

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, :

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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07-cv-2067 (NGG) (RLM)

MONITOR’S NINTH PERIODIC REPORT TO THE COURT

Pursuant to Paragraph 55 of this Court's Modified Remedial Order and Partial Judgment, Permanent Injunction, and Order Appointing Court Monitor, as modified following appeal, dated June 6, 2013 (the "Modified Remedial Order") (Dkt. #1143), Mark S. Cohen, in his capacity as Court Monitor (the "Monitor") in the above-captioned matter, respectfully submits the Monitor's Ninth Periodic Report to the Court.

EXECUTIVE SUMMARY

This report summarizes activities relevant to the compliance of the City of New York (the "City") with the Modified Remedial Order from June 11, 2014, when the Monitor's Eighth Periodic Report was filed, to September 14, 2014.

As discussed in Part I, the Parties and the Monitor have devoted substantial efforts during this period to issues relating to recruitment as well as equal employment opportunity ("EEO") issues. The Monitor is also filing today two reports with this Ninth Periodic Report, one regarding the FDNY's recruitment and hiring practices and a second involving the FDNY's EEO policies and procedures.¹

Part II discusses allegations recently raised by Plaintiffs-Intervenors and the United States that certain aspects of the FDNY's procedure for post-examination screening of firefighter candidates have had a disparate impact on black and Hispanic candidates. Plaintiffs-Intervenors have also raised concerns regarding the impact of other FDNY practices on candidates awarded priority hiring relief in this litigation ("Priority Hires"). As set forth below, the Monitor has discussed these issues with the Parties on several occasions, solicited additional written

¹ The Monitor has in the past included with his periodic reports a chart providing a high-level summary of compliance with particular provisions of the Modified Remedial Order. For the period covered by the present Report, the most pertinent information regarding compliance with specific portions of Modified Remedial Order is contained in two other reports being filed today regarding recruitment and EEO. Accordingly, the Monitor has elected not to provide an update to the status chart at this time.

submissions and input, and facilitated an interim agreement with respect to discovery requests by Plaintiffs-Intervenors and the United States. The Monitor is also conducting his own review of the allegations. The Monitor will report developments to the Court on an ongoing basis.

Part III discusses the Monitor's ongoing review and assessment of the FDNY's investigation of several specific instances of alleged retaliation in firehouses and at the Academy. The Monitor's report on EEO issues includes a broader discussion of the FDNY's policies and procedures for investigating allegations of retaliation and other EEO violations.

Part IV discusses issues related to the next written exam for prospective firefighter candidates.

Part V summarizes a range of additional issues addressed by the Monitor and the Parties over the past three months.

I. Recruitment and EEO Issues

As noted, together with this Ninth Periodic Report, today the Monitor is filing the Monitor's Recruitment Report to the Court (the "Monitor's Recruitment Report") and the Monitor's EEO Report to the Court (the "Monitor's EEO Report"). These filings serve a dual function: they comprise the Monitor's formal responses to the City's final reports on recruitment and EEO pursuant to Paragraphs 30 and 47 of the Modified Remedial Order; and they review and assess important recruitment and EEO-related developments subsequent to the City's reports.

The Parties and the Monitor have devoted substantial work to these issues during the period covered by this report. Among other things, the Monitor has analyzed and evaluated the FDNY's policies and procedures regarding recruitment and hiring of entry-level firefighters and the FDNY's EEO function by, for example, collecting and analyzing large amounts of

information related to the City's remedial efforts in the areas of recruitment and EEO; hosting "Special Purpose" meetings with representatives of the FDNY's Office of Recruitment and Diversity ("ORD"), EEO Office, Bureau of Investigations and Trials ("BITS"), and Data Analytics Unit; and holding extensive discussions with the Parties concerning the issues addressed in the forthcoming reports.

The Monitor will continue to observe and assess the City's efforts to comply with the Modified Remedial Order's provisions on recruitment and EEO going forward. In the near term, the Monitor, along with the United States and Plaintiffs-Intervenors, has issued a series of requests to the City for additional information on its remedial efforts with respect to recruitment and EEO. The Monitor will work with the City and the Parties to ensure that the information requested is provided and analyzed, and will update the Court as warranted.

The Monitor has also been collecting and analyzing data in relation to the FDNY's Personnel Review Board (the "PRB"), and discussing these issues with the City and the other Parties. Pursuant to Paragraph 40 of the Modified Remedial Order, the Monitor expects to file a report on the PRB (the "Monitor's PRB Report") in the near term.

