

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 TWENTY-SIXTH 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 October 15, 2018, the date of the Monitor’s Twenty-Fifth Periodic Report (Dkt. # 1877), to February 7, 2019. The report also summarizes activities relating to the implementation of the Parties’ settlement of Plaintiffs-Intervenors’ disparate treatment claims (the “Disparate Treatment Settlement”), which the Parties agreed would fall within the Monitor’s authority as defined in the Modified Remedial Order. *See* Stipulation and Order dated June 5, 2015 (Dkt. # 1599); *see also* Memorandum & Order dated June 5, 2015 (Dkt. # 1598) at 10.

Since the last periodic report, the City has made progress on several important reforms and initiatives in the major areas within the scope of the Modified Remedial Order. But there remain important areas of work. As the Court observed at the December 17, 2018 status conference, many of the projects and initiatives that remain to be completed are complex and specialized; and they require the City, the other Parties, and the Monitor to focus on a “micro” level of detail, often with the assistance of experts. Consequently, even where the City has made substantial progress on recent initiatives (as well as on certain other projects that have long been delayed), a number of major projects have not yet been completed. Notable examples (discussed in detail below) include the validation of the stairmill component of the Medical Exam, the EEO climate survey, the development and implementation of strategies to mitigate candidate attrition for the entire four-year life of the new eligible list, and formulating plans for future recruitment campaigns based on the City’s analyses of data from the campaign for the recent open competitive examination (Exam 7001). In other areas, where no further reforms are currently contemplated (either because the City has implemented the Monitor’s recommendations or

because it contends that the reforms implemented thus far are sufficient to ensure compliance with the Modified Remedial Order and applicable law), the City still needs to demonstrate that reforms are working as intended, and that it has the systems and practices in place to identify and address discrimination in its hiring process and its workplaces.

Part II of the report summarizes activities relating to FDNY recruitment, including the processing of candidates on the new “eligible list” (the rank-ordered list of candidates based on scores from Exam 7001) and efforts to minimize attrition among those candidates, especially among black and Hispanic candidates. The list is expected to be formally established February 27, and the first Academy class to include Exam 7001 candidates is expected to begin in May of 2019. On December 17, 2018, the City concluded CPAT<sup>1</sup> testing for the initial group of candidates.<sup>2</sup> As previously reported, the initial group comprises over 2,400 candidates, including at least 355 black candidates and 579 Hispanic candidates. The results of CPAT testing provide some indication (albeit inconclusive) that the City’s efforts to reduce voluntary attrition among black and Hispanic candidates have been at least somewhat effective (although voluntary attrition among black and Hispanic candidates has been higher than among whites). However, because of limitations in the available comparative data, no firm conclusions can yet be drawn.

As processing continues for Exam 7001 candidates, it is critical for the City to minimize attrition by ensuring that they remain informed, motivated, and prepared. In this area, while the City has devoted considerable attention and provided a number of resources to the group of approximately 2,400 candidates currently undergoing testing and screening, its efforts to sustain

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<sup>1</sup> The Candidate Physical Ability Test administered by the Department of Citywide Administrative Services (“DCAS”).

<sup>2</sup> The City has also arranged for a further, supplemental round of CPAT testing for a small number of candidates, including candidates who recently asserted claims for additional credit that raised their adjusted exam scores above the cutoff score for inclusion in the initial round of invitations, as well as some candidates whose applications were previously pending.

the interest and preparedness of candidates farther down the eligible list (a group many times as large, comprising candidates likely to be called off the list for processing at various times over the next four years), have been much more limited; and despite longstanding requests from the Monitor, the City has not yet provided a detailed, long-range plan for its efforts to keep these candidates engaged and help them succeed. It has committed to provide additional details in advance of a meeting on attrition mitigation that the Monitor plans to convene this month.

For the initial group of candidates, the City's efforts have focused largely on encouraging candidates to take advantage of the CPAT training sessions that the FDNY offered before and during the CPAT testing period. Its efforts are supported by data from Exam 2000 candidates that show a very strong correlation between CPAT training and successful completion of the CPAT.

The FDNY has also communicated with candidates to remind them of CPAT practice and testing appointments and to follow up with candidates who miss practice sessions; and the Office of Recruitment and Retention ("ORR") has assigned recruitment coordinators to contribute to its efforts – assisting in fielding inquiries and communicating with members of specified demographic groups, including black and Hispanic candidates.

The FDNY has also provided candidates undergoing processing with access to the candidate portal, which allows them to track their progress through screening, access correspondence and information, and (in an innovation introduced since the last periodic report) update contact information in a single location for all the different City agencies and FDNY units involved in the hiring process that may wish to communicate with them. The Monitor continues to recommend that the City develop scheduling features for the portal so that candidates can also manage, not just view, their appointments in a single, online location. Based on data provided by

the City on February 1, 2019, 56% of candidates given access to the portal have logged in, including 54% of black candidates and 57% of Hispanic candidates.

The City has made some provision for candidates who will be in the next group called for processing – for example, inviting them to “Mobile Academies” at which candidates can interact with firefighters and engage in training activities. But it has provided few details of the messaging or targeting it plans to employ in reaching out to candidates who will be called off the list in the later years of its life. Nor has the City yet indicated what resources or guidance it plans to offer them to maintain their preparation for the screening process. The Monitor continues to urge the City to develop plans that include messages tailored to candidates who will be called for processing in different time frames. And the City has committed to provide a more detailed long-term plan in the near future.

Part II also discusses the need for the City to ensure that its attrition mitigation efforts benefit from the experience it gathered in the processing of Exam 2000 candidates, and the experience that will accrue as groups of Exam 7001 candidates pass through screening. Since the last periodic report, the City provided the Monitor and the other Parties with an analysis of attrition among Exam 2000 candidates, which provides data on voluntary attrition and disqualifications, and on candidate participation in attrition mitigation initiatives such as the mentor program. However, although it briefly identifies and discusses a few programs that appear to have been successful in mitigating attrition among Exam 2000 candidates, the analysis does not indicate specifically whether or how the FDNY intends to employ or expand on those programs for Exam 7001 candidates. At a September 25, 2018 meeting and in subsequent communications, the City has provided some limited indications of the ways the FDNY has used insights derived from Exam 2000 data in formulating its plans for Exam 7001 candidates. The

Monitor expects to be presented with more detailed plans for data-driven initiatives in advance of its planned meeting on attrition mitigation issues.

Responding to repeated requests from the Monitor, on November 8, 2018, the City also provided a very brief list of the attrition mitigation measures whose effectiveness it plans to evaluate as Exam 7001 candidates are processed. The list confirms generally that the City plans to track the effect of specific initiatives on candidate attrition. But it does not indicate how the City plans to conduct its analyses or use the findings that emerge from them. The City has also provided an evaluation plan for the psychological exam that the City recently indicated will serve as an example of the method by which the City plans to conduct disparate impact analyses; and the City has stated it will provide plans for analyses of other parts of the process as those plans are completed – such as the Medical Exam and character review. The Monitor plans to continue to work with the City to confirm that its attrition mitigation strategies are informed by appropriate data analysis.

Finally, on a separate but related topic, Part II also addresses the City's ongoing efforts to analyze other data from its Exam 7001 recruitment campaign and develop plans for future campaigns based on its analysis. The City delivered an "After Action Report" on the campaign on November 13, 2018 (to the Monitor) and November 14 (to the other Parties). The report provides a detailed analysis of ORR's recruitment activities and events; but it does not include cost-benefit analyses or provide a detailed account or analysis of the City's digital marketing campaign, or its radio and outdoor ad campaigns. The Monitor has urged the City to complete these essential components of its analysis, so that it may move on to the next critical step of formulating data-driven plans for future recruitment campaigns.



Part III reports on activities relating to the FDNY's EEO function.<sup>3</sup> While the City has made progress on some EEO-related initiatives, substantial work remains to be completed, and the effective implementation of several reforms remains to be confirmed.

Regarding EEO staffing, the City has continued its efforts to fill the one remaining position in an expanded EEO Office; but its plans to bring the EEO Counselor program up to full strength by appointing additional counselors have been delayed while it focused on recruiting EEO staff. According to the City's most recent update, new Counselor positions were posted by Department order February 6, 2019, with a view to appointing and training an additional 25-30 Counselors from Fire operations. It is expected that the new Counselors will include a significant number of firefighters, as the current group of Counselors consists only of officers.

With respect to EEO messaging and training, the City has reported that additional EEO messaging videos are in development (with a projected rollout in June or July 2019), and that it plans to launch a new online training platform in the spring of 2019. However, it has taken no specific steps to implement the Monitor's longstanding recommendation that operational commanders participate actively and in-person in the delivery of EEO messaging at the firehouse level. Although the Commissioner, the Chief Diversity and Inclusion Officer ("CDIO"), and other senior leadership have participated to some extent in the dissemination of EEO messages (for example, in a recent video message from the Commissioner, and in CDIO visits to firehouses), the City has not yet devised a program or system in which operational commanders reinforce the importance of EEO messages via in-person visits to firehouses.

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<sup>3</sup> Previous periodic reports have included a separate section on the City's efforts to develop and implement systems to manage and analyze data associated with recruitment campaigns and the hiring process. Because most of the current activity relating to data management and analysis is concerned less with the development of such systems and more with the City's use of them in particular areas (*e.g.*, in guiding recruitment and attrition mitigation efforts, or in identifying patterns of disparate impact in the hiring process), relevant discussions of data systems have been incorporated in appropriate subject matter sections of the report.

In the area of officer accountability, after a long period in which it did not address recommended changes in its system for reporting breaches of workplace professionalism, the City has accepted the Monitor's recommendations and issued new forms and instructions giving officers more specific guidance on the subject matter of reports and requiring written records confirming that key topics (including potential EEO and hazing issues) have been addressed in conferences within the chain of command. Also under the heading of accountability, the Monitor is continuing to work with the City in an effort to confirm that the new EEO metric in officer performance evaluations is being applied as intended.

Part III also reports on the City's efforts, in consultation with the Monitor and the other Parties, to develop and administer the long-contemplated EEO climate survey. While the City changed its mind about proceeding with a firehouse climate survey for a period of time after proposing the idea in 2013, and subsequently expressed reluctance to administer such a survey to all firefighter ranks and houses, the City has committed to a plan for a survey of all houses and is making steady progress toward the goal of administering the survey in March of 2019. With the assistance of its expert, the United States has taken the leading role in drafting survey content, with input from the other Parties and the Monitor; and the City plans to use its own resources (rather than employing a vendor) to administer the survey and analyze the results, in consultation with Monitor and the other Parties. During the recent shutdown of the federal government, Department of Justice attorneys and its expert were prevented from working on the survey (or on any other initiatives under the Modified Remedial Order); and progress on the draft survey was delayed. However, the City, in addition to exploring contingency plans should the shutdown continue for an even longer period, continued work on other components of the project,

including messaging and logistics, during the shutdown; and with the shutdown concluded, the United States' expert has resumed work on survey content.

Part III also reports on the Monitor's continuing review of the FDNY's EEO investigative function – including its recommendations regarding the EEO Office's handling of interim protective or other measures that may be warranted by reports of potential violations, and its compliance with the Statement of Principles governing the placement of complainants who are removed from the workplace pending EEO investigations.

Part IV reports on efforts to analyze and reduce disparate impact on black and Hispanic candidates in the Medical Exam and to ensure that the FDNY's medical screening process is job-related and otherwise compliant with applicable laws.<sup>4</sup>

In particular, with regard to the City's long-running efforts to validate the stairmill component of the Medical Exam, the City's experts, PSI Services LLC ("PSI"), together with experts for the Monitor and the other Parties, have been working actively to develop and execute an appropriate validation protocol. Academy trainees took part in validation-related stairmill and treadmill testing in December, and further testing will take place in February. The experts continue to refine the analytic plan for the evaluation of results that are expected to lead to a new, validated test.

