

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES 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 SECOND PERIODIC REPORT TO THE COURT

Pursuant to paragraph 59 of this Court's Remedial Order and Partial Judgment, Permanent Injunction, and Order Appointing Court Monitor dated December 8, 2011 (the "Remedial Order") (Docket # 765), Mark S. Cohen, in his capacity as Court Monitor (the "Monitor") in the above-captioned matter, respectfully submits the Monitor's second 90-day report concerning the status of the parties' compliance with the Remedial Order.

I. Overview

Paragraph 59 of the Remedial Order requires the Monitor to "provide periodic reports to the court and to the Parties concerning the status of the Parties' compliance with this Order and other orders of the court or the Court Monitor, including their progress, any barriers to compliance, and potential areas of noncompliance." Remedial Order ¶ 59. The Remedial Order further provides that "[t]he Court Monitor shall file a report with the court under this provision at least once every 90 days." *Id.* The Monitor submitted his first periodic Report to the Court (the "First Report") on March 7, 2012. Accordingly, this Report sets forth an update regarding the parties' compliance with the terms of the Remedial Order, and provides the Monitor's observations on the progress of the parties in fulfilling the goals of the Remedial Order.

The Monitor has continued to hold conference calls with the parties on a regular basis (typically every week and occasionally every two weeks), during which the Monitor has reviewed upcoming deadlines with the parties, discussed ongoing tasks required to be performed by the City pursuant to the Remedial Order, and addressed procedural and substantive issues that are raised by the parties. The Monitor continues to find these weekly calls to be productive in ensuring compliance with specific tasks and deadlines set forth in the Remedial Order. Additionally, the Monitor has met with several members of the FDNY's Office of Recruitment and Diversity ("ORD") and with the FDNY's Assistant Commissioner of Equal Employment

Opportunity (“EEO”), to gain a better understanding of the department, its culture, its accomplishments, and the challenges presented in this matter. The Monitor is also conducting weekly calls with the recruitment and EEO consultants who have been retained by the City pursuant to the Remedial Order, during which the City’s consultants have described the steps they have taken thus far in carrying out the independent investigation mandated by the Remedial Order.

The sections below summarize the steps taken by the parties and the Monitor since the Monitor’s First Report, including the work of the consultants retained by the Monitor and City, the development and administration of Exam 2000, firefighter applicant recruitment, the City’s Attrition Mitigation Plan, EEO tasks, and the document retention plan for the City. This Report also notes additional issues that have emerged as the parties have undertaken the performance of their assignments under the Remedial Order.

II. Role of Consultants

Paragraph 71 of the Remedial Order authorizes the Monitor to “hire staff or expert consultants to assist the Monitor in performing his or her duties.” Remedial Order ¶ 71. As discussed in the Monitor’s First Report, the Monitor has retained Manitou, Inc. (“Manitou”) to assist the Monitor with his responsibilities under the Remedial Order, along with certain other tasks that the Monitor has been required to perform in the course of his engagement. To date, Manitou has assisted the Monitor with developing a research plan for examining the diversity efforts of the FDNY to date, gathering information concerning the diversity efforts of fire departments in comparable jurisdictions, and evaluating additional matters that have arisen concerning the FDNY. The Monitor expects that Manitou’s efforts during the next 90 days will be focused largely on these research efforts, including continuing to coordinate its research

efforts with the City's consultants as part of the top-to-bottom assessment to be performed by the City and its consultants pursuant to paragraph 32 of the Remedial Order.

A. Consultant Kick-Off Meeting

On April 26, 2012, the Monitor organized a meeting with the parties, Manitou, and the City's consultants to establish a work-plan for coordinating and performing the upcoming series of tasks required under the Remedial Order. Prior to the meeting, the Monitor requested and the City's consultants each provided draft work-plans for their respective tasks under the Remedial Order. With the assistance of Manitou, the Monitor proposed a consolidated work-plan to synthesize the plans of each of the City's consultants.