II. Concerns Regarding Possible Disparate Impact

The Modified Remedial Order requires the City to eliminate aspects of the firefighter selection process that have an unjustified disparate impact on black and Hispanic candidates.

Specifically, the Modified Remedial Order provides:

The City of New York shall, with reasonable diligence, take all steps necessary to eliminate all policies and procedures that are not job related or required by business necessity and either have a disparate impact on black and Hispanic firefighter candidates or perpetuate the effects of said disparate impact.

Modified Remedial Order ¶ 19.

In July and August 2014, Plaintiffs-Intervenors and the United States both raised concerns regarding the possible disparate impact on black and Hispanic candidates of two aspects of the FDNY's process for screening entry-level firefighter candidates: (i) part or all of the medical examination given to firefighter candidates; and (ii) the review of certain potentially disqualifying information in candidate files that is conducted by the PRB. Plaintiffs-Intervenors also raised concerns regarding the impact on black candidates and probationary firefighters of certain other FDNY practices, described below.

In a letter to the Monitor dated June 18, 2014 (the "June 18 Letter") and in follow-up correspondence, Plaintiffs-Intervenors alleged that the medical exam and the PRB process have had a disparate impact on black candidates. In a letter to the Monitor dated August 8, 2014 (the "August 8 Letter"), the United States claimed that its own statistical analysis indicates that the medical exam has had a disparate impact on black and Hispanic candidates, and that the PRB process had disqualified Priority Hire candidates at a disproportionately high rate as compared to non-Priority Hire candidates. Plaintiffs-Intervenors and the United States both asked the Monitor to direct the City to provide certain information relating to these practices.

In the June 18 Letter and subsequent correspondence, Plaintiffs-Intervenors also expressed concerns regarding the impact on black Priority Hires and other black candidates of two other FDNY practices: a timed run that all candidates must pass immediately prior to being appointed, and administration of a component of the curriculum at the New York City Fire Academy (the "Academy"), known as the Functional Skills Test (the "FST").² Plaintiffs-Intervenors argued that the FDNY had recently "intensif[ied]" these standards in a manner that potentially raised concerns regarding retaliation against Priority Hire candidates. As to the FST,

² The United States did not address the pre-appointment run or the Academy in its August 8 Letter.

Plaintiffs-Intervenors asserted that the FDNY had recently begun timing the performance of probationary firefighters and had newly made the FST a “critical pass,” meaning that probationary firefighters are required to achieve a score of 75 on the FST and one of two other core areas and an overall average score of at least 70. Plaintiffs-Intervenors asked for additional information from the City on both of these practices.

The Monitor has taken the following approach with respect to these allegations. *First*, the Monitor provided the City with an opportunity to respond in writing and the Monitor asked the Parties to discuss the issues in more depth through additional written submissions and on the Monitor’s weekly calls with the Parties. The City responded to the June 18 Letter in correspondence dated July 9, July 16, and July 25, 2014, asserting that, to the extent any statistical disparities may exist, they are job related and required by business necessity. The City has stated that these responses also apply to the allegations raised by the United States in the August 8 Letter. Plaintiffs-Intervenors replied to the City in subsequent correspondence, and the United States replied to the City’s position in its August 8 Letter.

The Monitor and the Parties have discussed the information requests contained in these submissions on several conference calls and through follow-up correspondence. On August 28, 2014, the Monitor proposed that the City provide certain information relating to the issues raised by the other Parties. No Party has objected to this proposal. The City is gathering the information and will produce it on a schedule to be established shortly.

Second, the Monitor is conducting an analysis of the allegations made by Plaintiffs-Intervenors and the United States. The Monitor is investigating the disparate impact concerns raised regarding the medical exam and the PRB process (which, as noted, will be the subject of a separate report to be issued by the Monitor in the near future). The Monitor is also considering

Plaintiffs-Intervenors' concerns regarding the timed pre-appointment run and the Academy.

With respect to the FST component of the Academy curriculum, the Monitor notes that is the Monitor's understanding that the Fire Commissioner is also reviewing whether the FST should remain a "critical pass."

As noted, the Monitor will keep the Court informed of developments related to these issues.

III. Retaliation Issues

The Modified Remedial Order includes several provisions relating to retaliation against persons who participated in or benefited from this litigation or meet other related criteria. *First*, the Modified Remedial Order prohibits retaliation against:

any person because he or she has complained of discrimination against blacks or Hispanics on the basis of their race or national origin in the selection and hiring of entry-level firefighters, or has participated in the investigation of any claim or allegation of such discrimination, or has sought or obtained relief from the Court in this case.