Part V reports on efforts by the Monitor and the Parties to determine whether the FDNY's character review process (conducted by the Candidate Investigation Division ("CID") and the Personnel Review Board ("PRB")) has an adverse disparate impact on black and/or Hispanic candidates; and it recounts the City's response to the Monitor's recommendations for reforms intended to reduce the risk of any such impact and eliminate screening criteria and

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

procedures that are not job-related. On December 12, 2018, the Parties and the Monitor met to discuss those recommendations and the Monitor's statistical analysis of the character review process, which it had circulated to the Parties on September 28, 2018. While the City has agreed to implement several of the Monitor's recommended changes in PRB procedures and instructions (including changes intended to help candidates correct and/or explain unfavorable information in their records, and changes intended to promote and enhance consistency in PRB decision making), it largely rejected any further changes in the substantive criteria that govern the CID's referral of candidates to the PRB – contending that the process as currently constituted is valid as job-related, and that the City's analyses thus far have not shown (1) that the process has a disparate impact on black or Hispanic candidates or (2) that the proposed changes in referral criteria would effectively target the causes of any such impact.

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

Part VI discusses PSI's Technical Report, which describes the development, administration, and analysis of the results of Exam 7001 (the open competitive exam given in September and October 2017) and the survey administered to certain Exam 2000 candidates.

Part VII 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. Candidate Processing**

#### **1. CPAT Testing**

The City anticipates that the eligible list for the most recent open competitive firefighter examination, Exam 7001, will be established February 27, 2019, with the first Fire Academy class from that list to commence in May 2019.

At the December 17, 2018 status conference, and in other communications with the Monitor and the other Parties since the last periodic report, the City has provided updates on candidate processing, including processing for the first group of candidates for the CPAT, which all candidates must pass to be eligible for hiring. As previously reported, this first group of candidates called off the eligible list, with adjusted final average scores of 102 and above (including claimed credits), numbers more than 2,400 candidates, including at least 355 black candidates and 579 Hispanic candidates. DCAS, which administers the CPAT, invites candidates to take two “practice” CPAT tests before taking the final test, and a candidate is deemed to have passed the CPAT with a satisfactory performance on either of the two practice tests or on the final test. Practice sessions for the first group taking the CPAT were held from October 16 through December 6, 2018, and final testing of the CPAT for that group was conducted from December 7 through December 17.

In addition to practice sessions and testing for the first round of candidates, the City has also scheduled a supplemental round of practice and testing for a group of candidates who recently claimed residency credits and received bonus points raising their scores to 102 or above, or whose pending applications were finalized. This group includes 20 additional black candidates and 36 additional Hispanic candidates. CPAT Orientation for these candidates took

place January 14 to January 18, 2019, and practice sessions and exams have been scheduled for January 28 to February 16.

On January 28, 2019, the City reported the following figures for attendance at CPAT testing and results for the first round of candidates<sup>5</sup>:

Black candidates – 355 scheduled, 257 attended, 225 passed

Hispanic candidates – 576 scheduled, 427 attended, 370 passed

White candidates – 1,358 scheduled, 1,028 attended, 959 passed

Total candidates – 2,419 scheduled, 1,806 attended, 1,632 passed

Based on these figures, rates of voluntary attrition were 27.6% for black candidates, 25.9% for Hispanic candidates, and 24.3% for white candidates. Pass rates (among candidates who appeared for the test) were 87.6% for black candidates, 86.7% for Hispanic candidates, and 93.3% for white candidates. Overall rates at which candidates passed successfully through this phase of the process were 63.4% for black candidates, 64.2% for Hispanic candidates, and 70.6% for white candidates.

By comparison, rates of voluntary attrition at the CPAT stage for Exam 2000 candidates (as provided by the City) were 34.1% for black candidates, 35% for Hispanic candidates, and 31.6% for white candidates. As reported by the City, for candidates in processing in the first year of the Exam 2000 list (2013), the rates of voluntary attrition were 29% for black candidates, 25% for Hispanic candidates, and 21% for white candidates. Pass rates for those taking the test (for all Exam 2000 candidates) were 88.6% for black candidates, 93% for Hispanic candidates, and 94.8% for white candidates. And overall qualification rates were 57.7% for black candidates, 58.8% for Hispanic candidates, and 63.2% for white candidates.

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<sup>5</sup> Candidates who passed the CPAT in practice sessions are counted as having attended and passed CPAT testing.

These results from the first round of CPAT testing are mixed: rates of voluntary attrition for black and Hispanic candidates, though higher than for white candidates, are lower (and closer to the rate for whites) than they were in Exam 2000 processing. However, the overall rate at which white candidates passed through this phase of screening successfully exceeded the rate for black candidates by a slightly increased margin compared to Exam 2000. It must be noted that the available Exam 2000 figures reflect rates of attrition either for all candidates called off the entire eligible list or (for the 2013 figures) for all those in processing in the first year of the list; and consequently they offer only an imperfect basis of comparison for the results from the first round of Exam 7001 candidates – who come from the initial cohort of the highest scoring candidates, and have been called off the list earlier than the vast majority of the candidates on the list. Accordingly, the comparisons do not provide a firm basis for any definite conclusions regarding the success of the City's attrition mitigation efforts thus far. Nor do they support any firm conclusions about likelihood of success for those efforts going forward. As the City's attrition analysis of Exam 2000 candidates shows, rates of attrition for all groups tended to increase with the passage of time during the life of the eligible list. Given that the rates of voluntary attrition for black and Hispanic candidates currently exceed the rate for white candidates, it will be important for the City to minimize attrition as additional candidates are called off the list, in an effort to ensure that black and Hispanic representation in the candidate pool does not diminish further as the hiring process continues.

The City has also provided the Monitor and the other Parties with a complete projected timeline for the processing of the first round of candidates. Medical Testing and candidate investigations, including character review, are projected to continue through late March 2019,

with the new Academy class to begin in May. For candidates who have successfully completed CPAT testing, the FDNY has begun issuing invitations for the Medical Exam.

## 2. Residency Credits

The City and Plaintiffs-Intervenors have continued their efforts to ensure that all candidates who are eligible for residency credits claim them.<sup>6</sup> As previously reported, when Exam 7001 scores were first released in June 2018, several thousand test-takers who listed New York City addresses had not claimed the five-point credit available to City residents. Monitor's Twenty-Fourth Periodic Report (Dkt. # 1861) at 10. While current New York City residency may not necessarily entitle a candidate to the credit (which is based on proof of City residency in an earlier time frame), the discrepancy suggests that some applicants who could have claimed the credit may not have done so. The City has continued its outreach to candidates who may be eligible but did not claim the credit, and it previously provided contact information to the United States and the Vulcan Society to enable them to communicate with potential residency credit claimants and remind those who are eligible that they should claim the credit. The Parties prioritized the highest scoring candidates, whose adjusted final scores (combining raw scores and bonus points) would qualify for the first round of intake if they receive the five bonus points the residency credit would provide. On February 5, 2019, Plaintiffs-Intervenors reported that they contacted black candidates via email and telephone calls with adjusted scores of 100 and above, splitting the groups into two outreach bands – 18 individuals with adjusted scores of 102 and above, and 31 individuals with adjusted scores of 100-101.

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<sup>6</sup> The United States has indicated that its outreach efforts to applicants to encourage them to complete pending applications, and to candidates who appear potentially eligible for residency credit to encourage them to claim the credit if eligible, have now concluded. The United States has stated the view that it wishes to ensure that future evaluations of recruitment efforts are based on the efforts of the City and the Vulcan Society, which it assumes can be expected to continue after the Monitorship.



Of the 18 individuals with an adjusted score of 102 and above –

- 13 have received the residency credit additional points.
- 2 have requested the residency credit and have not yet received the additional points.
- 3 have not responded to outreach.

Of the 31 individuals with an adjusted score of 100 and above –

- 8 have received the residency credit additional points.
- 5 have requested the residency credit and have not yet received the additional points.
- 16 have not responded to outreach.
- 1 does not qualify for the credit.
- 1 individual was granted the veterans credit which raises his score to 106.

## **B. Attrition Mitigation**

The Exam 7001 list will be active for four years after it is established, and many eligible candidates will be called off the list for processing only years after they filed applications and took the written test. Because it will take years for most candidates to be called off the list, the City must ensure that it maintains open lines of communication with non-traditional candidates, sustains their interest in becoming firefighters, and provides them with the information and preparation they need to pass successfully through the screening process. It is especially critical for the City to minimize attrition among black and Hispanic candidates, who, because of the FDNY's history of discrimination, may not have friends and family support networks connected to the Department, and who may therefore be at greater risk for abandoning their efforts to become firefighters.

### **1. Training and Outreach to Groups Called for Processing**

The City's current attrition mitigation efforts have focused largely on the group of candidates who have already been called off the Exam 7001 list for processing. Because the CPAT was the first step for these candidates, much of the outreach has consisted of notifying candidates about CPAT testing and endeavoring to ensure that they are fully prepared to pass the

test. Among other communications, candidates received invitations to CPAT orientation, practice sessions, and final test dates by mail from DCAS. The FDNY has also added copies of all mailings to its candidate portal; and it followed up with reminders by text, email and phone. The FDNY received updates from DCAS regarding candidates who failed to appear for CPAT practice and testing; and it engaged in follow-up communications with no-shows – encouraging them to reschedule where possible and gathering information about the reasons they failed to appear. The FDNY has also gathered information from candidates who fail to appear at CPAT training sessions, attempting to identify the reasons for no-shows, and compiling the resulting data in its ARCS database.

Both before and during the CPAT testing period, the FDNY's attrition mitigation efforts concentrated heavily on encouraging candidates to take advantage of CPAT training, as attrition data for Exam 2000 candidates, discussed further below, indicates a strong correlation between attendance at CPAT training (especially attendance at multiple sessions) and success in CPAT testing. The City offered CPAT training sessions from August 6, 2018 until the end of CPAT testing on December 17, 2018. As reported by the City on January 27, 2019, final attendance figures for CPAT training were as follows:

Black candidates: 372 invited, 265 RSVP'd, 202 attended (54.3% of invited)

Hispanic candidates: 590 invited, 415 RSVP'd, 316 attended (53.6%)

White candidates: 1,355 invited, 813 RSVP'd, 634 attended (46.8%)

These figures are close to the corresponding numbers for Exam 2000 candidates, which show 52% attendance for black candidates, 53% for Hispanic candidates, and 47% for white candidates.

A total of 99 black candidates (26.6% of those invited) and 102 Hispanic candidates (17.3%) attended three or more training sessions, and among those candidates, 91 black candidates and 97 Hispanic candidates passed the CPAT. These numbers provide further evidence of the strong correlation between training attendance and success on the test. However, they compare unfavorably to figures for Exam 2000 candidates. As reported by the City, 32% of black candidates and 34% of Hispanic candidates attended three or more training sessions for the Exam 2000 CPAT.

In addition to specific efforts relating to the CPAT, to assist candidates in navigating the process, the City has designated recruitment coordinators, who reach out to candidates, address questions and concerns, and facilitate interactions with the FDNY and DCAS. The coordinators are active firefighters who conduct candidate outreach in addition to their regular duties, generally for one day per week. In discussions before and since the last periodic report, Plaintiffs-Intervenors expressed a concern that this arrangement did not allow coordinators to devote enough time to their work with candidates or maintain continuity in follow-up communications. In response, the City announced plans to designate a full-time coordinator to assist in outreach to black firefighter candidates. And on February 6, 2019 the City confirmed that the full-time coordinator had been appointed December 20, 2018. Further, in a recent update (January 24, 2019), the City indicated that an additional “detailed” (part-time) firefighter had been added to the African-American Coordinator team.

The Monitor will continue to receive reports on the activities and workload of the coordinators as it oversees the City’s attrition mitigation efforts, paying specific attention to whether coordinators are able to fulfill candidates’ needs and requests, and whether additional resources are needed to maintain effective communications with candidates.

The City has also continued to offer mentors to all candidates who have been called off the list. These mentors provide candidates with information and support them as they go through the hiring process. The City has reported that all of the candidates called off the eligible list for the first round of processing have enrolled in the mentorship program.