B. Coordination with Consultants Retained by the City

The Remedial Order provides that the City's consultants, together with the City and the Monitor, should "cooperatively develop a plan for [each] consultant's research subject to the approval" of the Monitor, to culminate in each consultant submitting a report for review by the Monitor. Remedial Order ¶¶ 26-30, 48-51. During the April 26 Kick-Off Meeting with the consultants, the Monitor proposed that the City's consultants and Manitou coordinate some of their efforts; however, the City's preference has generally been to have its consultants proceed on a separate track in carrying out their assignments.

Consistent with the Remedial Order, the City's consultants have participated in weekly periodic conference calls led by Manitou, to provide updates on assignments under the Remedial Order, discuss any challenges presented, and coordinate the scheduling of meetings and interviews as the City deems appropriate. The City's consultants recently suggested a coordinated visit to the New York Police Department for the purpose of obtaining information about its hiring practices as a comparable data point in the same locality, which is currently

being scheduled. The City's EEO consultant has indicated that the City may be amenable to conducting certain interviews of former senior personnel of the FDNY on a joint basis from time to time.

During one of the Monitor's weekly calls with the City's consultants, the City's EEO consultant proposed exchanging research materials on best practices for recruitment and diversity in the fire service and analogous contexts. Manitou has created a central electronic repository for materials related to all the consultants' best practices research, to which the City's consultants have access to review and post materials.

III. Firefighter Test Development and Administration

The Monitor notes that the City and the parties worked with Special Master Mary Jo White in the development of Exam 2000, and that exam administration began on March 15, 2012, and continued through late April 2012. As noted in the Monitor's First Report, test development and administration remained within the purview of the Special Master (Remedial Order ¶ 7), and the Monitor has remained generally informed about the Special Master's work through party updates and communications with the Special Master. As set forth in Section IV(B) *infra*, the Monitor has been heavily involved in the parties' applicant outreach efforts with regard to registering for and preparing to take the examination. The Monitor continues to expect to receive, pursuant to paragraph 15 of the Remedial Order, advance notice and information from the City regarding any step in any process for the selection of entry level firefighters, except with regard to the steps specifically enumerated in paragraph 7 of the Remedial Order, over which the Special Master continues to have oversight.

The City has informed the Monitor that the Computer Based Test ("CBT") was administered to applicants who registered to take Exams 2000 and 2500 every day from March

15, 2012 through April 20, 2012. The City has also advised that additional sessions were held on April 26, 2012 for applicants who had missed their first scheduled test session in the last three days of testing or who experienced a technical problem during their examination, as well as applicants who had been on active military duty when they were initially scheduled to take the test.

The City has advised the Monitor that the City will continue to periodically administer the CBT to registered applicants who missed the March 15-April 20, 2012 testing period due to active military service. The City has also informed the Monitor that Candidate Protest Review Sessions, required under Civil Service Law § 50-a and consistent with the Court's decision on the City's motion to modify the requirements of Civil Service Law § 50-a (Docket # 802), were held between May 11 and May 19, 2012. The City anticipates that the Test Validation Board will begin meeting during the first week in June to review the protests received. This process is being supervised by Special Master White.

IV. Firefighter Applicant Recruitment

A. Optional Survey

Paragraph 25 of the Remedial Order provides that “[t]he City of New York, specifically ORD and the Department of Citywide Administrative Services (“DCAS”), shall, in consultation with the Court Monitor, the United States, and the Injunctive Relief Subclass, design an optional survey which the City of New York shall administer to all individuals who take Exam 2000 at the time they take Exam 2000.” Remedial Order ¶ 25. As discussed in the Monitor's First Report, the parties reached agreements on the optional survey, and the City's test consultant, PSI, incorporated the finalized optional survey into the end of the computer-based test that the City developed under the supervision of Special Master White. The optional survey was provided to

each of the 42,161 applicants who took the computer-based test. Of these applicants, at least 41,553 applicants completed one or more of the questions in the survey. The City's test consultant, PSI, transferred the survey response data to the City on May 18, 2012. The City has advised the Monitor that the data will be organized and analyzed in the coming months, pursuant to paragraph 25 of the Remedial Order.