Modified Remedial Order ¶ 17. *Second*, the Modified Remedial Order requires the City to identify and recommend measures to "deter and prevent acts of retaliation or discrimination against any current and future City of New York employee because of their involvement with this litigation." *Id.* ¶¶ 43(g)-(h), 47. *Third*, the City is more generally required to evaluate and enhance the FDNY's EEO function and to eliminate policies and procedures that "perpetuate the effects" of hiring procedures that have had a disparate impact on black and Hispanic firefighter candidates. *See id.* ¶¶ 19, 43.

The Modified Remedial Order also empowers the Monitor to "[p]roactively investigat[e]" matters relating to the Monitor's duties, to monitor and report on the City's compliance with the

Court's order, and to facilitate the resolution of disputes concerning the City's compliance. *Id.* ¶ 54.

As noted in previous Periodic Reports, at the request of the Parties, the Monitor has been observing investigations being conducted by the EEO Office and BITS of several recent instances of alleged retaliation against individuals who participated in the underlying litigation or who received or were eligible for relief under this Court's orders. *See* Monitor's Seventh Periodic Report (Dkt. # 1280) at 6-9; Monitor's Eighth Periodic Report (Dkt. # 1412) at 18-19. These claimed acts of retaliation are alleged to have occurred both at the Academy and among active-duty firefighters.

The FDNY's investigations, and the Monitor's observation of them, have been ongoing during the period covered by this Report. Among other things, the Monitor has conferred with the BITS and EEO investigators on several occasions, reviewed certain documents and other relevant material, and facilitated discussions between the City and the other Parties regarding the timing and procedure of the investigations. In addition, the City has provided the Monitor and the other Parties with weekly updates on the progress of these investigations.

The EEO process is discussed more fully in the Monitor's EEO Report.

IV. Next Written Exam

A. Background of Exam 2000

Exam 2000 was developed following the Court's determination that prior written exams had a disparate impact on black and Hispanic candidates that was not justified by job-relatedness or consistent with business necessity. (Dkt. # 294 at 53-54; Dkt. # 390 at 3.) Special Master Mary Jo White oversaw the development and validation of the exam by the City's testing expert, PSI, in consultation with the other Parties and the Special Master's own testing expert.

The Court approved the City's proposed rank-order and pass-fail use of Exam 2000 to create an eligible hire list on September 28, 2012.³ (Dkt. # 986.) The Court approved these uses despite having found that Exam 2000 created a "statistically significant discrepancy in the pass-fail rates of minority candidates." (*Id.* at 2, 6.) The Parties all agreed that the City's proposed use of Exam 2000 would produce little to no difference in hiring between minority and white candidates because the discrepancy in scores arose only among test takers whose scores were too low to win them a place on the eligibility list. (*Id.* at 4, 6.) The Court concluded, however, that this fact, by itself, did not justify approval of the proposed pass-fail use of Exam 2000. (*Id.* at 6-7.) The Court nevertheless approved the exam based on the City's alternative argument that, despite the adverse impact, Exam 2000 was job-related and consistent with business necessity. (*Id.* at 9.)

Exam 2000 was administered to firefighter applicants between March 15 and August 1, 2012.

Pursuant to Paragraph 7 of the Modified Remedial Order, Special Master White's oversight of the exam process ended after the City submitted the final technical report for Exam 2000, which occurred on September 24, 2012. (Dkt. # 976-1.) The Monitor now has responsibility for the continued use of Exam 2000 and the development of subsequent exams.

See Modified Remedial Order ¶ 7.

The City has informed the Monitor and the other Parties that it will continue to draw from the hiring lists generated following Exam 2000 until approximately June 2017. *See* Monitor's

³ In particular, the Court approved the use of an effective pass-fail, or cutoff, score of 97. Test takers who scored below 97 were not considered for further processing. Scores of test takers who scored greater than 97 were combined with any applicable bonus points (meaning points for New York City residents, certain military veterans, and certain relatives of police officers and firefighters who died in the line of duty), and these candidates were placed in a rank order (from highest score to lowest passing score) on a list of candidates for consideration as entry-level firefighters.

Seventh Periodic Report at 18. To ensure that hiring can continue without interruption, the City plans to administer the next open competitive written exam for entry-level firefighters in 2016.

Id.