The City has provided all candidates who have entered the hiring process with access to its online candidate portal, which helps candidates track and manage their progress. Based on data provided by the City February 1, 2019, 56% of candidates given access to the portal have logged in, including 54% of black candidates and 57% of Hispanic candidates. The portal features notifications and reminders of appointments and upcoming events; copies of correspondence with the candidate; lists of required documents; a progress bar displaying the completed, pending, and upcoming steps in candidate screening; and informational resources such as policies and guidelines. The portal is an important and helpful development in the FDNY's outreach and interactions with candidates. But, as initially demonstrated, it lacked some potentially useful capabilities, and the Monitor has encouraged the City to evaluate whether additional features can be added to the portal to enhance interactions with candidates. *See* Monitor's Twenty-Fifth Periodic Report at 18. For example, following up on discussions with the Monitor at the demonstration, the City has added a feature that allows a candidate to revise contact information through the portal in one step for all the City agencies involved in the hiring process. (Previously candidates had to complete three different electronic forms and were advised to deliver forms in person to correct errors or update information.)

As previously discussed, the portal also currently lacks the ability to schedule or reschedule appointments. It allows candidates to look up existing appointments, but they can create or change appointments only by directly contacting relevant units or agencies. The

Monitor and the other Parties have continued to recommend that the City explore ways of using the portal as a central scheduling tool for candidates in processing, and the City is exploring the feasibility of such innovations for further versions of the portal.

In particular, Plaintiffs-Intervenors have raised concerns regarding the scheduling of CID intake appointments, which can be performed only by CID personnel. Plaintiffs-Intervenors noted that the process could be discouraging or inefficient if both initial and any rescheduled time slots were selected by CID schedulers without input from the candidate about his or her availability. Although the City has expressed a preference for CID to maintain control of its own scheduling, it has confirmed that candidates may communicate preferred and unavailable dates to the CID by phone or (preferably) by email – to diminish the risk that the CID will repeatedly offer dates on which candidates are unable to attend. The City has objected to further changes on the basis that allowing candidates any greater preference is unrealistic for several reasons, including but not limited to the fact that the candidates need to proceed through intake in approximate list order and the City’s belief that the current system provides candidates with sufficient opportunities to communicate with FDNY about scheduling.

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

The City’s plans to communicate more broadly with all candidates who may be called off the list at any point during its four-year term are less robust, and the concerns the Monitor expressed in the last periodic report persist. *See* Monitor’s Twenty-Fifth Periodic Report at 19. The United States and Plaintiffs-Intervenors asked the City to describe its communications plan in detail before the list was established, with the Monitor’s agreement that this information was useful and would represent best planning practice.

Before the last periodic report, the Monitor again asked the City to provide a detailed communication plan covering the life of the list for all candidates, including when and how the FDNY will communicate with candidates likely to be called off the list in each year of its life, and what messages it will deliver at what times. On December 2, 2018, the City provided the Monitor with a one-page list of planned communications and events. But the list provides very little indication of the long-term strategies, targeting, and messaging the City plans to employ to engage with candidates and prepare them for the screening process. The latest item shown on the City's list is a Mobile Academy<sup>7</sup> event in March of 2019, and the list includes very few events or communications aimed at candidates likely to be called off the list after the first two rounds of invitations. The City had previously described plans to use Mobile Academy events to engage with candidates projected to be called off the eligible list in the next round of invitations (currently those with scores of 100 to 101). *See* Monitor's Twenty-Fifth Periodic Report at 20. But invitations to such events are not extended to candidates farther down the list, and thus play no role in maintaining their interest or preparation.

The only items on the City's list specifically directed to candidates with scores below 100 are videos conveying the message that the job is "worth the wait" (which the City had previously advised were in development, and which it planned to email to candidates with scores between 98 and 101 in January 2019) and information sessions with affinity groups (the Hispanic Society and the Vulcan Society), whose timing is indefinite (listed as "TBD"). In previous discussions with the Monitor and the other Parties, the City has generally described plans to maintain

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<sup>7</sup> Mobile Academies are events at which candidates can experience some of the activities associated with firefighting and interact live with current members of the FDNY. As previously reported, the FDNY plans to focus invitations to its Mobile Academies on candidates in the next "band" of candidates expected to be called off the eligible list, and to proceed in a similar fashion as processing progresses – so that as each band is called for processing, the next band will receive invitations to the Mobile Academies. Monitor's Twenty-Fifth Periodic Report at 20.

periodic contact with candidates by email, to encourage them to follow the FDNY on social media, and to post videos on the JoinFDNY website. *See* Monitor’s Twenty-Fifth Periodic Report at 20. But the City’s list includes no detailed discussion of the messaging and targeting the City plans to employ to reach out to candidates likely to be called off the eligible list in the later portions of its four-year life. The Monitor plans to convene a meeting of the Parties to discuss attrition mitigation issues and initiatives later this month, and it has asked the City to provide a more detailed, extensive plan in advance of the meeting. The Monitor will also continue to consult with its experts, and work further with the City to develop more detailed, data-driven plans.

### 3. Use of Data about Attrition

The Monitor has consistently urged the City to use data from the Exam 2000 hiring process and, eventually, from the early rounds of screening for Exam 7001 candidates, to guide its attrition mitigation efforts.<sup>8</sup> Since the last periodic report, the City provided the Monitor with a set of attrition analyses for Exam 2000, dated October 17, 2018,<sup>9</sup> which attempt to evaluate (subject to certain data limitations) the rates at which candidates dropped out or were disqualified at different stages of the hiring process, rates of participation in programs such as the mentorship program, and the effects of changes in the hiring process on candidate attrition. The City’s report also compares attrition before and after some changes in the process, and it includes data on the effectiveness of some particular measures such as CPAT training and the Fitness Awareness Program (“FAP”). However, the City’s report does not examine the reasons candidates dropped out of the process; and although it briefly identifies some initiatives that may

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<sup>8</sup> Additional sources of relevant data include the survey given to Exam 7001 candidates in connection with the CBT, and the optional survey sent to successful Exam 2000 candidates in October of last year.

<sup>9</sup> The City has also provided a version of the analysis, “Review of Candidate Attrition for Exam 2000,” to the other Parties.

have been effective in mitigating attrition, it does not indicate in detail how the City plans to use its findings in formulating new strategies or tactics.

Based on the Monitor's review thus far, two notable findings that emerge from the analysis are the importance of CPAT training for success in the CPAT and the potential impact of the FAP in reducing attrition associated with the Medical Exam, which is one of the leading causes of attrition among black and Hispanic candidates. The City's figures indicate that pass rates for black candidates go up from 29% for candidates with no CPAT training to 86% for those who attend three training sessions; the corresponding rates for Hispanic candidates are 30% and 89%. These figures support the emphasis the City has placed on encouraging attendance at CPAT training. Regarding the Fitness Awareness Program, the City's analysis notes that participation in the Program was associated with a 14-percentage-point increase in the pass rate for black candidates in the Medical Exam, and a 12-percentage-point increase for Hispanic candidates. The Monitor has previously advocated that the FDNY expand the FAP and leverage it by developing and distributing related guidance and communications. *See* Monitor's Twenty-Fifth Periodic Report at 21. The City previously reported that it was developing a video based on the FAP to inform candidates about the level of physical fitness required for the job and provide guidance on how to achieve and maintain it. *Id.* The Monitor expects the City to provide an update on this process as part of the long-range attrition mitigation plan that the Monitor has requested.

The Monitor has also asked the City to provide an account of its plans to analyze attrition among Exam 7001 candidates as rounds of candidates go through the hiring process and fill Academy classes. On November 8, 2018, the City provided a very brief list of analytical topics, indicating that it plans to evaluate the effectiveness of some key attrition mitigation efforts



including mentorship, the FAP, and the portal. But it has not indicated how it plans to evaluate them, or what analyses it plans to conduct regarding attrition at different stages of the hiring process. The Monitor plans to follow up to obtain more details and to discuss setting at least a minimum requirement for the content and frequency of attrition data analyses. The City has indicated that it will be prepared to discuss these plans in more detail at the planned meeting on attrition mitigation issues.

### **C. After-Action Analysis**

As the Monitor has repeatedly emphasized, in addition to its ongoing efforts in candidate processing and attrition mitigation, the City must conduct a comprehensive analysis of the Exam 7001 recruitment campaign to determine which strategies, targeting, and messages were effective in attracting successful black and Hispanic firefighter candidates. *See, e.g.*, Monitor’s Twenty-Fifth Periodic Report at 24; Monitor’s Twenty-Second Periodic Report (Dkt. # 1821) at 14. After delays,<sup>10</sup> the City delivered an “After Action Report” on November 13, 2018 (to the Monitor) and November 14 (to the other Parties). The Report contains a large volume of potentially useful data on the FDNY’s recruitment activities – including figures showing numbers of applicants, test-takers, and successful test-takers associated with particular activities and events. This information is helpful, but several essential components of analyzing Exam 7001 have yet to be performed.

As the City acknowledges, it has not yet conducted its analysis of budgeting, costs, and benefits associated with different recruiting initiatives. At last report (in a January 24, 2019 message), the City indicated it had conducted an initial analysis, but that additional work would be required before it could share the results with the Monitor and the other Parties. The City has

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<sup>10</sup> The City had originally projected that the report would be completed in August.

invited the Monitor and the other Parties to offer suggestions for the types of analyses they would find most informative, and the Monitor is considering what further input it may be able to provide (in addition to the guidance it has already provided in communications with the City regarding the appropriate content of the analysis). However, the City should not wait to move forward with its own analysis, and the Monitor has renewed its request for a date on which the City expects to share its assessment. It has also asked the City to provide a historical account of its budgeting for the Exam 7001 recruitment campaign (including both internal expenditures and those associated with external vendors and advertising). The City provided a set of historical budget numbers on February 1, 2019, which the Monitor is reviewing.

Although the After Action Report provides a considerable quantity of data correlating Expressions of Interest (“EOIs”), applications, and test-takers with the types and timing of recruitment events and communications conducted by the Office of Recruitment and Retention, there are some obvious areas in which additional analysis appears to be required. For example, although it includes some figures reflecting lead captures by the FDNY’s digital campaign, the Report does not provide any detailed examination of the digital advertising and outreach efforts conducted by Hodes, an advertising and marketing firm retained by the City. Such an examination would presumably include data showing the effectiveness of particular forms of digital outreach and advertising, and assess the effectiveness of particular messages in attracting interest from potential candidates. Similarly, the City’s report does not include any assessment of the targeting and messaging employed in its radio and outdoor ad campaigns, which were important components of the overall recruitment effort.<sup>11</sup> It also does not attempt to determine

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<sup>11</sup> Also, the issue of the City’s compliance with the Intent Settlement’s “best efforts” requirement must be resolved. See Monitor’s Twenty-Fourth Periodic Report at 17.

whether particular recruitment efforts and targeting are associated with candidates who ultimately obtain reachable scores.

As the City acknowledges, in addition to completing its analyses of the Exam 7001 campaign, it must also develop and share with the Monitor a comprehensive plan for the next campaign, and it intends to do so. This step is essential for the City to demonstrate the ability to learn from, and repeat or improve on, its previous campaign.

#### **D. Assignment Issues**

As discussed in detail in the Monitor's previous periodic report, Plaintiffs-Intervenors have raised issues regarding the City's compliance with Paragraph 1(d) of the Disparate Treatment Settlement, which requires the City to give "New York City residents who graduate from the Fire Academy first priority for placement into a fire company within the Division in which they live, to the extent reasonable, practicable, and consistent with operational needs"; and the Monitor has undertaken an investigation of Plaintiffs-Intervenors' concerns. Monitor's Twenty-Fourth Periodic Report at 18. On November 28, 2018, the City responded to a set of follow-up questions, first posed by the Monitor on August 8, 2018, regarding the stated operational justifications for its assignment decisions, its assignment criteria, and its processes for recording and handling requests for home division assignments. While the City's response provided some additional clarification and reassurance regarding the standards and procedures it uses in eliciting, recording, and handling requests from new probationary firefighters, it remains unclear whether and how the Department articulates and records the specific operational needs supporting its decisions when it declines home division requests. On January 29, 2019, the Monitor requested further clarification from the City and recommended procedures to ensure that operational needs are stated in sufficient detail.

