monitor's June 6 recommendations, some of the deficiencies identified by the Monitor persist in some cases – for example, failing to gather evidence from all relevant sources; neglecting potentially relevant lines of investigation; failing to identify and investigate all possible theories of liability based on the facts presented; and/or holding complainants to elevated burdens of proof,

heightened standards of credibility, or requirements of corroboration. The Monitor continues to work with the City to ensure consistent adherence to sound investigative practices, which the City has not yet demonstrated.

Plaintiffs-Intervenors have expressed particular concerns regarding the length of time that the FDNY takes to complete EEO investigations. And the Monitor is also concerned that in some cases the long duration of EEO investigations may impose hardships on EEO complainants, diminish confidence in the EEO Office, and deter firefighters from reporting potential violations – though the appropriate time frame may depend greatly on factors such as the complexity of the conduct at issue and the number of witnesses who must be interviewed. The FDNY’s EEO Investigation Manual (at page 7) establishes a 90-day goal for the completion of EEO investigations, but many investigations take more than 90 days to complete. To facilitate analysis of the duration of investigations, the City has provided the other Parties and the Monitor with a list of recent investigations showing dates of intake and resolution. The Monitor has requested further information – including additional details on the nature of each EEO matter (*e.g.*, whether a case required investigation or whether it was a mere “inquiry” that could be answered without fact finding) and how it was resolved (*e.g.*, by fact finding or by administrative closure based on jurisdictional considerations). And the Monitor also plans to conduct further discussions with the Parties this month to identify the causes of any delays in the investigative process – including scheduling issues, staffing and resources – and possible remedies. Plaintiffs-Intervenors have argued that the duration of investigations indicates a need for additional staffing in the EEO Office. And the City reports that the FDNY has requested six new attorneys for the EEO Office to help handle investigations and speed their resolution (including four contract

attorneys and two new permanent positions). The Monitor plans to consider resource issues, among other possible causes of delay, in its ongoing review.

**D. Training, Accountability, and Compliance**

The Monitor has continued to work with the City on initiatives relating to training, accountability, and EEO compliance. These include EEO training for officers, reporting requirements for officers, and plans for a survey of the EEO climate within the Department, as endorsed in the City's own 2013 EEO Report to the Court. *See* City of New York's EEO Report (filed July 15, 2013) at 61.

Pursuant to a Department Order dated July 12, 2017, officers are required to confer regularly with their superiors regarding factors relating to the maintenance of a "professional workplace." As noted in the Monitor's Twenty-First Periodic Report (at page 27), the Monitor transmitted a series of comments to the City on August 29, 2017, recommending that reports be in writing and proposing that the accompanying instructions for such reports ensure that the discussions touch on a number of specific potential indicators of interpersonal conflict, hazing, bullying, or adverse treatment on the basis of protected characteristics – so that those topics receive regular attention and trends can be spotted. The City has responded that it prefers to leave the decision about what should be covered more to officer discretion; and officers have begun to engage in the required consultations in accordance with the City's original plans. The City plans to provide the Monitor with updates on the chain-of-command reports – providing a summary of any professionalism issues that officers identify in their reports. But given the lack of specific direction that officers receive from the FDNY's order and the absence of written records to verify the thoroughness of oral reports, the Monitor is concerned that the consultations will not serve as a consistent or reliable indicator of the FDNY's professionalism or management

of EEO issues. In addition, because the FDNY currently requires substantive, written reports only from Division Commanders, and only if in their judgment the oral reports contain “relevant information that may require attention or review,”<sup>12</sup> the Monitor is also concerned that officers who fail to report issues that later ripen into EEO violations may not be held accountable for their failure to oversee conduct within their commands. Given these concerns, the Monitor plans to oversee the reporting process closely, and review the information that emerges from it in the context of the FDNY’s overall EEO compliance, to determine whether the City’s approach is viable.