B. Applicant Outreach

As the Court stated in its Findings of Fact dated September 30, 2011 (Docket # 741), “[t]he purposes of the FDNY’s remedial firefighter recruitment effort must be to (1) change the perception that the job is available only to white male candidates; (2) increase awareness of the benefits of the job across all communities in New York City; and (3) thereby change the applicant pool to more closely reflect the population of New York City.” Memorandum Findings of Fact at 38. In the 90 days since the Monitor’s First Report, the parties have continued to engage in several applicant outreach programs, each of which is described in detail below. The Monitor’s staff and consultant also met with FDNY Assistant Commissioner Michele Maglione and Deputy Director Nafeesah Noonan on May 24, 2012 and discussed the recent results of the FDNY’s applicant outreach. Assistant Commissioner Maglione assisted the Monitor’s consultant by identifying multiple categories of data maintained by the City, and the City has agreed to provide such data. The Monitor commends the efforts of Assistant Commissioner Maglione, Deputy Director Noonan, and their team at the FDNY’s Office of Recruitment and Diversity, as described during those interviews.

1. Phone Bank Outreach

As discussed in detail in the First Report, after the application period for Exam 2000 closed, the FDNY’s ORD established a phone bank that made follow-up calls to all pending

applicants whose applications remained incomplete or otherwise required follow-up (e.g., for failure to submit either the required fee or documentation to support a fee waiver request). This phone bank was staffed with firefighters, including members of the Vulcan Society, the FDNY Hispanic Society, and the United Women Firefighters, as well as 11 additional temporary employees hired by ORD to work as agents on the phones. ORD's phone bank also made 16,658 calls to applicants who missed their scheduled test date to encourage them to reschedule and take the CBT. Additionally, 47,954 robo-calls from FDNY Fire Commissioner Salvatore J. Cassano were made to applicants the day before they were scheduled to take the exam to remind them of their scheduled date and wish them luck.

2. E-mail and Text Messaging Outreach

The City has informed the Monitor that the FDNY has communicated with applicants to encourage them to proceed to take the CBT and to attend the tutorial sessions offered by the FDNY. Specifically, three additional E-Alerts, including one featuring a video of Commissioner Cassano encouraging applicants to take the CBT and wishing them luck, were sent to all registered applicants for whom the FDNY had e-mail addresses. In addition, e-mails were sent to applicants notifying them of the tutorials being offered by the FDNY.

The FDNY's ORD has further continued to develop and produce its "Profiles in Bravery," a series of video messages from current firefighters that are designed to inspire and help applicants who will be taking the entry-level firefighter examination. The ORD has posted two new "Profiles in Bravery" videos since the Monitor's First Report, and the City has advised that there have been a total of 49,118 views of all five "Profiles in Bravery" videos.

3. Tutorial Programs

The FDNY's ORD offered tutorial sessions to all applicants for Exam 2000 over a seven-

week period in February and March 2012. The tutorials were also made available online to applicants. A phone bank operated by the FDNY's ORD also made 59,547 calls and reached 29,458 applicants to schedule applicants to attend the City's tutorial sessions. The Monitor has been advised by the City that 8,635 applicants attended the live tutorial sessions, and that 19,883 individuals visited the tutorial after it was made available online.

As noted in the Monitor's First Report, the Vulcan Society also held tutorial sessions for Exam 2000 and Exam 2500. The Vulcan Society hired an outside test expert at its own expense to prepare tutorial materials. The Vulcan Society held a total of 24 sessions in Brooklyn, Queens, Manhattan, and the Bronx on weekday evenings and Saturday mornings from February 27 – March 31, 2012. The Monitor has been advised by the Vulcan Society that 2,920 individual visitors and 3,854 total visitors attended the sessions. The Vulcan Society maintained sign-in sheets for each of its tutorial classes, and the Vulcan Society has compiled data regarding attendance and shared it with the parties and the Monitor.