Also as previously reported, Plaintiffs-Intervenors have raised additional concerns relating to firefighter assignments, including assignments to engine and ladder companies, which Plaintiffs-Intervenors contend demonstrate potential unlawful discrimination or retaliation under the Modified Remedial Order, and are also relevant to the Order's focus on the importance of an effective EEO office within the FDNY. *See* Monitor's Twenty-Fourth Periodic Report at 18-19. Before the last periodic report, the Monitor had remanded the issues to the FDNY EEO Office, with instructions to report to the Monitor on the outcome of the investigation within 120 days. That period expired on November 13, 2018. In subsequent discussions with the Monitor, the City reported that it had completed statistical analyses and other inquiries relevant to the issues raised by Plaintiffs-Intervenors, but that it had not yet completed a report on the conclusions reached in the investigation. The Monitor asked the City to provide the complete report of its investigation to the Monitor by January 10, 2019. But the City has not yet done so. The Monitor has renewed the request and urges the City to produce its findings as soon as possible.

#### **E. Working Group**

The Monitor has continued to oversee the City's work on initiatives undertaken by the Working Group Committee, which was created pursuant to the Disparate Treatment Settlement for the purpose of "creat[ing] educational and other opportunities that will enhance the ability of New York City students to pursue careers as New York City firefighters." Monitor's Twelfth Periodic Report (Dkt. # 1603) at 7-8 (citing Proposed Stipulation and Order (Dkt. # 1291-1) ¶ 1(e)). These initiatives include the implementation of the Fire Cadet title and the continued operation and expansion of the FDNY's Explorer Program. In response to the Monitor's request, the City has provided an updated timeline for its preparations for the launch of the Fire Cadet program, which brings forward the timing of some of the key steps. The City's new timeline sets out milestones for additional staffing and training (in 2019), recruitment (June 2019 through

February 2020), an application period (March/April 2020), and selection and investigation of prospective Fire Cadets (April 2020 through April 2021), with the anticipated start of the first class in April 2021. The City reports that it has created a web-based application and database that will allow applicants to complete and submit applications online and will track each individual from application through the hiring process. The City has posted the position of Uniformed Academy Director to replace the outgoing director, who is retiring, and it also posted for a Civilian Academy Administrator in February 2019.

The City has also continued efforts to expand the FDNY Explorers Program, which provides training and mentoring at posts associated with City high schools in diverse neighborhoods.<sup>12</sup> The City previously advised that it selected 18 new post advisors in July 2018 for a total of 52. Monitor's Twenty-Fifth Periodic Report at 27. And the City reports (as of February 1, 2019) that 207 Explorers are enrolled in the program – close to its full capacity, which the City previously reported as 208. *Id.*

### **III. EEO**

#### **A. Overview**

The Monitor has continued to work with its experts, the City, and the other Parties on initiatives relating to the FDNY's compliance with its EEO-related obligations under the Modified Remedial Order – including initiatives relating to EEO messaging and training, officer accountability and reporting requirements, and an FDNY workplace climate survey. The Monitor has also continued to examine the FDNY's handling of EEO complaints. In several areas – notably in the long-awaited climate survey and in revisions to policies on reporting up the chain of command – the City has made substantial additional progress since the last periodic

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<sup>12</sup> The Explorers Program has been described in detail in previous periodic reports. *See, e.g.*, Monitor's Nineteenth Periodic Report (Dkt. # 1761) at 16-17.

report. In other areas – such as the involvement of operational leadership in EEO messaging, the implementation of the EEO metric for officers’ evaluations, and the establishment of systematic disparate impact analyses – either needed reforms have not yet been fully undertaken, or their successful implementation has not yet been confirmed.

## **B. EEO Staffing**

The City has continued its efforts to fill the one remaining position (a Deputy Director post) among those recently added to the EEO Office staff. As previously described, the fully-staffed EEO Office will include 16 attorneys (including the Assistant Commissioner, two Deputy Directors, Investigative Attorneys and contract attorneys) and six non-attorney staff. Because attorneys have the responsibility for conducting investigations, the added attorney positions are the most likely to affect the ability of the EEO Office to complete investigations promptly and effectively. Current EEO positions include the following:

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

Additions to the investigative staff, including additional attorney investigators, are expected to have a favorable impact on the conduct of investigations – decreasing caseloads and thus, at least potentially, enabling investigators to reduce the duration of EEO investigations. The Monitor will continue to assess the FDNY’s handling of EEO cases to determine whether further additions are warranted.

As the City reported at the December 17, 2018 status conference, its plans to bring the EEO Counselor program up to full strength by appointing more Counselors have been put on hold while it focuses on hiring EEO staff. The program was launched in January 2018 with the appointment of a group of 18 Counselors, all officers, and with plans for a total of 25-30 Counselors from Fire operations. The FDNY originally planned to post additional Counselor positions in July and August last year, but those plans were postponed pending the completion of hiring for the remaining Deputy Director position. On January 24, 2019, the City advised the Monitor and the other Parties that additional Counselor positions were posted by Department Order on February 6. And it estimates that that an additional 25-30 counselors will be added from Fire operations. The Monitor expects that this new group will include a significant number of firefighters – addressing a concern expressed by the Monitor and the other Parties that the Counselor corps should not consist solely of officers. Given the important role that EEO Counselors are expected to play in several areas, the Monitor encourages the City to proceed expeditiously with plans to appoint and train additional Counselors, and City reports that it has begun to do so.

### **C. Policies and Messaging**

The Monitor has continued to urge the City to augment and improve the content and delivery of its EEO messaging and training – with a particular focus on the involvement of operational commanders in the delivery of EEO messaging. As part of those efforts, the City has continued to implement messaging plans that it first shared with the Monitor and the other Parties, in response to recommendations by the Monitor, on March 10, 2018. Monitor’s Twenty-Third Periodic Report (Dkt. # 1844) at 24. As previously reported, the City’s plans included “voice alarm drills” at roll call (in which firefighters would be shown videos of senior leadership presenting EEO messages), the distribution of web-based and multi-media messaging, online

refresher EEO training, and additional messaging through conventional channels such as posters and newsletters. *See id.*; Monitor’s Twenty-Fourth Periodic Report at 28.

The first of the FDNY’s voice alarm drill videos, which it now calls “voice announcement messages,” was rolled out at the end of September – presenting a message from the Commissioner about the importance of diversity in the Department. And in a November 15 email to the Monitor, the City reported that additional videos are in production, covering an array of topics “supporting diversity and inclusion goals.” The Monitor plans to review the materials as they become available. The City also confirmed that all FDNY members are required to participate in the drills and that attendance is recorded. While the continuing implementation of voice announcement messaging is a positive development, the Monitor continues to encourage the City to increase the involvement of operational commanders in the in-person delivery of diversity and inclusion messaging. The Monitor’s view is based on consultations with its experts and on its understanding of the FDNY’s own practices with regard to operational training, in which training and messaging are delivered and reinforced by commanders in person. *See* Monitor’s Twenty-Fifth Periodic Report at 37. The Monitor has repeatedly suggested that the FDNY develop a regular system of firehouse visits by senior leadership, and that such visits could potentially be combined with firehouse visits that senior officers make in the ordinary course of operations. *See id.* at 36. Following up on that suggestion, on November 28, 2018 the Monitor asked the City to provide information on the frequency with which battalion commanders make regular visits to firehouses within their commands in the ordinary course of operations.

As current examples of leadership involvement in the live delivery of EEO messages, the City has previously pointed to firehouse visits by the Chief Diversity and Inclusion Officer



(accompanied by a uniformed officer) and to the involvement of EEO Counselors (all of whom, in Fire operations, are currently officers) in training activities. Monitor's Twenty-Fifth Periodic Report at 37. But as the Monitor has observed, because these initiatives involve only a small number of officers, and because those officers (in most instances) will necessarily be delivering messages to firefighters outside their own operational commands, the activities cited by the City are unlikely to have the same impact as the reinforcement of EEO messages by operational leadership. *See id.*

As part of its discussion of EEO messaging at the December 17, 2018 status conference, the Court directed the City to develop means of confirming that EEO messages are delivered effectively and whether they are well received. The Monitor plans to work with the City to develop appropriate mechanisms for monitoring the delivery of and responses to EEO messaging. To some extent, such information will be obtained via the EEO climate survey, discussed below in Part III.D.2. Other options may include the observation of selected voice announcement messaging and other EEO presentations by EEO personnel.

With regard to enhanced EEO training initiatives, which the City initially outlined in its March 10, 2018 message, as of November 15, 2018 the City reported that its new "learning management system" was still in development, with an anticipated launch in the spring of 2019. The City reports that, when launched, the new system will provide a platform for a full curriculum of diversity and inclusion training materials. The City reports that it is currently employing its "DiamondPlate" system (the FDNY's intranet information sharing platform) to deliver EEO focused training to firehouses, currently concentrating on sexual harassment. The training includes hypothetical scenarios, and members must electronically verify that they have reviewed videos and engaged in discussions concerning the hypotheticals. As described, these

features appear responsive at least in part to a longstanding suggestion from the Monitor – that the City include in its training materials methods to verify that training messages are received and understood. The Monitor plans to follow up with the City to obtain access to relevant training materials and confirm how they are delivered. The City reports that current online training messages focus on sexual harassment issues, and that materials on other topics (including discrimination or harassment based on race and ethnicity) will be rolled out in the summer of 2019. The Monitor has asked the City to provide copies of the materials for the Monitor to review before launch.

#### **D. Compliance and Accountability**

##### **1. Increased Accountability within the Chain of Command**

###### **a) *“Workplace Professionalism” Reporting***

Since the last periodic report, responding to longstanding Monitor recommendations, and the Court’s direction at the September 13, 2018 status conference, the City has made a number of changes in its system for reporting certain information up the chain of command. The FDNY’s “Professional Workplace Policy,” and an associated reporting system, were established by a Department Order dated July 12, 2017, which requires officers to meet with their superiors to discuss conduct and issues affecting workplace professionalism – including but not limited to potential violations of EEO and anti-hazing policies. Monitor’s Twenty-Second Periodic Report at 34; *see also* City Letter to Court dated January 19, 2018 (Dkt. # 1828) (listing “anti-hazing, bullying, and other important initiatives implicating workplace professionalism” as intended topics of discussion).

The Monitor had recommended that the City give officers more detailed instructions and use a reporting form to ensure that all consultations are memorialized and that the reports reach essential issues and provide sufficient accountability. Monitor’s Twenty-Fourth Periodic Report

at 30; Monitor's Twenty-Fifth Periodic Report at 8-9. Before the Monitor's last periodic report, the City indicated that it was working on changes responsive to the recommendations, and on October 16, 2018 it provided the Monitor with revised draft rules and forms for its "Professional Workplace" reporting system. The new instructions list topics to be covered in the required conferences, including topics relating to EEO and hazing or bullying – and provide examples of conduct that should trigger reports. The Monitor made a small number of additional suggestions on October 24, which the City accepted in part and declined in part on November 15; and the FDNY issued the new rules by Department Order dated December 18, 2018.

With the new rules in place, the Monitor plans to follow up by requesting and reviewing reports generated by the new system – once enough time has passed for it to produce an informative sample of materials.

Based on consultations with its experts, the Monitor believes that new, more specific reporting requirements will enhance officer accountability by encouraging officers to take the necessary steps to remain informed and aware of conduct and conditions affecting the EEO environment, and by removing any doubt about the types of conditions and conduct that should be reported.