The Monitor previously reported that the City had hired a professional outside diversity consultant, Kaleidoscope, which began providing diversity training to all members of the Department in September 2015. *See* Monitor’s Thirteenth Periodic Report (Dkt. #1636) at 18. At the December EEO Meeting, the City informed the Monitor and the other Parties that it had transitioned its diversity and inclusion training from Kaleidoscope to its in-house staff of EEO counselors. The City noted that the transition involved having Kaleidoscope train a staff of “Master Trainers” who could then train other in-house EEO counselors on administering training – with a view to transferring the training program entirely to in-house resources. According to the City, the EEO counselors receive approximately three hours of instruction to prepare them to deliver diversity training. The City stated that it had received feedback from both Kaleidoscope personnel and firefighter participants that the training programs were being administered successfully. The Monitor is concerned that the transition of this important function to in-house resources from third-party professionals may diminish the quality and effectiveness of EEO

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<sup>12</sup> Department Order dated July 12, 2017.

training. The Monitor looks forward to observing sessions and/or reviewing post-session surveys reflecting participant feedback.

The City and the Monitor have also continued to work together on the development and implementation of an anonymous online survey to assess the EEO climate in FDNY workplaces, and to assess employee perceptions of the Department's EEO function and its handling of EEO issues. The City identified climate surveys as a useful initiative in its 2013 EEO Report. *See* City of New York's EEO Report at 61. In October 2016, the Monitor sent the City a draft form of survey to help expedite the survey development process. After a series of discussions, in November 2017, the City advised the Monitor that rather than survey the entire Department, it prefers to first engage in a pilot project targeting a subset of firefighters. And it provided the Monitor with its own draft survey on December 1, 2017. The Monitor has expressed concerns about the extra delay that the pilot approach entails, and it has advised the City that both the limited scope of the proposed pilot questionnaire and the limited size of the sample population will deprive the pilot of sufficient reliability to be a useful assessment of climate within the FDNY.<sup>13</sup> The Monitor plans to provide the City with written comments on its draft survey within the next few days, along with further suggestions on methodology. The United States and Plaintiffs-Intervenors have also suggested questions for inclusion in the survey, which the City has taken under advisement.

During the December EEO Meeting, the United States and Plaintiffs-Intervenors expressed concern that a survey administered by the FDNY might not attract as much participation as a survey administered by a third party – primarily because participants may not

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<sup>13</sup> The City has also recently advised the Monitor that the sample for the pilot survey will be chosen by senior FDNY uniformed leadership. In light of this non-statistically based sampling method, it is not clear whether the pilot survey will produce informative data.

believe that responses will remain anonymous. The Monitor's experts agree that typical practice is to use a third party, both for expertise and for heightened assurance that responses will not be disclosed to an employer. However, the City asserts that it has the capability to administer an effective survey directly, and disputed the view that firefighter participants would perceive an outside agency as more trustworthy than in-house FDNY survey administrators.

On a December 21, 2017 call with the Monitor and the other Parties, the City provided additional details on the methodology and procedures for its proposed pilot program. It plans to roll out the survey to one battalion in each borough, with the battalions selected by the Chief of Operations. The survey will be administered by the FDNY's Bureau of Training, and firefighters will be paid one hour of overtime to complete the survey at home. The City expects the entire pilot survey to take 2-3 weeks to complete. The City's plans – most notably, but not only, the fact that the sample population will be selected by the Department leadership, rather than randomly or by a third party expert – raise serious concerns about the validity of any results generated by the survey.

The Monitor plans to work with the Parties over the next several weeks to continue providing feedback on the City's plans for the content and administration of the survey. The Monitor believes it is essential for the City to conduct an informative survey promptly. The City's pilot survey (planned for February 2018) is only an intermediate step toward a full survey, which the City has agreed to conduct expeditiously following the completion of the pilot (estimated by September 2018).

#### **V. Medical Exam-Related Issues**

Pursuant to the Modified Remedial Order, the Monitor continues to address allegations by Plaintiffs-Intervenors and the United States that certain steps in the Medical Exam 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 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.