B. Use of Equivalent Forms of Exam 2000 in Next Testing Cycle

In conjunction with the prior administration of Exam 2000, PSI developed a number of equivalent test forms, all of which conformed to the technical specifications of the prototype of Exam 2000 that was validated and ultimately approved by the Court. (Dkt. # 1280 at 18.) Each form was reviewed by PSI and experts for the United States, Plaintiffs-Intervenors, and the Special Master. PSI then subjected the alternate forms to an equivalency study. (*See* FDNY Firefighter Test Development and Validation Report (the “Technical Report”), filed September 26, 2012, Dkt. # 976-1 at 62-63.)

Two of the equivalent forms developed and approved in this manner were not administered in the 2012 exam cycle and remain available for future exam cycles. (Dkt. # 1280 at 18.) The City has stated that it plans to develop additional equivalent forms for potential administration in 2016. (*Id.*) Accordingly, the City asked the Monitor on February 19, 2014 to authorize it to begin the procurement process to enter a contract with PSI to develop these forms. (*Id.* at 18-19.)

The Monitor and the Parties discussed the City’s request on several conference calls in February and March, 2014. No Party objected to the City’s proposal, and the Monitor approved it on April 23, 2014. The proposed contract, in the amount of \$2.6 million, will be the subject of a public hearing on September 18, 2014.

With the Court’s approval, the Monitor has retained Dr. Shane Pittman, the testing expert used by Special Master White in connection with the development of Exam 2000. The Monitor anticipates consulting with Dr. Pittman in connection with the development and use of additional

equivalent forms of Exam 2000 and other issues relating to the administration of Exam 2000 and the potential need to develop a new written examination for future testing cycles.

For written exams to be given after 2016, a determination will be required as to whether to continue to develop equivalent forms of Exam 2000, a process the City has noted is costly and time consuming. *See City of New York's Interim Report on Its Top to Bottom Assessment of the Steps in the Selection Process for Entry-Level Firefighters* at 22-24. One potential alternative raised by the City is to use a firefighter test used in another jurisdiction. *Id.* at 23-24. Doing so would require, at a minimum, an assessment of the "transportability" of the exam. Federal regulations allow the use of exams from other sources, provided that: (i) the alternative source has been subjected to validity studies; (ii) the job-relatedness criteria used in validating the alternative test are substantially the same as those applicable to the FDNY firefighter position; and (iii) studies have been conducted – either in the jurisdiction from which it originates or in New York City – of "test fairness for each race, sex, and ethnic group which constitutes a significant factor" in the New York City labor market. 29 C.F.R. § 1607.7.

These and other options will require careful consideration, and the Monitor intends to consult with the City and the other Parties on these issues in the first or second quarter of 2015.

C. Timing and Logistics

The City has previously noted that uncertainty over the timing of the administration of Exam 2000 in 2012 and unanticipated delays in the development of the exam made certain recruitment efforts more difficult. *See City's Recruitment Report* (Dkt. # 1166) at 9-11. As detailed in the Monitor's Recruitment Report, the Monitor has asked the City to provide the schedule for upcoming filing and exam periods as promptly as possible. In addition, the City previously listed improved communications between the City's Department of Citywide Administrative Services ("DCAS") and the FDNY on this issue as one of its core "Strategies for

Improvement” in its Recruitment Report. The Monitor plans to follow up to ensure that the City fulfills this and other recruitment related goals. *See* Monitor’s Recruitment Report.

Currently, the City has two computer testing centers that can accommodate 200 test-takers at a time and plans to expand capacity at those centers to accommodate 400 test-takers at a time by June 2014. A third computer testing center under construction in the Bronx will add 100 more seats and additional locations for computer testing centers in Queens and Staten Island have been identified with planned designs for an additional 200 seats. The City estimates that DCAS could administer the exam to 4,200 candidates at the testing centers over a weekend, and 20,000 applicants over approximately 10 days.

The Monitor requests that the City provide updates on these issues on a periodic basis.

V. Additional Issues

In addition to the activities discussed above and in the Monitor’s Recruitment and EEO Reports, the Monitor has been involved in a range of additional issues over the past three months. They are described below.

“Special Purpose Meetings.” The Monitor organized and hosted three in-depth “special purpose” meetings in July and August 2014 with key personnel from ORD, the EEO Office, BITS, and the FDNY’s Data Analytics Unit. These meetings were also attended by counsel for all Parties. The meetings provided the Monitor and the Parties the opportunity to obtain updates on the City’s efforts to comply with the Modified Remedial Order directly from the relevant City personnel. Information provided at those meetings was important in preparing the Monitor’s Recruitment Report and the Monitor’s EEO Report. A follow-up meeting with ORD personnel is scheduled for September 19, 2014. The Monitor anticipates further special purpose meetings on these topics on a periodic basis.