*b) Performance Evaluations*

Since the last periodic report, the Monitor and the Parties have continued to discuss the FDNY's implementation of an EEO metric in officer performance reviews. The metric was first introduced for Lieutenants' reviews in February 2018, and subsequently as a component of performance reviews for Captains. Monitor's Twenty-Fourth Periodic Report at 32; Monitor's Twenty-Third Periodic Report at 29. Before the last periodic report, in response to a Monitor request, the City had provided a description of the EEO Office's role in the review process, advising the Monitor that the Office contributes written reports to EEO evaluators when an

officer's conduct has been brought to its attention and has fallen below the expectations set forth in FDNY EEO Policy. Monitor's Twenty-Fifth Periodic Report at 42. As previously reported, at a September 27 meeting of the Monitor and the Parties on EEO issues, the City indicated that, in addition to actual EEO violations, such conduct would include failures to report violations or potential violations, failures to cooperate with the EEO Office, or negligent oversight and supervision of firefighters within an officer's command. *Id.* Subsequently, the Monitor issued follow-up requests to the City for materials reflecting EEO Office contributions to performance reviews. However, in a November 15 message, the City advised the Monitor that no such materials had been generated, because there had been "no substantiated complaints of EEO violations findings [sic] by the EEO Office regarding Fire Officers" during the relevant period. The City's response raised concerns that the scope of the EEO Office's participation in the process, and the range of officer conduct (or failures of supervision) accounted for in the process is too limited to provide meaningful evaluations. In a further December 4, 2018 call with the Monitor, the City provided some assurances that the EEO Office would contribute to evaluations as discussed at the September 27 meeting, and that raters would also take EEO factors into consideration, even in cases where the EEO Office had not provided specific input. In order to confirm the City's assurances, and more generally in order to confirm that the EEO performance metric is operating as intended, on December 19, 2018 the Monitor asked the City to provide it with further materials and information generated by the review process – including an overview of ratings for all officers reviewed, and sample reviews. The City reports that it is working to comply with the Monitor's request, but it has not yet produced the requested material. Accordingly, at this point the Monitor does not have the information needed for it to evaluate the effectiveness of the performance review system, or to determine whether it effectively captures

the information (both favorable and unfavorable) that would enable the FDNY to assess each officer's compliance with EEO law and policy. The Monitor plans to continue to work with the City to obtain the necessary documents and data.

## 2. Climate Survey

Since the last periodic report, the Monitor and the Parties have made significant progress on the development of a workplace climate survey, and on plans for administering the survey. As recounted in detail in the Monitor's previous report, although the City has acknowledged the need for the climate survey since at least 2013, work on the survey has been plagued by delays, false starts, and changes in course. The City circulated a draft survey to the Monitor and Parties in December 2017, following a meeting between the Commissioner and the Monitor in October 2017, and, after opting not to hire an outside vendor by the fall of 2018, decided to conduct and administer the survey using City resources, including resources from the Mayor's Office of Data Analytics ("MODA") as well as DCAS. The Parties engaged in a series of detailed discussions on the survey content and logistics along those lines since the City proposed DCAS, including two extended meetings on November 8 and December 5, 2018.

Since that time, the United States, working with its expert, has spearheaded the development of survey content, accounting for comments and suggestions from the Monitor, the other Parties, and their respective experts in a draft survey, as well as the overall survey plan and timeline. The City's plan is for DCAS to administer the survey using a commercially available electronic survey tool, making appropriate provisions to ensure the anonymity of survey participants. The analysis of survey data will be conducted primarily by MODA; but in response to concerns expressed by the Parties that the analyses should draw upon EEO expertise in addition to data analytics resources, the City has confirmed that the EEO Office will be involved in setting the goals of the analyses and have the opportunity to pose follow-up queries. In

addition, the Parties and the Monitor plan to task a small group of representatives to work with MODA in analyzing the data. The City has also confirmed that it plans to administer the survey regularly and use its results in the development of EEO initiatives.

Before the recent shutdown of the federal government, the timeline for work on the survey called for it to be administered in early spring. However, because the shutdown prevented the Department of Justice (and its expert) from moving forward with work on the survey, the schedule will have to be adjusted to take account of the lost time. Currently, the City is proceeding with work on plans for survey logistics and on the messaging that will accompany the survey. For the survey to be successful, it is critical for it to elicit a sufficient response from a full range of workplaces and demographic groups within the Department; and accordingly it is essential for the messaging surrounding the survey to communicate the benefit to the FDNY, its leadership, and its members. On February 4, the Monitor circulated a series of suggestions based on input from its experts, along with sample messaging content and additional materials for the City to consider as it proceeds with plans for the survey. Plaintiffs-Intervenors have also circulated their comments on messaging for the City to consider.

### 3. Disparate Impact Analyses

One of the core responsibilities of the FDNY's EEO Office is the analysis of hiring practices and other employment actions to identify instances of potentially unlawful disparate impact. For the FDNY's EEO function to comply with the Modified Remedial Order, the City must show that it has both the data resources and the institutional practices in place to conduct sufficiently frequent and targeted analyses to detect patterns of discrimination and disparate impact. Such analyses are essential to fulfill the City's duty to "with reasonable diligence, take all steps necessary to eliminate all policies and procedures that are not job-related or required by

business necessity and have a disparate impact on black and Hispanic firefighter candidates or perpetuate the effects of said disparate impact.” Modified Remedial Order ¶ 19.

As previously reported, the City has provided general assurances that it plans to conduct such analyses; and on October 5, 2018 it provided a list of the analyses it plans to conduct regularly. Monitor’s Twenty-Fifth Periodic Report at 31. However, the list does not describe specific queries or methods of analysis or comparison; and in some instances the analyses are planned to occur only once per year or once per examination, which may not be frequent enough for the City to detect and respond to any issues it identifies.<sup>13</sup> In addition, the City’s list does not indicate what provisions are made for the EEO Office to be informed of, and follow up on, relevant results. In subsequent communications, the City has recently pointed to its Review of Candidate Attrition for Exam 2000 as a further illustration of the types and methods of analysis the City plans to employ. While this document provides some indication of the methods the City plans to employ in some areas, it does not cover all the areas of analysis contained in the City’s October 5, 2018 list, nor does it clarify the roles of those responsible. The Monitor plans to obtain additional details regarding the planned analyses and work further with the City to ensure that its systems of analysis and reporting can identify and address any patterns of discrimination. As part of that process, it will be necessary for the Monitor to see the system in action over time and review the reports it produces.

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<sup>13</sup> For example, given that the hiring process fills two Academy classes per year, a system of annual reviews could permit disparate impact to persist through the hiring of two classes – or, realistically, three or more, given the time that would be required to detect disparities and to devise and implement reforms.

## **E. Investigations**

### **1. The Monitor's Report on FDNY EEO Investigations**

Since the last periodic report, the Monitor has completed a further draft of its report, pursuant to the Court's November 17, 2017 Order, regarding the EEO Office, its staffing, its investigative procedures, and its performance in the completion of EEO investigations – with a particular focus on the duration of investigations as measured against the presumptive 90-day time limit for investigations set forth in the City's EEO guidelines and the FDNY's own EEO Policy.<sup>14</sup> The latest draft includes revisions based on the Parties' comments on a previous draft, which the Monitor circulated on September 25, 2018; and it also includes some updates reflecting recent developments. The Monitor provided the current draft to the Court on December 17, 2018. On January 7, 2019, the City produced to the Monitor a set of updated and expanded statistics. Based on its analyses of the new statistics, the Monitor plans to provide an updated draft of the report to the Court shortly.

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

### **2. Compliance with the Statement of Principles on Complainant Assignments**

The Monitor has continued to conduct discussions with the Parties on the City's compliance with the Statement of Principles ("SOP") governing the detailing or reassignment of

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<sup>14</sup> In relevant part, the Court's Order stated as follows:

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



complainants in EEO investigations.<sup>15</sup> *See* Monitor’s Twenty-Third Periodic Report at 22. The Statement of Principles provides that “while the Department retains the ultimate authority to determine whether and where a member should be detailed or transferred, if operational needs permit, the Department will consult with the member to be detailed or transferred and consider their concerns and preferences along with the proposed work location’s history of EEO and workplace violence complaints.”

On July 16, 2018, responding to concerns expressed by Plaintiffs-Intervenors regarding the City’s compliance, the Monitor recommended that the City implement a set of revised procedures for cases implicating the SOP. *See* Monitor’s Twenty-Fifth Periodic Report at 47. Specifically, the Monitor recommended (1) that the FDNY “should endeavor to elicit the concerns and preferences of each complainant before identifying and offering options for placement”; (2) that “if consistent with operational needs, the Department should endeavor to provide options consistent with the preferences of which it has been advised”; and (3) that the Department should record its consultations with complainants, including placements offered, and, in cases where it concludes that it cannot offer placements consistent with their concerns and preferences, it should record the operational considerations supporting its decisions.

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<sup>15</sup> The Statement of Principles was developed as part of the process overseen by the Monitor to implement a new FDNY EEO Policy and a new FDNY EEO Investigative Manual. It was circulated as Supp. No. 24 to Dept. Order No. 31 on April 6, 2017. *See* [http://www.nyc.gov/html/fdny/insider/resources/do/2017/031\\_sup\\_24\\_2017.pdf](http://www.nyc.gov/html/fdny/insider/resources/do/2017/031_sup_24_2017.pdf).

It reads in relevant part:

There may be instances where a member who has made an EEO complaint requests and is granted a transfer or detail, or where operational needs of the Department dictate that the member must be detailed or transferred to another work location. In such cases, while the Department retains the ultimate authority to determine whether and where a member should be detailed or transferred, if operational needs permit, the Department will consult with the member to be detailed or transferred and consider their concerns and preferences along with the proposed work location’s history of EEO and workplace violence complaints.

In an October 5, 2018 letter, the City accepted the Monitor's recommendations in part and rejected them in part. The City agreed that (subject to operational needs) it should elicit complainants' concerns and preferences before offering placements, but it objected to the recommendation to the extent that it would permit complainants to state preferences for individual firehouses. And although the City asserted that its current procedures largely conform to the Monitor's record-keeping recommendations, it raised objections to the Monitor's second and third recommendations as potentially imposing a "burden of proof" on the City and infringing on the operational discretion that the Statement or Principles preserves.

Subsequently, Plaintiffs-Intervenors continued to raise concerns about the City's compliance, contending that its offers of placements in particular cases reflected a failure to consider complainant input.

On January 30, 2019, following further discussions with the City (on a December 4, 2018 call) and a review of relevant materials provided by the City, the Monitor offered the Parties the following additional clarification and guidance regarding its recommendations:

- (1) The City has confirmed that it is prepared to implement the Monitor's recommendations, subject to its position that the SOP and the recommendations do not impose a burden of proof on the City in addition to those imposed by applicable law. The Monitor notes that under the Statement of Principles, "[u]nder no circumstance should a Complainant be subjected to a materially adverse change in the terms and conditions of employment because he or she has made a good faith complaint, or otherwise exercised rights under the EEO Policy, regardless of whether such complaint results in a finding that an EEO violation occurred."
- (2) While the Monitor acknowledges the City's litigation position concerning burden of proof as stated in point 1, without prejudice to the City's right to make any such argument, the Monitor continues to recommend that the City take the following steps to facilitate its compliance with the SOP: (1) documenting that the Department has consulted with a complainant to obtain his or her concerns and preferences, (2) recording what the concerns and preferences were as stated, and (3) recording any particular reason(s) it was not possible to accommodate them.

- (3) Based on the City's feedback and to improve the chances that the Department can accommodate complainants' concerns and preferences and avoid misperceptions, the Monitor makes the additional observation that complainants most likely should be encouraged to state their preferences in descriptive or categorical terms instead of (or in addition to) identifying specific firehouses that would be acceptable, and the City should consider eliciting the preferences in those terms.

### 3. EEO Database

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

Before the last periodic report, the City projected that version 2.0 of the database, incorporating new features including the Monitor's recommended changes, would be launched in December of 2018. The new version was launched as projected in December. And the City has indicated that it is prepared to demonstrate this newest iteration of the database to the Parties and the Monitor as soon as a demonstration can be scheduled.

### 4. Interim Measures in EEO Cases

In several of the Parties' weekly calls with the Monitor since the last periodic report, the United States and Plaintiffs-Intervenors expressed concerns that the FDNY makes insufficient use of interim measures – such as targeted messaging, supplementary training, counseling, or

guidance to the chain of command – in addressing EEO complaints and reports of potential violations. Their concerns focused on the need to consider interim relief not only at the start of an investigation but also as it proceeds, and on the need for the Department to consider a broad range of interim measures. Especially in complex cases where investigations may take considerable time to complete, such interim measures are an important component of the FDNY's response to EEO issues. Often, even where alleged violations cannot be substantiated or liability cannot be determined without substantial investigation, the need for such interim steps may be apparent.

In discussions on the weekly calls, the City offered assurances that interim measures are considered in the course of an investigation, and that the EEO Office operates with a broad “tool box” of interventions that it may employ based on case specific considerations. In view of the City's representations, the Monitor suggested that the City draft a revision to the relevant section of the EEO Investigation Manual, making it clear that investigators should consider and, where warranted, raise the need for interim measures at any point in a case, and that a full range of possible steps should be considered. On December 14, 2018, the City circulated a draft revision, and the Monitor circulated comments on the draft on February 4, 2019.