**A. Analyses of Exam 2000/2500 Medical Data**

As described in previous Periodic Reports, the City's prior record-keeping practices with respect to the Medical Exam have made it difficult for the Monitor and Parties to identify and analyze root causes of medical disqualification for black and Hispanic candidates compared to white candidates, and to analyze disparities in rates of disqualification among the groups. *See* Monitor's Twentieth Periodic Report at 31-34; Monitor's Nineteenth Periodic Report at 34-35; Monitor's Fifteenth Periodic Report at 23; Monitor's Thirteenth Periodic Report at 16-17; Monitor's Twelfth Periodic Report at 17-18.

Following sustained discussions with the Monitor about the need for improved data, the City agreed to create a database of relevant medical information for each candidate, including gender; age; race/ethnicity; the date of any measurement, test, subtest, and retest; the result of each such measurement or test; follow-up appointments within BHS and with outside providers; and the results of such follow up appointments. The Monitor requested the database in order to facilitate systematic impact analyses of candidate results on each component and sub-component of the Medical Exam. In November 2015, BHS began to document the requested Medical Exam data in the City's Electronic Medical Record ("EMR") database. The transition from paper to electronic recording of medical data occurred over several months, however, and records for many Exam 2000/2500 candidates who had medical testing before or during the transition exist in paper form only: candidates processed before November 2015 have no records in the EMR

database, and many of those processed during the transition have no records or only partial records there.

Despite these deficiencies in the available electronic data, the City is required by the Modified Remedial Order to assess the entirety of the Exam 2000 hiring process and make any necessary changes based on that assessment. *See, e.g.*, Modified Remedial Order ¶¶ 19, 32. The medical testing of Exam 2000/2500 candidates – which took place from 2013 through June 2017 – is indisputably a part of the firefighter hiring process, and the Monitor is charged with assuring that an assessment of the results of that testing is undertaken and that changes required by the results of the assessment are implemented. Under Paragraph 62 of the Modified Remedial Order, the City is required to give the Monitor access to all the data it requires to perform its duties under the Order. But the City's data management practices, combined with the slow pace at which it developed its EMR database, have impeded the City's and the Monitor's ability to carry out their obligations. The Monitor has been required to devise an analytical approach that draws upon an array of different sources; and it may still need to call upon the City to produce additional data.

The Monitor believed that all of the Exam 2000/2500 Medical Exam data could be gathered by using (a) data the Monitor extracted from BHS paper files created between 2012 and 2015 (files which the City had provided to the Monitor in a production that was completed in 2016) and (b) data entered into the EMR database beginning in 2016 through the end of medical processing for the Exam 2000/2500 lists, in June 2017. The Monitor had expected that disparate impact analyses would be conducted using this combination of paper and electronic files. But the fact that files for some candidates (those whose processing took place during the transition to

the EMR database) exist partly on paper and partly in electronic form, significantly complicates this approach.

Nevertheless, the fact that the EMR database contains only partial data for some of the Exam 2000/2500 candidates processed after November 2015 need not, and must not, prevent disparate impact analyses of the Medical Exam as a whole. Disparate impact analyses can be conducted using the Candidate Tracking Spreadsheet for Exam 2000/2500 (the “CTS,” discussed in Part III, above), the paper files the City produced (and those it may still be required to produce), data relating to those candidates who do have results recorded in the EMR database, and the August 2, 2017 BHS Attrition Metrics Report, discussed below.

1. Candidate Tracking Spreadsheet

The CTS provides complete Exam 2000/2500 medical exam pass rate data for all candidates for the entire life of the corresponding hiring lists. The Monitor intends to begin its disparate impact analysis by analyzing the overall pass rates for white, black, and Hispanic candidates, as recorded in the CTS. It will work with the City on this effort.

The CTS does not, however, identify the specific component or “station” of the Medical Exam a candidate has failed; accordingly, it does not permit analyses of the impact of specific components of the Medical Exam. This information will have to be gleaned from a combination of other sources.