Proposed Disparate Treatment Settlement. On April 28, 2014, the Court gave preliminary approval to a proposed settlement of Plaintiffs-Intervenors' claim of intentional discrimination. Several provisions of the settlement bear directly on the Monitor's responsibilities. *See* Monitor's Eighth Periodic Report (Dkt. # 1412) at 4. These include the City's agreement to use its best efforts to recruit African American test-takers in proportions closely approximating the representation of age-eligible African American New Yorkers in the City's labor market, plus three percent; the appointment of a Diversity Advocate and a Chief Diversity and Inclusion Officer; and the creation or expansion of educational and other opportunities to enhance the ability of minorities to pursue careers in firefighting.

The Monitor has taken steps with respect to each of these aspects of the proposed settlement. The City's recruitment goals are addressed in the Monitor's Recruitment Report. The Monitor has met and spoken with the new Diversity Advocate on several occasions, and has communicated with the Parties regarding the scope of the Diversity Advocate's role and certain topics raised by the Diversity Advocate. The City has kept the Monitor and the other Parties apprised of efforts to hire a Chief Diversity and Inclusion Officer, and the Monitor's Recruitment Report requests information on what that role will entail. As to outreach, the Monitor will meet in October with a working group established to consider ways to expand outreach to city schools.

Civil Service Commission Appeals. The Parties have also worked toward ensuring that appeals by firefighter candidates to the Civil Service Commission are addressed in a timely manner. In response to concerns raised by the United States and the Vulcan Society, the City has produced information about pending appeals to the Civil Service Commission, some of which have been pending since late 2013. Plaintiffs-Intervenors and the United States have both

expressed concerns about the length of this delay, especially since many of the candidates who have filed appeals are Priority Hire candidates.

The Monitor has spoken with the City's DCAS to understand the reasons for the delay and has asked DCAS to provide concrete suggestions for accelerating the appeals process. The Monitor expects to receive those suggestions very shortly, and will work with the City and the Parties to ensure that the process is as prompt and thorough as possible.

Data Collection and Analysis. Working with the Monitor and the other Parties, the City has created a spreadsheet that collects and integrates information from a variety of sources regarding the process of screening firefighter candidates from the written exam through the Academy. The Monitor and the Parties have made extensive use of this data compilation, and are engaged in ongoing dialogue concerning the formatting and accuracy of the spreadsheet as well as questions regarding how, by whom, and how frequently the data will be updated. The Monitor also asked the FDNY's Data Analytics Unit to review and suggest improvements to the spreadsheet, which was created by the City's Law Department.

Other Issues. On weekly calls and in correspondence, the Parties and the Monitor consider a range of issues relating to enforcement of the Modified Remedial Order. During the period covered by this report, these have included the following:

- Monitoring the progress and analyzing the results of an audit performed by the Data Analysis Unit of the way in which prospective firefighter candidates are awarded points in connection with their ranking on the civil service list based on their residency in New York City;

- Drafting and finalizing revisions to the notifications issued to candidates who are hired subject to an extended probationary period or stipulation regarding drug or alcohol testing;
- In conjunction with the Parties, reviewing the content and timing of various other communications to Priority Hire candidates and firefighters, including Notices of Proposed Disqualification and Notices of Final Disqualifications, as well as letters regarding eligibility for certain benefits;
- Monitoring the large number of open information requests to the City from the Monitor and the other Parties, principally in the areas of recruitment, EEO, and data analytics;
- Reviewing and commenting on materials related to EEO training provided by the City;
- Reviewing and commenting on draft “climate surveys” administered to probationary firefighters at the end of the Academy as well as reviewing the data produced by such surveys;
- Working with the Parties to resolve disputes over whether the City should provide Plaintiffs-Intervenors and the United States with copies of certain reports prepared by the City’s consultants;
- Considering the Parties’ positions regarding the timing and format for the next update of the City’s Attrition Mitigation Plan, *see* Modified Remedial Order ¶ 31;
- Reviewing and commenting on a draft document prepared by the City designed to tell candidates what to expect in connection with the medical exam; and

- Obtaining information from the City about inquiries with the EEO office as well as complaints filed with that office.

Dated: September 15, 2014
New York, New York

/s/
Mark S. Cohen