#### 5. Review of Investigations

Since the last periodic report, the Monitor has continued to receive, review, and comment on intake documents and closing memoranda from EEO investigations that the City has identified as requiring substantial investigative activity.

As previously reported, in a June 6, 2017 set of recommendations, the Monitor identified a number of deficiencies in the FDNY's EEO investigative practices, based on an historical review of complete investigative files. *See* Monitor's Twenty-Second Periodic Report at 32-33. Subsequently, the City has continued to produce intake documents and closing memoranda from

selected cases. And in a small number of specific cases the Monitor has also received additional investigative materials and periodic updates on investigations in progress. In a December 12, 2018 message, the Monitor requested that the City provide full investigative files from all investigations for which it provides closing memos, to ensure that the Monitor has access to complete information for its reviews and comments.

The Monitor's comments and suggestions on draft memoranda are intended to provide the EEO Office with guidance in adhering consistently to investigative best practices; and the Monitor does not dictate results in particular cases or require the City to obtain Monitor approval before issuing findings. *See* Monitor's Twenty-Third Periodic Report at 31. However, in some instances, the City has conducted additional investigation based on comments made by the Monitor. Monitor's Twenty-Fifth Periodic Report at 49.

Closing memoranda from recent cases provided to the Monitor indicate that, although the EEO Office's investigative practices have improved in some respects, some of the deficiencies previously identified by the Monitor persist – for example, placing an undue burden on complainants to articulate all the elements of an EEO violation, or placing disproportionate burdens of corroboration on complainants. The Monitor plans to work with the City to address these issues.

With respect to the duration of investigations (addressed in detail in the Monitor's EEO Report), based on the cases for which investigative materials have been provided to the Monitor, the City has shown some recent improvement in its ability to complete investigations within 90 days, as required by City policy. But the number of cases provided to the Monitor in 2018 is too small for the Monitor to support a conclusion that the trend will be sustained.

In addition to the materials produced to the Monitor, the City has also circulated comprehensive lists of EEO matters showing intake dates, case numbers, dispositions, dates of dispositions, numbers of witness interviews, and the date of the first interview in each matter. In accordance with the Court's direction following representations made by the City at the December 17, 2018 status conference, the Monitor requested additional, updated data and clarifications of categories of data the City has provided. As discussed above in connection with the Monitor's report on EEO investigative practices, the City produced updated and expanded data on January 7, 2019, and the Monitor is conducting an analysis of the new data, with a view to including a discussion in a revised draft of its report on EEO investigative practices.

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

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

As reported in the Monitor's Twenty-Fourth Periodic Report, an analysis completed by the Monitor and shared with the City on May 8, 2018 confirmed that the Medical Exam has a disparate impact on black and Hispanic candidates. *Id.* at 38-41. Now that the City has made available all data from Exam 2000 medical testing – including NOFDs and the BHS Attrition Metrics Report – the Monitor, aided by its experts, Manitou, Inc., is continuing statistical analyses to identify which specific components of the Medical Exam are responsible for the disparate impact. This type of analysis is essential to developing potential mitigation strategies for those components that are found to be causing the disparate impact, and the City will need to show that it has the capacity and an established plan to continue to conduct these kinds of analyses in the future.

### **A. Validation of the Stairmill Test**

The Monitor, in consultation with its expert, Dr. Denise Smith, has continued to work with the City to address longstanding concerns, first expressed by Plaintiffs-Intervenors and the United States, that the stairmill portion of the Medical Exam has a disparate impact on black and Hispanic candidates. Both the Monitor's analyses of NOFDs produced by the City and the City-produced BHS Attrition Metrics Report indicate that this concern is supported by the data. *See* Monitor's Twenty-Second Periodic Report at 42.

#### **1. Background**

In February 2017, the City reported its intention to engage PSI, which assisted the City in developing the written examination, to assist the City in validating the existing stairmill test – or otherwise identify a validated screen. *See* Monitor's Nineteenth Periodic Report at 6. In March 2018, PSI circulated a high level proposal to the Monitor and the other Parties. *See* Monitor's Twenty-Fourth Periodic Report at 42. In May 2018, at the request of the Department of Justice, the City agreed to permit experts for the United States and Plaintiffs-Intervenors to participate in stairmill validation discussions between PSI, BHS, and the Monitor's expert, Dr. Smith.<sup>16</sup> PSI also retained an exercise physiologist to assist with the validation.

Based on earlier assurances from the City, the Monitor reported in numerous periodic reports that the City would complete the validation study by April 30, 2018. *See* Monitor's Twentieth Periodic Report (Dkt. # 1784) at 34; Monitor's Twenty-First Periodic Report (Dkt. # 1803) at 36; Monitor's Twenty-Second Periodic Report at 9, 45. The Monitor then reported that the City could no longer meet that deadline but would complete the study well before Exam 7001

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<sup>16</sup> As noted in earlier periodic reports, Plaintiffs-Intervenors and the United States reserved their right to raise objections to the validation study. *See, e.g.*, Monitor's Twentieth Periodic Report at 33. In the interest of avoiding disputes and delay after validation, the City agreed to allow the other Parties to be heard as PSI develops and conducts the validation study.

candidates begin medical testing at BHS. Monitor's Twenty-Third Periodic Report at 37-38.

The Monitor stated that the prospect of a second examination list being processed without a validated stairmill protocol was not acceptable and that the City must make every possible effort to complete the validation as soon as possible. *See* Monitor's Twenty-Fourth Periodic Report at 43.

As reported in the Monitor's Twenty-Fifth Periodic Report, because of the short time frame between March 2018 – when the City first circulated a high level proposal to the other Parties – and the beginning of processing for the next class, some of the validation testing cannot be completed until February; and the first group of Exam 7001 candidates to whom the Medical Exam will be administered will have to be tested using a stairmill protocol that has not been validated. *Id.* at 52. The City has offered that, if the stairmill protocol that is validated differs from the stairmill protocol currently in use, the City will permit candidates who do not pass the current stairmill protocol to retake the stairmill test, using the validated protocol.<sup>17</sup> Although this is not a desirable situation, the Monitor will work with the City and other Parties to ensure that the validated protocol, if different from the current protocol, is put in place as expeditiously as possible, and that no candidate is disqualified by a stairmill protocol that has not been validated.

## 2. Validation Testing

PSI and the Monitor's and Parties' experts have begun to conduct the study to validate the stairmill test. The goal of the validation study is to ensure that candidates possess adequate fitness to meet the aerobic demands of the Fire Academy's Functional Skills Test ("FST") while climbing stairs in full PPE (personal protective equipment). The stairmill validation study will determine the aerobic demand of different step rates on the stairmill by measuring oxygen

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<sup>17</sup> The specific criteria under which candidates will have the opportunity to retest remain to be determined.



consumption for three minutes at each step rate. The aerobic demand associated with the FST, which incorporates an array of firefighting activities, will also be assessed, and statistical analyses will be performed to determine the stairmill stepping rate that most closely corresponds to the aerobic demands of the FST. Additional analyses are expected to explore the extent to which performance on the stairmill is associated with the aerobic demands of the FST. Participants will also complete a graded exercise test to volitional fatigue on a treadmill to determine their maximum aerobic capacity; this will permit statistical analyses to determine the extent to which successful completion on the stairmill is associated with aerobic capacity, as well as how performance on the FST is associated with aerobic capacity. It will also permit the reporting of data as a percentage of maximal capacity.

PSI conducted the data collection on the stairmill study protocol using a sample of approximately 147 Academy trainees on December 7-9, 2018. PSI collected additional data on a treadmill protocol using approximately 135 of the same trainees on December 14-16, 2018. Data gathered from this portion of the study will be compared with aerobic cost data that is to be collected February 11-22, 2019 from trainees performing the FST. All these results will be analyzed to determine which stairmill stepping rate is best aligned with the aerobic demands of New York City firefighting, as reflected in Academy FST testing.

The demographic makeup and sample size of the trainee participants is, unfortunately, not optimal. While the demographics of the trainee volunteers track closely with the overall class composition, minorities and women are underrepresented. Further, the trainees are promotional candidates rather than open-competitive candidates, and this may affect their fitness level and FST performance. The Academy trainee volunteers also, by definition, all passed the BHS medical evaluation prior to their Academy admission, including the stairmill test; thus, no

individuals participating in the study can be expected to “fail” the stairmill test; and in that regard any impact seen in this group is not likely to be representative of the potential impact on more typical firefighter applicants. As for sample size, the study design requires that the same trainees complete all three components (stairmill, treadmill, and FST). While approximately 147 trainees completed the stairmill testing, several dropped out or had medical issues that prevented them from completing the treadmill testing. It is expected that some number of the remaining 135 participants will be unavailable for the FST testing, so significantly fewer than the anticipated 150 participants will complete all three components of the study. Nevertheless, the experts believe that the data obtained will be of sufficient quality to permit the study to continue, and additional testing or analyses comparing demographic groups is possible, if needed.

Experts for the Monitor and the Parties met in Chicago on December 10 to discuss preliminary results and next steps and have continued to do so via email and on conference calls.

### 3. Next Steps

PSI has data from the stairmill and treadmill testing that needs to be reviewed for reasonableness and completeness, cleaned, reduced, and then shared with the expert group. PSI reported on January 22, 2019 that data file preparations were proceeding and circulated preliminary data on February 1. Having actual data from the stairmill and treadmill and mock data from the FST should permit PSI and the experts to make further progress on the analytic plan before the next round of testing. The next call among the experts is scheduled for February 26.

On February 11-22, 2019, PSI will measure the aerobic demands of FST testing on trainees nearing the end of their time at the Academy. PSI is currently performing pilot testing to ensure that equipment will work as planned and to identify any modifications that may be required.

PSI needs to update the analytic plan for the study, including a description of the statistical tests and analyses on which the experts have come to agreement and identification of issues that still require resolution. Additional conversations among the Monitor, PSI, and the experts are needed to confirm the adequacy of procedures for data cleaning and data reduction as well as specific statistical analyses. The experts also need to come to agreement about the use of a cross-validation testing sample. PSI is now working to schedule an in-person meeting with the experts sometime between March 25 and April 12 to discuss initial results and additional analyses and to begin to formulate a stairmill protocol based on those results.

After the stairmill validation study is completed, the overall process for screening for cardiopulmonary fitness will need to be studied. Current BHS practice is to allow three stairmill test attempts, with the requirement that a candidate failing the second attempt obtain a negative methacholine challenge test and a normal echocardiogram before being permitted to make a third attempt. It is also current practice for BHS to permit a candidate to demonstrate adequate aerobic fitness by taking and passing an exercise stress test to 12 METs, in lieu of a third stairmill test. It will be necessary to confirm that this process will remain the same or that the City has provided evidence that a change is appropriate. Also, aerobic capacity screening does not occur only within the BHS stairmill testing protocol; under the current system, candidates perform a CPAT test (which includes a stairmill component) before BHS screening and do a 1.5 mile run afterwards, right before entering the Academy. A candidate can be disqualified during any one of these evaluations, all of which either test for or rely on aerobic capacity. It will be important to track whether the disparate impact seen on the BHS stairmill is exacerbated because of these multiple screens and whether this is something that can and should be addressed.

#### 4. Measuring Heart Rate

One issue that remains unsettled is whether the City intends to measure candidate heart rate during BHS medical testing and how it will use heart rate to qualify or disqualify candidates. The City has assured the Monitor and other Parties that the new stairmill protocol will not include a heart rate component: candidates will pass or fail the stairmill test based on their ability to complete the test, and no part of the stairmill testing protocol or outcome will be based on candidate heart rate during stairclimbing. (In the past, candidates whose heart rates exceeded 90% of their age-predicted maximum were required to remain on the stairmill for an extra three minutes in order to be deemed qualified, or were sent for further medical testing.)