2. Paper Records

The Monitor has Notices of Final Disqualification (“NOFD”) and full medical files for candidates who were disqualified by the Medical Exam between March 2013 and May 2015. The NOFDs are notices sent to candidates, advising them about which component(s) of the Medical Exam resulted in their disqualification. Information extracted from these documents, in

conjunction with the corresponding full medical files and the overall pass/fail/reserved data from the CTS, will permit the Monitor to conduct disparate impact analyses of each component for the period covered by the produced paper files (*i.e.*, the beginning of medical testing through May 2015).

### 3. BHS Attrition Metrics Report

The City's August 2, 2017 "Fire Department of New York City Firefighter Candidate Bureau of Health Services Testing Attrition Metrics" (the "BHS Attrition Metrics Report" or the "Report") is based on Medical Exam data entered into the EMR database from November 2015 to June 15, 2017, with the limitations explained above – including incomplete electronic records for a substantial number of candidates.<sup>14</sup> The BHS Attrition Metrics Report shows the numbers of qualified, disqualified, and reserved candidates for each component of the Medical Exam and their percentages by race/ethnicity, as recorded in the EMR.

The BHS Attrition Metrics Report shows that, among candidates who do have their medical testing data in the EMR database and whose overall medical qualification status is either qualified, disqualified, or reserved, 20.2% were disqualified. When broken down by race/ethnicity, the data for this group of candidates shows that only 14.8% of white candidates were disqualified by the Medical Exam, while 30.5% of black candidates and 22% of Hispanic candidates were disqualified.

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<sup>14</sup> Specifically, of the 1,663 Exam 2000/2500 candidates evaluated by BHS after the EMR database was first implemented, 956 (57.5%) have records in the database and 707 (42.5%) do not. BHS Attrition Metrics Report at 16. The 707 candidates who went through the BHS testing process during that time but do not have any EMR documentation are not included in the report. The BHS Attrition Metrics Report includes numerous further caveats from the City, including that the City "has not conducted any analysis that asserts any statistical significance of these results. Despite differences in attrition rates across race-ethnicities, the small sample size available here (which may exaggerate percentages that are based on small numerical differences), confounding factors and other statistical biases may influence the interpretation of the results. A further disparate impact analysis must be conducted to draw any conclusions from the results of the attrition calculations." *Id.* at 6. The City has advised that it intends to produce final attrition metrics in the future and that this may alter these figures.

The BHS Attrition Metrics Report also provides insight into which components of the Medical Exam most often lead to candidate disqualification. Bearing in mind the City's caveats about sample size and other factors,<sup>15</sup> one can still see that 90.8% of the white candidates in the report pool passed the stairmill, while only 74.8% of the black and 81.6% of the Hispanic candidates passed it.<sup>16</sup>

4. Possible Further Data

The Monitor intends to further explore the data it has to determine which components of the Medical Exam are causing potentially disparate pass rates. The Monitor will determine whether it has sufficient data to perform these analyses; if not, the Monitor will request further data from the City.

**B. Analyses of Medical Data Beginning with Exam 7001/7500**

As outlined in the last Periodic Report, the Monitor was anticipating that the City would be able to produce reports run directly from the EMR database and that the Monitor and Parties would be able to perform analyses on requested raw data. The Monitor also reported that the City had given the Monitor and other Parties a brief demonstration of the EMR database in February 2017. *See* Monitor's Twenty-First Periodic Report at 31. In October, the City clarified that the prior demonstration had consisted of screenshots prepared by the City to illustrate what the database would do in its future operation.

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<sup>15</sup> The City recently advised that its data has been updated.

<sup>16</sup> It is worth noting that the candidates in the EMR database, from which these numbers are drawn, include – and are probably primarily – candidates who took the stairmill test after the series of improvements made to that test in an effort to reduce disparate impact, including, as previously reported, adjustments to the test protocol, making heart rate visible to the candidate, and providing better guidance through written and video materials. The persistent discrepancies between groups among these candidates indicate that there may be more to be done to lessen the adverse impact of the cardiopulmonary component of the Medical Exam.

