

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

FILED
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CLEER US DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY DM
DEPUTY

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
)
CITY OF AUSTIN, TEXAS,)
)
Defendant.)

Civil Action No. 1:14cv533-LY

ORDER GRANTING SUPPLEMENTAL RELIEF

Having considered the movants' Joint Motion for Supplemental Relief (Docket No. 83),
the Motion is GRANTED subject to the following terms:

(1) The Court grants the International Association of Firefighters, Local 975, rights to participate with the United States and City of Austin (City) in discussions and resolution pursuant to Parts III.C.6 and IV of the Consent Decree entered by this Court on November 7, 2014 (Consent Decree), as described below. This participation will arise only if the United States objects in writing to the City's proposed selection device(s), to include the manner of use of any selection device(s), for entry-level firefighters. This Order should be read in conjunction with Parts III.C.6 and IV of the Consent Decree. To the extent this Order is inconsistent with the Consent Decree, this Order controls.

(2) Part III.C.6. of the Consent Decree is modified to read as follows:

The City will use lawful selection procedures to select qualified applicants for hiring into the position of fire cadet as set forth below.

a. If a Selection Device(s) used by the City has statistically significant disparate impact on African Americans or Hispanics, it must be shown to be job related for the fire cadet position

in Austin and consistent with business necessity in accord with Title VII. In deciding to use a Selection Device, the City shall make reasonable efforts to explore the availability of Selection Devices which have been shown to reduce or eliminate disparate impact upon African-Americans and Hispanics in the selection of fire cadets without diminution of job-relatedness. If it identifies such alternatives, it must use them, subject to any objections raised by the City to the cost of such alternatives, which shall be resolved by agreement of the Parties (collectively, the United States and the City) and the International Association of Firefighters, Local 975 (AFA) or by the Court if the Parties and AFA cannot agree.

b. The City will inform the United States not later than 60 days before any planned administration of a new Selection Device(s). At that time, the United States may request all information available to the City about the development and/or validation of the proposed Selection Device(s), including but not limited to: a description of the Selection Device(s); a description of the manner in which the City intends to use the Selection Device(s); the known or likely disparate impact, if any, of the intended use of the Selection Device(s); all validation studies, analyses, test plans, and any other evidence of job relatedness of the Selection Device(s) available to the City, including data underlying such studies, analyses, test plans, and other evidence; and any basis for a conclusion that the City's proposed use of the Selection Device(s) is job related for the fire cadet position and consistent with business necessity. The City's submission shall also identify any other Selection Devices, as well as any other manners of using the chosen Selection Device(s), considered by the City. If the United States does not notify the City in writing that the United States has an objection within 15 business days of receiving the City's complete submission, the City may administer the Selection Device(s). Any written objection by the United States that is sent to the City shall be sent simultaneously to AFA. All

notices described herein that are provided to AFA by the City or the United States shall be sent to the following address:

Austin Firefighters Association, Local 975
Attention: AFA President
7537 Cameron Road
Austin, Texas 78752

c. After administering any Selection Device(s) and before announcing the results to candidates or deciding upon the method of use, in recognition that the job-relatedness and validity of an exam can often be evaluated fully only after the exam has been administered, the City will provide to the United States in Excel format the name, unique identifier, race, national origin, exam score and any applicable sub-scores, and test form identification for all applicants to whom the Selection Device was administered. The City shall submit simultaneously to AFA the same information identified in the foregoing sentence except that the City shall not provide the names and unique identifiers of any applicant to AFA. At the same time, the City will cause its testing vendor to provide to the United States the answer keys and test question responses for each candidate for each Selection Device. The City will provide AFA aggregated data that identifies the adverse impact, if any, based on applicants' race and ethnicity, for each test question of each Selection Device. The City, United States, and AFA will maintain all data provided pursuant to this paragraph subject to appropriate security and confidentiality measures consistent with Paragraph h. If the United States determines that the City's proposed use of the Selection Device(s) does not comply with Title VII and with this Decree, the United States shall notify the City and AFA in writing within 15 business days of receiving the above-listed information that the United States objects to the City's use of the Selection Device(s).

d. Upon completion of the administration of all components of the City's fire cadet selection process upon which any eligibility list may be based, the City will provide to the

United States in Excel format the name, unique identifier, race, national origin, scores and applicable sub-scores on all components of the selection process, any applicable combined and/or final scores, military or other bonus points, and ranks for each applicant who participated in the selection process, if applicable. The City shall submit simultaneously to AFA the same information identified in the foregoing sentence except that the City shall not provide the names and unique identifiers of any applicant to AFA. If after the administration of all components of the City's selection process on which any eligibility list may be based, the United States determines that the City's selection process does not comply with Title VII and with this Decree, the United States shall notify the City and AFA in writing within 15 business days of receiving the above-listed information that the United States objects to the City's selection process.