Although the City has agreed that candidate heart rate during stairmill testing will not be used either to disqualify a candidate on the stairmill test or to require further or longer testing pursuant to the validated stairmill protocol, the City has not stated categorically that it will not measure heart rate during stairmill testing or that heart rate – whether measured during stairmill testing or elsewhere – will not play any part in the medical qualification or disqualification of candidates. This is problematic because the disparate impact seen with stairmill testing of Exam 2000 candidates may have been driven largely by heart rate. Candidates who had a heart rate greater than 90% of age-predicted maximum were not disqualified outright but, if they could not stay on the stairmill for a full eight minutes, they were required to come back for another stairmill test and/or obtain additional other testing. The vast majority of candidates who were disqualified by the stairmill test were actually disqualified because they did not return for the next step in the process. The fact of their “elevated” heart rate sent them into further testing, and their failure to appear for this further testing is what led to their disqualification. Even after the stairmill protocol was amended in or around November 2016, BHS continued to use heart rate during the first five minutes of climbing to determine whether a candidate needed to climb for an

extra three minutes. It is possible that, if the City continues to use heart rate as a measure of medical health, disparate impact may simply be transferred to a new or different component of the Medical Exam.<sup>18</sup> It was only in mid-November 2018 – after the experts had come to agreement that heart rate would not be used at all in stairmill testing and three weeks before the validation testing began – that the City raised the possibility of continuing to use heart rate as a reason for disqualification in some other, as yet unidentified, medical context. The City has been promising to articulate a rationale and proposal on this issue since it brought heart rate back into the discussion in November. It is critical to hear the City’s position on this issue so that the Monitor and the other Parties can determine whether the particular use of heart rate (if any) presents the concerns referenced above. The Monitor has cautioned the City that any change to the hiring process, including a new use of heart rate, must be approved by the Monitor and, specifically, that any use of heart rate for further testing possibly leading to medical disqualification would need to be validated before it can be considered for use in the medical examination of candidates.

## **B. Psychological Exam**

### **1. Background**

As reported in the Monitor’s Twenty-Fifth Periodic Report, on September 24, 2018, the City informed the Monitor and the Parties that it had revised its protocol for the psychological exam for Exam 7501 promotional candidates and asked for the Monitor’s approval to use the revised protocol when it processes Exam 7001 open competitive candidates. *Id.* at 56. The City’s revised protocol would consist of two changes: (1) the questionnaire the City previously used as a preliminary screen – the Minnesota Multiphasic Personality Inventory (“MMPI”) –

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<sup>18</sup> The Monitor notes that the “cardiac” component of the Medical Exam also appears to have had a disparate impact on minority candidates.

would be replaced with a shorter, self-administered questionnaire the City refers to as the “SAMH”; and (2) the questionnaire would be administered on the same day as the Medical Exam, whereas the protocol used during Exam 2000 processing required candidates to return to BHS on a different day.

On October 12, 2018, the United States circulated a number of questions and comments about the City’s proposed use of the SAMH, noting, among other things, that the MMPI is a validated test that does not appear to cause disparate impact among FDNY candidates, whereas the SAMH has not been validated and is a new test that was created by the City. Plaintiffs-Intervenors joined the United States’ objections. The City responded to the United States’ questions on October 12 and 31, describing the psychological exam protocol, explaining the scoring of the SAMH and the City’s approach in creating it, and providing pass-rate statistics for Exams 2000 and 7501. The United States responded again on November 13, expressing concern about the way the new psychological protocol appeared to have been developed and the fact that the number of candidates whose status remained pending after testing made it difficult to assess definitively the impact of the previous protocol.

## 2. Approval of Proposed Change and Request for Impact Plan

On November 14, 2018, after having reviewed all the Parties’ submissions, the Monitor informed the City that it would not object to the City’s use of the new protocol for the Psychological Exam, with the proviso that the City provide a plan to assess results of the new protocol. The Monitor noted that, as with any changes in the hiring process, the City must demonstrate that it has a plan to assess the impact of the change on Exam 7001 candidates and, if necessary, to address any disparate impact that assessment may reveal. The Monitor noted, however, that it shared the United States’ concerns about the City’s decision to use a self-created new testing instrument that has not been validated or even administered in the form or for the

purpose the City proposes. While most of the questions included in the City's SAMH screening test are drawn from questionnaires that have been validated as complete instruments for one purpose or another, the resulting SAMH uses only a limited number of questions from each instrument, resulting in a newly-created collection of questions that has not been validated and was first used by the FDNY in its screening of Exam 7501 promotional candidates. For that reason, the Monitor told the City that, in general, it is more sound to use validated instruments where possible.

While the City's decision to change a hiring step that has no disparate impact by substituting an unvalidated instrument for one that is validated could be subject to question, the Monitor notes that there is reason to believe that the proposed change will mitigate attrition. The City's reported Exam 2000 numbers and the Monitor's own review of the CTS indicate that a higher percentage of candidates of all race/ethnicities were disqualified by their failure to appear for the Psychological Exam than were disqualified by the exam itself. The fact that the SAMH is short enough to be administered on the same day as the Medical Exam means that candidates are spared the burden of appearing twice for BHS testing; the Monitor expects the rate at which candidates fail to report for the Psychological Exam to approach zero, given that candidates will already be at BHS.

### 3. The City's Adverse Impact Plan for the Psychological Exam

In its November 14, 2018 email, the Monitor asked the City to create a plan for assessing the impact of the new protocol on Exam 7001 candidates and addressing any disparate impact that may occur with its use. Though not a perfect comparison, the Monitor asked that the City compare the results for the first year of the Exam 7001 Psychological Exam protocol to the results for the first year of the protocol used with Exam 2000 candidates and that the City monitor the rates, by race/ethnicity, at which candidates are referred for further psychological

screening, are disqualified following the entire Psychological Exam protocol, and remain in pending status as each class moves to the Academy.

On December 6, the City sent the Monitor its “FDNY Firefighter Candidate BHS Testing Psychological Exam: Attrition Metrics and Adverse Impact Analysis Plan.” The plan is quite comprehensive and projects performing adverse impact analyses for every class at multiple junctures in the process. The plan describes how the City will use two separate statistical significance tests as well as the 80% rule and, in some cases, regression analyses, to check for disparate impact, and will do so with the establishment of each firefighter class.

On January 15, 2019, the Monitor sent the City a number of follow-up questions and requests. For example, it is unclear to the Monitor whether or not the City’s plan currently calls for monitoring by race and ethnicity the rates at which candidates fail to appear for follow-up testing. The Monitor would also like the City to apply its planned analyses to Exam 2000 data, which can then be used as a baseline from which to gauge the success of the new protocol. But the Monitor recognizes the work that went into this plan and appreciates that the City has developed what appears to be a sound methodology for measuring adverse impact in this area. The City has told the Monitor that it will respond shortly to the Monitor’s questions and requests. Plaintiffs-Intervenors and the United States have asked to see the City’s adverse impact analysis plan and the Monitor’s follow-up questions.

### **C. Mask Fit Test**

As reported in previous periodic reports, Plaintiffs-Intervenors have raised concerns about the City’s decision, reflected in a May 24, 2018 Department Order, to withdraw an accommodation previously extended to firefighters who could not comply, for religious or medical reasons, with the requirement that members remove any facial hair that comes between the face and the sealing surface of a respirator mask. *See* Monitor’s Twenty-Fourth Periodic



Report at 44. The Department's decision could mean that some candidates who may previously have been able to take and pass the Mask Fit Test (a component of the Medical Exam) may now be unable to do so. Plaintiffs-Intervenors' position, and the City's explanation for the revised policy, are recounted in the Monitor's Twenty-Fifth Periodic Report at 55.

After Plaintiffs-Intervenors raised the issue, individual plaintiffs brought two lawsuits in this District challenging the City's decision to withdraw the accommodations, including one such suit before this Court. *Hamilton v. City of New York*, 1:18-cv-04657-NGG-JO (E.D.N.Y). The Monitor previously advised the Parties that it plans to wait for further progress in the litigation before addressing the issue. Monitor's Twenty-Fifth Periodic Report at 55. The City has indicated it concurs with the Monitor's approach. Plaintiffs-Intervenors have also concurred but have noted their understanding that the Monitor's attention may ultimately prove necessary as *Hamilton* may resolve some but not all of Plaintiffs-Intervenors' concerns.

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

### **A. Overview**

Since the last periodic report, the Parties and the Monitor, with the assistance of its expert consultants, Manitou, Inc., have continued work with the City to analyze the character review portion of the FDNY's hiring process (in which the FDNY assembles and examines background information such as candidate arrests or convictions, employment history, and driving record) and to consider further reforms in the standards and procedures governing referral of certain candidates' files by the CID for additional consideration (and potential disqualification) by the PRB – and in the rules governing PRB decision making.

As the Monitor reported in September 2015, analyses of the character review process as it existed at that time, which reflected a number of reforms under the Modified Remedial Order but

pre-dated the most recent round of changes,<sup>19</sup> showed that minority candidates were referred by the CID to the PRB for further, discretionary screening at a higher rate than white candidates. Analyses of the same data set also showed that minority candidates referred to the PRB were disqualified by the PRB at higher rates than white candidates who had been referred. *See, e.g.*, Monitor's Thirteenth Periodic Report (Dkt. # 1636) at 20-21 (discussing findings). As described in the last periodic report, the Monitor recently completed updated analyses of all character review outcomes for Exam 2000 candidates – including analyses focusing on candidates who went through the process after the latest round of revisions in the summer of 2016. Although the sample size for this latest group was too small to support a definitive conclusion, the available data (assuming continuation of existing trends) indicates that the process, even as most recently revised, may still have an adverse disparate impact on black and Hispanic candidates. *See* Monitor's Twenty-Fifth Periodic Report at 47.

At a meeting on July 27, 2017, the Monitor provided the City with a detailed set of recommendations for new reforms, developed in consultation with the Monitor's expert, Alison Wilkey of John Jay College; and the City responded on October 13, 2017, declining to adopt the Monitor's recommendations and stating a number of objections. On September 28, 2018, after obtaining the necessary data and completing its statistical analysis, the Monitor circulated to the Parties a detailed response to the City's concerns and objections regarding the Monitor's recommended reforms – along with its analyses of the effect of the character review process on relevant demographic groups. Monitor's Twenty-Fifth Periodic Report at 57. On October 28,

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<sup>19</sup> As previously reported in detail, beginning in 2012, and in consultation with the Monitor and the other Parties, the City issued a series of guidelines for the CID and PRB; the most recent modifications to the guidelines were issued in the summer of 2016. Monitor's Sixteenth Periodic Report (Dkt. # 1694) at 29-31; Monitor's Seventeenth Periodic Report (Dkt. # 1714) at 29-30. As noted in prior periodic reports, the revisions were agreed upon by the Parties with the understanding that they might be subject to additional changes based on further analysis. Monitor's Seventeenth Periodic Report at 30.

2018, the Department of Justice's expert, Dr. Bernard Siskin, provided the Monitor and other Parties with his latest updated analysis of the character review process, which focused on the PRB component of character review.

On December 12, 2018, the Parties, the Monitor, and their experts met to discuss the Monitor's proposed reforms. The City agreed to implement some of the Monitor's proposed changes in procedures and instructions, and to continue considering others. The City also agreed to drop two items from its list of criminal offenses that trigger referral to the PRB. But the City took the position that the analyses conducted to date have not demonstrated the need for further changes, and also that the PRB review process operates to differentiate job-related instances of particular violations from those that are not related to the job of a firefighter.

At the December 12 meeting, the Monitor noted that if further analysis, based on sufficient statistical samples, shows that the process has an adverse disparate impact on black or Hispanic candidates, the City will be required either to make further changes in the process (and show they are effective in eliminating disparate impact) or to validate the process as job-related; and in either case the City's timeline for establishing compliance with the Modified Remedial Order will be extended. The City agreed to continue to maintain and analyze data as Exam 7001 candidates go through the character review process, to identify any adverse disparate impact on black or Hispanic candidates, and to enable identification of the specific factors in the process that are producing such impact. Consistent with the Court's direction at the December 17, 2018 status conference, as additional rounds of candidates from the Exam 7001 eligible list go through character review and enter Academy classes, the City must carefully track outcomes, detect any disparate impact, and identify and address (or appropriately validate) the factors producing it.