At the Monitor's request, and in response to questions about medical data queries, the City gave a second EMR database demonstration on December 19, 2017. The Monitor learned at that time that queries the Monitor or the Parties wish to run will have to be carefully constructed in collaboration with the City, and will take time to develop and process – slowing the response time for queries and preventing the Parties and the Monitor from running new or modified queries without lead time as they become necessary. The Monitor will work with the City to create standing filters and preset searches and will also address how future indicators of disparate rates of disqualification can be flagged by the database and addressed by the City.

Although the City has made progress in its development of a comprehensive and workable EMR database, the slow pace of that development has been unacceptable, and it has substantially impeded the work of the Monitorship. As discussed in Part V.A., because the database began to receive candidate data only in November 2015, and even then did not receive full data on all individuals who took the Medical Exam after that date, it is not a tool that can be used for analysis of disparate impact affecting all Exam 2000 and 2500 candidates; and even though the database now receives all Medical Exam data and is capable of running queries, even at this stage it will require modifications before it can readily perform the analyses necessary for the City and the Monitor to assess and identify the individual steps responsible for any disparate impact produced by the Medical Exam. The Monitor will continue to work with the City on further developments in the database to ensure that it can run the required analyses.

### **C. The Stairmill Test**

Plaintiffs-Intervenors and the United States have expressed concern that the stairmill portion of the Medical Exam has a disparate impact on black and Hispanic candidates; and, as described above, the Monitor's analyses of medical files produced by the City and the BHS

Attrition Metrics Report indicate that this concern is valid. In part because of the way the City kept data about stairmill test failures in the past, it is difficult to determine whether the disparate impact should be attributed to candidates' underlying medical conditions, non-medical factors (such as the candidate's familiarity with the test), or possible flaws in the stairmill test itself. To address the possibility that disparate impact was due to issues with test administration, the City implemented a number of measures intended to mitigate any adverse impact that may have resulted from a lack of information about the test or from the manner of its administration. *See* Monitor's Nineteenth Periodic Report at 30-32; Monitor's Eighteenth Periodic Report (Dkt. # 1734) at 32-33. In addition, the City has been tasked with validating the stairmill test. The Monitor also intends to examine whether the stairmill protocol itself is causing disparate impact, and whether any such impact is not job-related.

1. Stairmill Validation

As previously reported, the City has considered a number of methods for validating the stairmill component of the Medical Exam. *See, e.g.*, Monitor's Thirteenth Periodic Report at 14; Monitor's Fifteenth Periodic Report at 19; Monitor's Twentieth Periodic Report at 34. The Monitor reported in its Nineteenth Periodic Report that, on February 13, 2017, the City advised that it planned to engage PSI Services LLC ("PSI") to conduct a validation study. *Id.* at 31.

On June 9, 2017, the City sent the Monitor the first version of PSI's stairmill validation study outline. *See* Monitor's Twentieth Periodic Report at 34. On July 11, the City and the Monitor, along with PSI and the Monitor's expert, Dr. Smith, met to discuss the Monitor's observations and recommendations concerning PSI's June outline. *See* Monitor's Twenty-First Periodic Report at 35. On August 3, the City sent the Monitor an updated stairmill validation proposal from PSI, which incorporated much of what was discussed at the July meeting. *Id.* The

Monitor provided further comments to the City on September 29 and has been waiting for more than three months for an updated validation proposal. As reported in previous Periodic Reports, the deadline for completion of the validation study is April 30, 2018, including all analyses, reports, and conclusions. *See* Monitor's Twentieth Periodic Report at 34; Monitor's Twenty-First Periodic Report at 36. Given that the United States and Plaintiffs-Intervenors are to have an opportunity to review and comment on the next version of the validation proposal, it is critical that the City submit it now and that the study begin immediately after discussions with the Monitor and other Parties are complete.<sup>17</sup> The City must devote whatever resources are required to meet the April 2018 deadline for completion of the study.