The Monitor believes that the time, energy, and resources devoted to the respective tutorial sessions by the City and the Vulcan Society were beneficial to exam applicants, and helped achieve the historic number of candidates that participated in the examination. The Monitor commends the parties for their efforts in these tutorial sessions.

C. Recruitment Consultant

The City has advised the Monitor that the City's independent recruitment consultant, Verna Meyers, along with her colleague, Doug Reynolds of VMCG, have been conducting interviews of FDNY staff, as well as other City employees. Ms. Meyers has been conferring regularly with the City's independent EEO consultant, the Monitor, and the Monitor's consultant. Ms. Meyers has also participated regularly in the weekly consultant phone call led

by the Monitor's consultant, Manitou, Inc.

VMCG has conducted meetings with members of both the Vulcan Society and the FDNY Hispanic Society to discuss their views on the FDNY's diversity efforts and other issues pertinent to the Remedial Order. VMCG has also met with senior staff for the FDNY and the City, including Fire Commissioner Salvatore J. Cassano, Chief of Department Edward Kilduff, First Deputy Commissioner Daniel Shacknai, Deputy Commissioner Frank Gribbon, Associate Commissioner Maldonado, Assistant Commissioner Maglione, and Georgia Pestana, Chief of the Labor and Employment Law Division in the City's Law Department. During these meetings, VMCG requested data on the FDNY's recruitment efforts including details regarding its advertising efforts and the number of applicants who completed the filing process and sat for the firefighter exams.

V. Attrition Mitigation Plan and Reassessment of Entry-Level Firefighter Selection

Paragraph 31 of the Remedial Order directs that "[t]he City, in consultation with the Court Monitor and the Parties, shall draft and implement a written plan to mitigate and diminish rates of voluntary candidate attrition between different steps of the City's process for the selection of entry-level firefighters." Remedial Order ¶ 31. As noted in the Monitor's First Report, the City submitted its Draft Attrition Mitigation Plan to the parties on December 1, 2011, and the parties and the Monitor then and provided comments to the City. The parties and the Monitor agree that the City's attrition mitigation plan will continue to evolve over the length of the Monitorship based on the success of different approaches and input from the Monitor and the parties. It appears likely that some aspects of efforts to reach a diverse base of candidates during the recruiting process may also result in mitigating the attrition of candidates who were successfully recruited by FDNY efforts.

VI. EEO Compliance Reform

A. EEO Compliance Issues

Paragraph 47 of the Remedial Order provides that the independent EEO consultant shall submit a report concerning the City's EEO compliance activities with respect to the FDNY that, among other issues, "evaluates the effectiveness of equal employment opportunity law compliance activities," "identifies best practices used by other offices responsible for ensuring comparable municipal department's compliance with applicable equal employment opportunity laws and policies, and particularly, best practices used by EEO offices in other fire departments nationally," and "recommends a detailed compliance program to be carried out by the EEO Office including specific compliance activities, and which references specific metrics and goals to be used to evaluate the EEO Office's performance in carrying out each activity." The EEO consultant's report is to be based upon a research plan to be developed by the consultant in cooperation with the City and the Monitor, "subject to the approval of the Court Monitor." Remedial Order ¶ 48.

The City's independent EEO consultant, Merrick T. Rossein, has been conducting interviews of FDNY staff, including Margo Ferrandino, the FDNY's Assistant Commissioner of Equal Employment Opportunity, and Lisa Nakanishi, Executive Director of the Division of Citywide Equal Employment Opportunity with DCAS. Professor Rossein has also attended and observed several EEO training sessions for FDNY personnel and provided initial feedback regarding potential improvements to the EEO training process. Professor Rossein has conferred regularly with the City's independent recruitment consultant and the Monitor's staff and consultants, and has also jointly interviewed certain members of the FDNY Hispanic Society and the Vulcan Society in conjunction with VMCG.