e. Any objection(s) to the City's use of a Selection Device or overall selection process made by the United States pursuant to Subparagraphs c or d, above, shall be resolved by the Parties and AFA under the dispute resolution procedures in Part IV of this Decree. If either Party or AFA submits any such objection(s) to the Court for resolution under Part IV.A, the Parties and AFA agree that the burdens of proof set forth in 42 U.S.C. § 2000e-2(k) shall apply in resolving such objection(s). If the Court determines that the City's proposed Selection Device, manner of use or overall process does not comply with Title VII, the City shall not use that Selection Device in that manner or shall not employ that process without whatever modifications the Court may order. AFA shall have no right of appeal of any order issued by this Court concerning the resolution of any objection. If an objection to the City's use of a Selection Device for the fire cadet position or overall hiring process for the fire cadet position is made by the United States pursuant to this Paragraph, no person shall be certified for appointment as a fire cadet except by written agreement of the Parties and AFA or order of the Court.

f. Following the administration of a fire cadet hiring process that was subject to the review and objection procedures set forth in Subparagraphs a-e, above, the City shall be authorized to administer and use the Selection Device(s) agreed to by the Parties pursuant to Subparagraph b above, or ordered by the Court pursuant to Subparagraph e, above, during the life of this Decree, subject to the requirements of Subparagraph g, below. For any subsequent administrations, the City will provide the United States and AFA with at least 90 days' notice of its intent to announce a new fire cadet selection process. The City's notice shall state whether the City intends to administer the same Selection Devices and overall selection processes as previously agreed to by the Parties and AFA or ordered by the Court, or whether it intends to make any changes to the Selection Devices or their manner of use.

g. If the City intends to make any changes to the Selection Devices or their manner of use in a subsequent administration of a fire cadet hiring process, the review and objection procedures set forth in Subparagraphs b through e, above, shall apply. If the City does not intend to make any changes to the Selection Devices or their manner of use in a subsequent administration of a fire cadet hiring process, including the limited use of the 2013 exam set forth in this Decree, the City will produce to the United States and AFA the data and information required by Subparagraphs b through d, above, for the subsequent administration.

h. Due to the importance of test security, along with concerns about the proprietary nature of test development materials, all correspondence and communications between and among the Parties and AFA and their test developers, consultants and/or experts in connection with performance of the obligations set forth in Subparagraphs a through d, above, shall be held confidential and shall not be disclosed to any third party in the absence of a Court order

compelling such disclosure, or the written consent of the adverse party, or as otherwise required by law.

(3) Part IV of the Consent Decree is modified to read as follows:

IV. DISPUTE RESOLUTION

A. The Parties shall attempt in good faith to resolve informally any disputes that arise under this Decree. The Parties and AFA will similarly attempt in good faith to resolve informally any objections that are raised by the United States pursuant to Part III.C.6. If the Parties and AFA, as appropriate, are unable to resolve the dispute expeditiously, either party or AFA may submit the disputed issue to the Court for resolution upon 15 days' written notice to the other entity(ies), as appropriate, unless a different process or time period is specified in the applicable section of this Decree.

B.1. Access To Retained Testing Experts. The Parties and AFA agree that good faith efforts to resolve any dispute may include an opportunity for each entity to interview or depose each others' expert who is retained to assess the City's selection procedures (retained testing expert). Upon either a Party or AFA's request, any Party or AFA must make its retained testing expert available for interview or deposition at a mutually agreeable time and location.

2. Access To Individuals With Knowledge Regarding Disputes. With respect to individuals other than a retained testing expert, within 30 days after the United States so requests in writing, the City shall make available in Austin for interview or deposition (at the United States' option) any agent, employee or official of the City who the United States reasonably believes has nonprivileged knowledge of information necessary to verify the City's compliance with the terms of this Decree or to resolve a dispute arising under this Decree. If, after completing discovery, the United States maintains that the City has not complied with the Decree

or the dispute still exists, within ten days after the United States communicates that fact to the City (and AFA, if the dispute or noncompliance concerns matters covered by Part III.C.6), the City and AFA may interview or depose any witness with knowledge regarding the matter in dispute. Under no circumstances may the City or AFA interview or depose any officials, agents or employees of the U.S. Department of Justice other than the United States' retained testing expert in this process in the absence of further Court order for good cause shown.

(4) This Order is not intended to, and does not, affect or modify any other provisions of the Consent Decree, all of which shall remain in full force and effect as approved by the District Court on November 7, 2014.

(5) This Order remains in full force and effect until the expiration of the Consent Decree.

Date:

June 5, 2015.


LEE YEAKEL
U.S. District Court Judge