## **VI. Character Screening by the CID and PRB**

Since the last Periodic Report, the Parties and the Monitor, with the assistance of its expert consultants, Manitou, Inc., have continued to examine the standards and procedures employed in the character review phase of the FDNY hiring process, along with the effect of the character review process on relevant demographic groups.

### **A. Enhancements in the Character Review Process**

As previously reported in detail, beginning in 2012, in consultation with the Monitor and the other Parties, the City issued a series of guidelines for the CID and PRB, with the most recent modifications to the guidelines issued in the summer of 2016. *See* Monitor's Sixteenth Periodic Report at 29-31; Monitor's Seventeenth Periodic Report at 29-30.<sup>18</sup> The goal of these guidelines is to enhance the consistency and predictability of outcomes in the character review process, as

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<sup>17</sup> As noted in earlier Periodic Reports, Plaintiffs-Intervenors and the United States have reserved their right to raise objections to the validation study. *See, e.g.*, Monitor's Twentieth Periodic Report at 33.

<sup>18</sup> As noted in prior Periodic Reports, the revisions were agreed upon by the Parties with the understanding that they may be subject to additional changes based on further analysis. *See* Monitor's Seventeenth Periodic Report at 30.



well as to minimize discretion or opportunities for personal influence by friends or family members of applicants. While delays in data production, and flaws in the data produced, have prevented complete analysis of rates of disqualification in the character review process, the Monitor and the Parties have also sought to improve their understanding of the impact of the process on different demographic groups, the grounds on which candidates are disqualified, and the job relatedness of different disqualification reasons.

The Monitor and the Parties have continued to consider further potential changes in the character review process. As previously reported, on July 27, 2017, the Monitor and its expert Alison Wilkey<sup>19</sup> met with the City to discuss potential reforms that the Monitor developed in consultations with Ms. Wilkey – with input from the United States and Plaintiffs-Intervenors. *See* Monitor’s Nineteenth Periodic Report at 38. The City responded to the Monitor’s recommendations in writing on October 13, 2017. And both the Monitor’s recommendations and the City’s responses were shared with the United States and Plaintiffs-Intervenors on October 27, 2017.

The Monitor’s recommendations include the suggestion that the City use background checks provided by the criminal justice system (which it already obtains as a matter of course for all candidates) to identify which candidates meet criminal history criteria for referral to the PRB and accordingly must explain any relevant arrests or convictions. Currently, all candidates are required to self-disclose and explain any criminal information (even incidents that would not trigger referral to the PRB, such as a single arrest that did not lead to a conviction). The recommendation is intended to reduce unnecessary burdens on candidates that may discourage them from pursuing the process or impede their progress. It is based in part on research

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<sup>19</sup> Ms. Wilkey’s qualifications and expertise are summarized in the Monitor’s Eighteenth Periodic Report at 39.

indicating that candidates with arrest and conviction records often have not been clearly advised of the charges against them and therefore cannot “match” background check descriptions; the self-disclosure requirement can thus produce apparent discrepancies for which candidates may be penalized in the hiring process, if they are deemed to have omitted or misrepresented their histories.

The Monitor has also recommended further limitations on the grounds for which candidates are referred to the PRB, specifically suggesting that referrals based solely on certain minor “quality of life” offenses (which the City has eliminated as criteria for public housing eligibility) should be eliminated, and that additional limitations should be imposed on look back periods to reflect the decline in recidivism rates that occurs with the passage of time.

Finally, the Monitor has also suggested that PRB decision making, and the record keeping associated with it, be further regularized to help ensure that decision making is consistent and based on clear criteria. At present, although the PRB records the reasons for referrals and disqualifications in general terms (noting, for example, whether a candidate is referred to the PRB or disqualified for criminal history or employment history), it does not record its reasoning for candidates who are not disqualified; nor does it maintain searchable records of the detailed types of misconduct that cause candidates to be disqualified.