Paragraph 42 of the Remedial Order provides that “each investigator and manager in CID, and each member of the Personnel Review Board (“PRB”) shall receive interactive training tailored to educate the recipients how to practically apply applicable equal opportunity laws and policies in the performance of their responsibilities in CID or on the PRB, respectively.” Remedial Order ¶ 42. The City has advised the Monitor that Professor Rossein and a colleague, Natalie Holder-Winfield, have begun developing the interactive training program for investigators and managers of FDNY’s CID pursuant to paragraph 42 of the Remedial Order. Professor Rossein is scheduled to submit the curriculum to the Monitor on June 13, 2012 for the Monitor’s review and approval in accordance with the Remedial Order. Subject to such approval by the Monitor, the training sessions are scheduled to commence on June 26, 2012 on a pilot basis, with the first rollout of the new curriculum being to CID staff who will be processing candidates for the FDNY’s EMS Division this summer.

Additionally, the Monitor met with Assistant Commissioner Margo Ferrandino on March 12, 2012 and again on May 24, 2012, to discuss the FDNY’s current EEO compliance activities. Assistant Commissioner Ferrandino conveyed that she has devoted significant effort to the process of closing the files that remained open as of her arrival, and investigating new complaints made since she began at the FDNY.

B. Top-To-Bottom Assessment

In addition to submitting the report, the Remedial Order tasks the independent EEO consultant with consulting with the City, the City’s recruitment consultant, the Parties and the Monitor to “conduct a comprehensive top-to-bottom assessment of all steps in its process for the selection of entry-level firefighters that evaluates the strengths and weaknesses of the City’s current selection process as a whole and of individual steps in that process.” Remedial Order ¶

32. The Monitor has engaged in initial discussions with the City's independent consultants regarding this top-to-bottom assessment, and the consultants have developed a work-plan for the execution of the top-to-bottom assessment.

VII. Document Retention and Preservation

A. Document Retention and Preservation Order.

The Remedial Order provides that “[t]he Court Monitor, in consultation with the Parties, shall prepare and file a Document Retention and Preservation Order, for approval by the court, directing the City of New York to retain, preserve, and maintain specified broad categories of documents that are relevant to evaluating the City's compliance with the Order, including documents currently in existence and any document which will be created in the future.” Remedial Order ¶ 52. The Remedial Order further provides that the Monitor “may amend or supplement the Document Retention and Preservation Order at any time.” *Id.*

As noted in the Monitor's First Report, the Monitor circulated a draft Document Retention and Preservation Order to the parties in January 2012, and the parties each timely submitted their respective comments to the draft order on February 1, 2012. Following a conference call with the City in February 2012 concerning the City's logistical infrastructure for documents, the Monitor revised the Document Retention and Preservation Order and submitted a revised draft of the order to the parties. The City provided comments to the revised draft on April 20, 2012, and the Monitor has responded to those comments.

The Monitor received confirmation from the City during the Monitor's first conference call with the parties on December 13, 2011, that the litigation hold from the underlying litigation in this matter is still in place. The Monitor further notes that the parties have cooperated and worked expeditiously throughout the process of revising the Document Retention and

Preservation Order, and the Monitor expects the Document Retention and Preservation Order to be finalized and submitted to the Court in the near future.

B. Access to Information

The Remedial Order grants the Monitor with “access, on short notice, to individuals, information, documents, materials, programs, services, facilities and premises under the control of the City of New York that the Monitor requires to perform his or her duties under this Order.” Remedial Order ¶ 66. The Monitor notes that all of the parties, including the City, have been forthcoming and cooperated in providing the Monitor with access to information. Accordingly, the City has continued to fully comply with paragraph 66 of the Remedial Order to date.