Accordingly, the PRB and the FDNY have no way to determine with meaningful precision whether similarly situated candidates receive similar treatment from the PRB.

In its response to the Monitor, the City expressed a number of concerns regarding each of the Monitor’s recommendations – including broadly applicable requirements calling for criminal history disclosures from all City employees and the job-relatedness of certain minor offenses for

firefighters. The Monitor plans to respond to the City's concerns in writing soon and convene a meeting of the Parties to discuss the potential reforms.<sup>20</sup>

### **B. Analysis of Potential Disparate Impact**

The Monitor and the Parties have continued to analyze data from the character review process – to assess whether the process as a whole or either of its component parts (referral to the PRB and PRB decision making) has a disparate impact on black or Hispanic candidates. As discussed in previous Periodic Reports, a previous analysis of data through the end of 2014 indicated higher rates of referral to the PRB for minority candidates than for white candidates, and higher rates of disqualification among minority candidates referred to the PRB than for white candidates who had been referred. *See, e.g.*, Monitor's Thirteenth Periodic Report at 20-21. Since that analysis, several additional rounds of hiring have taken place for subsequent Academy classes; the FDNY has implemented several reforms in the character review process (as discussed above); candidates disqualified under earlier standards and procedures have been reconsidered under the current, revised rules; and the City has produced additional data in updated editions of the CTS. *See* Monitor's Twentieth Periodic Report at 38-41.

As discussed above in Part III.C, the most recent CTS, which was provided September 5, 2017, includes complete hiring-process data for all candidates on the Exam 2000 and 2500 lists, including the outcome of reconsideration for those candidates disqualified under discontinued standards who were reconsidered using the current criteria and procedures. However (also as discussed in Part III.C), on December 5, 2017, the City advised the Monitor that it had identified previously unobserved errors in some of the data, reviving concerns that the current CTS, like

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<sup>20</sup> The United States has indicated that it intends to complete its disparate impact analysis once the City provides the corrections to the CTS discussed above, and may offer further suggestions for reforms.

some prior versions, may not be a reliable source for analyses of the character review process. *See* Monitor's Twentieth Periodic Report at 24-25. The City is currently determining the exact nature, scope and source of the newly identified issues. Although the City has stated that it believes the errors affect a small number of records, it has not yet definitively identified the affected data fields or the affected candidate records. The Monitor has asked the City to specify the categories of data involved, and ultimately to provide revised and corrected data; and it is continuing discussions with the City to determine the effect of the errors on relevant data analyses.

Using the CTS data that is currently available (which, as noted, may be subject to change), the Monitor and its consultants at Manitou have performed a series of analyses of referrals to the PRB and PRB decisions – in an effort to determine whether the process continues to produce higher rates of referral and disqualification for black and Hispanic candidates than for white candidates. In addition to analyzing rates of referral and disqualification for several different time frames (both before and after the most recent changes in standards and procedures), the Monitor is examining the effect that referral to the PRB has on delays in appointment or the terms of employment for candidates who are not disqualified. The Monitor has substantially completed these analyses, but is waiting to circulate the results to the Parties until the data issues the City recently identified are fully resolved. It is hoped that the issues the City has identified will not require substantial revisions in the Monitor's analyses. The Monitor plans to provide its statistical assessments to the City and the other Parties along with its reply to the City's response to the Monitor's recommendations for additional reforms. Once a statistically sufficient number of candidates from the new hiring list have completed the character review process, the Monitor will conduct a further analysis to determine whether the

process (as modified by any further changes) has a disparate adverse impact on black or Hispanic candidates. If the analysis does reveal such an impact, the City will be required to implement further changes, or to show how its character review criteria and procedures are job-related and consistent with business necessity.