Pursuant to paragraph 67 of the Remedial Order, the City was also required to “designate persons responsible for handling inquiries by the Court Monitor, including without limitation persons responsible for the areas of document retention, CID, ORD, and PRB, which persons’ duties shall include taking calls from the Court Monitor and promptly responding to the Court Monitor’s communications.” Remedial Order ¶ 67. As noted in the Monitor’s First Report, after the issuance of the Remedial Order, the City designated FDNY First Deputy Commissioner Daniel Shacknai as the person responsible for handling inquiries from the Monitor. The Monitor met with First Deputy Commissioner Shacknai and communicated with him on several occasions regarding inquiries to the FDNY.

On March 20, 2012, the City appointed José Maldonado as FDNY Associate Commissioner for Compliance. In this role, Associate Commissioner Maldonado now serves as the contact person for the Monitor pursuant to paragraph 67 of the Remedial Order, and helps ensure the City’s compliance with the Remedial Order. The Monitor met with Associate Commissioner Maldonado on April 26, 2012 as part of a meeting with the consultants and

parties, and has communicated with him on several occasions since then. Associate Commissioner Maldonado has been very helpful in assisting the Monitor in scheduling meetings with FDNY officials, and the Monitor looks forward to the continued cooperation of Associate Commissioner Maldonado and the FDNY.

VIII. Party Dispute Regarding Fax Machine Communications

On January 25, 2012, Plaintiff-Intervenors Vulcan Society, Inc. wrote to the Monitor expressing concerns regarding specific communications distributed within firehouses by use of FDNY fax machines. This issue is addressed in a separate filing by the Monitor which is being made contemporaneously herewith.

IX. Continuing Themes and Next Steps

Over the course of the past 90 days, certain issues have continued to emerge as potentially significant in connection with the Remedial Order. The Monitor will be discussing these issues further with the parties.

A. Senior Leadership Communication with the Outside Community

The Monitor continues to study the potential need for an increase in positive communication by senior leadership of the FDNY about efforts to increase diversity in the FDNY. As noted in the Remedial Order, the City and its residents benefit from a broader range of talent seeking to qualify for a firefighting career. *See Findings of Fact at 24-32.* Communication by the FDNY and City, particularly at the senior level, can play an important role in accomplishing this goal.

B. Communication within the FDNY

The Monitor also continues to review whether and how improving communication within the FDNY on diversity-related issues can help achieve the goals of the Remedial Order. The

Monitor maintains his intention, in consultation with the City and its consultants, to explore ways that the City can involve firefighters in diversity efforts and improve the FDNY's policies and procedures to ensure that all firefighters understand the FDNY's commitment to diversity and are able to work in a fair and inclusive workplace.

C. Need for Empirical Data in Connection with Outreach

The Monitor continues to emphasize the need for empirical data in approaching the programs and objectives of the Remedial Order. Manitou has likewise expressed the desire to collect data at every step in the remedial process to the City's consultants, who also are gathering data from the City. The Monitor continues to believe that this empirical data will help the City and the Court to assess the efficacy of remedial measures over the life of the Remedial Order. Some of the data relevant to this analysis includes data maintained by the City in databases of expression of interest cards filled out by potential applicants, and demographic data maintained by the City concerning applicants and progress of the applicant pool through the exam process, as well as statistics from other city agencies concerning their recruitment efforts and makeup of the resulting workforce.

D. Near Term Schedule

Now that the development and administration of Exam 2000 are complete, the Remedial Order will begin to enter the next phase of the firefighter applicant process, beginning with the review of the training provided to the FDNY's Candidate Investigative Division and the selection of candidates. The Monitor plans on being involved in each step in the candidate selection process, as required under the Remedial Order.

The Monitor is also working with its own consultants to assess the City's recruiting and hiring of entry level firefighters as set forth in the Remedial Order, reviewing the experience of