## **VII. Firefighter Exams**

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 and the other Parties on the administration and scoring of the examination. The Monitor continues to be assisted by its testing expert, Dr. Shane Pittman of The Pittman McLenagan Group, L.C.

### **A. December 2016 Promotional Exam**

The City’s recent promotional Exam 7501 was taken by 1,489 members of the EMS in December 2016. Most of them passed the exam and were placed on the Exam 7501 eligible list. The first Academy class from this list of promotional candidates was announced on December 11, 2017. The next Academy class, which will begin in approximately June 2018, will also consist exclusively of promotional candidates from this list. The last candidates on the promotional list will probably fill a portion of a third class.

Although oversight of the promotional exam is not within the scope of the Court’s Modified Remedial Order, the City agreed to provide demographic data from Exam 7501 to facilitate analysis of any issues that may relate to the current open competitive exam. As reported in the last two Periodic Reports, PSI did not find statistically significant evidence of

disparate impact on black or Hispanic candidates in the pass rate for the exam. *See* Monitor's Twentieth Periodic Report at 43-45; Monitor's Twenty-First Periodic Report at 40.

**B. Open Competitive Exam**

Exam 7001 was administered from September 5 through October 28, 2017. Protest Review Sessions (in which test takers have the opportunity to contest the answer key with respect to specific questions) were conducted during the first two weeks of November. Approximately 1,100 candidates participated in these sessions, 579 of whom submitted approximately 2,200 protests.

PSI created a database of the results of Exam 7001 and has analyzed the results. The Monitor and the United States' testing experts have reviewed PSI's analyses and scoring of the CBT responses. Nothing unusual occurred during administration of the test and nothing unexpected was revealed in the preliminary analyses of the results. Immediately following TVB review of the new Exam 7001 protests, in mid-January 2018, PSI will generate a preliminary candidate score roster and will send it to DCAS. PSI plans to share adverse impact analyses with the Monitor and Parties by January 24, 2018, which the Monitor and Parties will review. PSI will then conduct updated adverse impact analyses of the exam results after any changes are made due to candidate protests and share those with the Monitor and Parties by March 6, 2018, which the Monitor and the United States will review. The City expects to appoint the first open competitive candidates from the Exam 7001 list to the Academy in December 2018 or June 2019, depending on the number of promotional candidates who are appointed.

### **C. Candidate Surveys**

#### **1. Optional Survey Appended to Exam 7001**

The results from the optional candidate survey appended to Exam 7001 have also been compiled by PSI and reviewed by the Monitor and the United States and their respective experts. In April 2017, the City informed the Monitor and the other Parties that it plans to use the survey data to build statistical models to predict how individuals and groups proceed through the hiring process – including the time it takes individuals to get through each milestone from recruitment to appointment and which individuals from which groups leave the process either by dropping out or because of disqualification. The City advised that this effort may take more than one exam cycle.

In May 2017, the Monitor requested that the City provide a written plan describing the City's projected methodology for analyzing the survey data, along with target dates for data compilation and completion of analysis. The Monitor also asked the City to share its plans for use of all the recruitment-related data it is tracking in ARCS and elsewhere. The Monitor and Parties will then work together to discuss how this recruitment data, along with the data collected via the survey, should be analyzed for the purpose of building a recruitment plan that specifically targets applicants who are likely to make it through the hiring process and obtain appointment to the FDNY.

#### **2. Optional Survey to Be Administered to Exam 2000 Candidates**

Related to the optional survey to be given to Exam 7001 candidates, the Monitor also directed in May 2017 that a survey be administered by a third party, within a year, 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 voluntarily dropped out at some point. (The Monitor noted that

Exam 2000 candidates disqualified by the City should not be asked to participate in the survey.) The Monitor and its experts believe that data concerning hires from Exam 2000 is important and will aid in the interpretation of the survey given to takers of Exam 7001. The Monitor intends to assist in the creation of this optional Exam 2000 survey.

#### **VIII. 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: January 9, 2018

New York, New York

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/s/

Mark S. Cohen