## **B. Monitor's Statistical Analysis of the Character Review Process**

The principal findings from the Monitor's statistical analysis of the character review process were recounted in the previous periodic report. *See* Monitor's Twenty-Fifth Periodic Report at 57-58. The Monitor's analysis of PRB referrals and outcomes indicated that the process, even as revised by the reforms already implemented under the Modified Remedial Order, may still have an adverse disparate impact on black and Hispanic candidates. *See id.* at 59. Since the most recent reforms in the rules governing the process were implemented (in mid-2016), among candidates who completed the character review process (either because the CID determined that their cases did not require PRB review or because they received a final decision from the PRB), rates of disqualification for black candidates and for Hispanic candidates have continued to be higher than the rate for white candidates. The sample of candidates who have gone through the process since the most recent round of changes is not large enough for these apparent disparities to be deemed statistically significant. Nevertheless, if the same disparities persist as more candidates go through character screening, the results will ultimately reflect an adverse disparate impact – particularly on black candidates.<sup>20</sup>

In addition, an analysis of all candidates on the Exam 2000 open competitive hiring list who received a final decision from the character review process, including candidates who were disqualified under now obsolete criteria and then reconsidered under the current standards, shows a statistically significant disparity between rates of disqualification for black candidates and white candidates. While this analysis, incorporating the effects of reconsideration, does not necessarily reflect the outcomes that would have occurred had the current standards and

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<sup>20</sup> Based on the Monitor's power analysis, using the current trends of disparity in disqualifications, the observed disparity between white (2%) and black (5%) candidates will be statistically significant ( $p = .047$ ) if 95 more white candidates and 85 more black candidates receive decisions (of any kind) from the character review process.

procedures been in place throughout the life of the list, it suggests that the reforms implemented to date may not have eliminated the tendency of the process to have an adverse disparate impact, at least on black candidates.<sup>21</sup>

In an analysis focusing not only on disqualifications but also on appointments with extended probation (*i.e.* on both types of adverse outcome that the character review process can produce), there is also a statistically significant disparity between black and white candidates. In the period since the current procedures and standards were implemented, the rate at which black candidates were either (1) disqualified or (2) hired with extended probation (combining the percentages for both results) exceeds the same rate for white candidates to a statistically significant degree.

The Monitor's analysis also found differences between the processing times for candidates who had been referred to the PRB and for those who had not. Among candidates who are ultimately appointed to the FDNY, both median and mean processing times are longer for those who are referred to the PRB than for those who are not, and a higher percentage of the referred candidates have processing times longer than 500 days.<sup>22</sup>

### **C. Monitor's Recommendations, the City's Response, and Next Steps**

The Monitor's recommendations (first communicated to the City in July 2017, as discussed above) included revised procedures intended to relieve unnecessary burdens on

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<sup>21</sup> When the results of reconsideration are included, the ultimate outcomes for all the Exam 2000 candidates who passed through character review represent an approximation of the results that would be obtained by applying the new rules to the whole group. However, it must be noted that the expanded analysis does not necessarily produce the same results that would have been obtained if the new rules had been in place all along – starting when the first candidates were called off the Exam 2000 eligible list: all candidates eligible for reconsideration did not take advantage of it; and in some cases, candidates' criminal histories and/or employment histories may have changed between initial disqualification and reconsideration.

<sup>22</sup> As noted below, at the December 12 meeting, the City suggested that the Monitor's analysis did not account for some factors relating to the sequence of candidate processing and that the Monitor's findings may not accurately reflect the real impact of referral on processing. The Monitor has asked the City to provide details of its own analysis.

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

At the December 12 meeting, the City accepted some of the Monitor's suggestions for changes in procedures and in the guidance provided to candidates, but it largely rejected the Monitor's proposals for changes in the substantive criteria for referral to the PRB. The City has

agreed in principle to provide candidates with additional guidance on obtaining and correcting errors in their criminal histories (though it will not provide them with the reports it obtains from the justice system<sup>23</sup>), and the Monitor's expert has provided the City with further suggestions for materials that the City could offer to candidates and resources to which they can be directed. The City has also agreed to modify candidate instructions to make it clear that they may provide favorable information about positive influences in their histories, and it incorporated these changes into the relevant forms in time for them to be used for candidates from Exam 7001. The City will also consider changes in its procedures and record keeping for PRB decisions, and the Monitor's expert will provide the City with additional detailed suggestions for procedures designed to encourage, document, and maintain consistency in decision making and to minimize any unconscious bias in the decision making process. With respect to substantive criteria for CID referrals to the PRB, the City was much more reluctant to agree to changes, and agreed to except only two offenses (jaywalking and bicycling on the sidewalk) from the general rules governing referrals for felony and misdemeanor convictions and arrests.<sup>24</sup>

The City asserts that the process as currently constituted is valid and job-related as applied in practice, because the PRB makes an individual decision and considers all information in a candidate's file. The City further asserts that the analyses conducted to date have not demonstrated (1) that the process has an adverse disparate impact on black or Hispanic candidates or (2) that the Monitor's proposed reforms would address the causes of any such impact.

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<sup>23</sup> According to the City, it is not permitted to share the reports according to the terms under which it obtains them. The Monitor's recommendations included a suggestion that the City explore negotiating a change in those terms to allow it to share the reports with candidates.

<sup>24</sup> The current rules call for PRB referrals for any misdemeanor conviction, for a felony arrest within the past five years, and for two or more misdemeanor arrests within the past three years. A felony conviction automatically disqualifies a candidate unless he or she has obtained a Certificate of Good Conduct.

With regard to disparate impact in disqualifications, the City's view will be either confirmed or refuted once a sufficient sample of candidates have passed through the process under the current standards. Similarly, the City's assertions regarding the effectiveness of the Monitor's proposed reforms in addressing specific causes of disparate impact cannot be confirmed without data connecting specific criminal offenses or alleged conduct to PRB referrals or outcomes – data which the City has not maintained in electronic form; and if the analysis of additional outcomes confirms that the character review process as a whole has an adverse disparate impact on black or Hispanic candidates, the City will need to conduct further specific analyses to identify the causes and likely remedies.

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

The City's decisions rejecting the majority of the Monitor's substantive recommendations are based largely on a series of contentions and assumptions that have not yet been confirmed about the effect of the character review process on candidates from different demographic groups. Accordingly, to support its decisions, the City has agreed to perform, and share with the Monitor and the other Parties, a number of analyses. In particular, the City has committed to perform analyses confirming whether disparate PRB referral rates, in themselves, constitute an



adverse disparate impact on black and Hispanic candidates; and in addition to its general and ongoing data analysis obligations under the Modified Remedial Order, the City has acknowledged that, given its decision to adhere substantially to current referral criteria, it must analyze disparate impact in the character review process as Exam 7001 candidates go through screening, to determine conclusively whether the process produces an adverse disparate impact on black or Hispanic candidates, and to identify and remedy (or validate) any components of the process that cause such disparate impact. As noted above, this process may require more detailed data tracking than the City currently conducts – encompassing data on the specific criminal offenses and alleged conduct involved in candidates’ cases.

## **VI. Firefighter Exam**

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

### **A. Open Competitive Exam**

The Exam 7001 scores were released on June 13, 2018. The City currently expects to establish the Exam 7001 list on February 27, 2019 and anticipates that the first class drawn from the list will enter the Academy in May 2019.

#### **1. Current Milestone: Technical Report**

The current step in the exam analysis and reporting process (Step 204, “Technical Report”) requires PSI to complete a report documenting all the steps taken in the development,

administration, scoring, and analysis of Exam 7001. PSI circulated its first draft of the report to experts for the Monitor and the other Parties on July 23, 2018. The other Parties submitted comments on August 7, and the Monitor submitted comments on August 10.

As reported in the Monitor's Twenty-Fifth Periodic Report, the July 23 draft report provided a full description of PSI's work, including its confirmatory job analysis, development of new exam forms, equivalency testing, exam administration, scoring, and analyses of results. *Id.* at 61. The report included the adverse impact analyses for Exam 7001 that were performed and circulated by PSI in March 2018 and that formed the basis for the Parties' and Monitor's understanding of the impact of Exam 7001's method of use before the scores were released in June. The Monitor described these adverse impact analyses in detail in its previous reports. *See* Monitor's Twenty-Fourth Periodic Report at 49-51; Monitor's Twenty-Third Periodic Report at 43-44.

In its August 10 comments, the Monitor requested that an appendix be added to the draft Technical Report so that subsequent updates to the assumptions and data as of March 2018 could be included.<sup>25</sup> For example, the Monitor asked PSI to perform the following analytical tasks: use final attrition data from Exam 2000 to update the assumed attrition rate used in PSI's adverse impact projections for the Exam 7001 list; make calculations based on the updated assumption that candidates will be called off the Exam 7001 list for four years of Academy classes, rather than the three years projected in the March analyses (when the forecast was that the open competitive list would be established while promotional candidates were still being processed); and use the most recent list data, including scores that may have changed as a result of added or subtracted residency credits or other adjustments. The appendix approach was suggested, after

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<sup>25</sup> PSI's March report was based on scores and demographic information provided by DCAS only as of February 21, 2018.

discussion with the Parties, so that the body of the Technical Report would not require substantial changes and would continue (a) to reflect the data upon which the Parties and the Monitor based their review of adverse impact ratios and other analyses in the months leading up to publication of the Exam 7001 list and (b) to be useful for direct comparisons to the technical report prepared for Exam 2000. The appendix would be useful as a more up-to-date projection of likely Exam 7001 outcomes and for comparisons that may be performed with respect to future exams.

On December 24, 2018, PSI circulated a second draft of the Technical Report, which includes an appendix along the lines the Monitor requested, including projections based on updated assumptions. Notable among the updated assumptions is that the attrition rate for Exam 2000 candidates was 5 to 1 (*i.e.*, five certified candidates required to fill each Academy placement), rather than the 3.5 to 1 rate used in PSI's March and April 2018 projections. Other updated assumptions include that the City expects to have two Academy classes per year for four years, with each class containing approximately 322 trainees. The number of trainees needed for processing each year is thus approximately 3,220 (322 trainees x 2 classes x 5 candidates per successful trainee). For its updated analysis, PSI selected 3,220 candidates per year using the DCAS rules to select candidates in rank order beginning at the top of the list and to break tied scores using a number created from candidates' social security numbers. PSI's updated analyses also include the assumption that successful trainees not placed in classes in the first year their score is reached will be placed in the next available class.

PSI used these updated assumptions to project that the City will reach candidates with scores down to 96. (Using the earlier assumptions, as reported in previous periodic reports and in the first draft of the Technical Report, PSI projected that the City would only reach candidates

with scores down to 97.) The new assumptions appear to project that disparate impact against both black and Hispanic candidates will be approximately the same as what was predicted under the old assumptions.<sup>26</sup>

As previously reported, although the Exam 7001 classes are projected to have a higher percentage of black and Hispanic candidates than Exam 2000 classes, the adverse impact ratios are lower for Exam 7001 (showing greater disparities between groups) because the adverse impact ratios compare the percentage of all white test-takers who are projected to be called for processing into Academy classes against the percentage of all test-takers of each other race/ethnicity who are projected to be called.<sup>27</sup> Thus, even if the number of test-takers likely to be called from a given demographic group remains the same from one exam to the next, an increase in the number of test-takers for that group diminishes the percentage of that group who are likely to be called. *See* Monitor's Twenty-Fourth Periodic Report at 50.

The Monitor has circulated further suggested edits to PSI and experts for the United States and Plaintiffs-Intervenors, and the United States has stated that it will complete its review soon, now that normal federal governmental operations have resumed.

## 2. Optional Survey Administered to Former Exam 2000 Candidates

In May 2017, the Monitor directed that the City administer a recruitment-focused survey by May 2018 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 asked that Exam 2000 candidates disqualified by the City not be asked to participate in

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<sup>26</sup> The standard deviation numbers look marginally worse for both black and Hispanic candidates when the updated assumptions are used. The adverse impact ratios look marginally worse for the first two years and marginally better in the second two years for both black and Hispanic candidates.

<sup>27</sup> For example: white candidates likely to be called / all white test takers vs. Hispanic candidates likely to be called / all Hispanic test takers.

the survey.) This survey was intended to provide insight into the reasons candidates with high scores dropped out of the hiring process, as well as to identify any characteristics that candidates who performed well on the exam and other hiring steps might have in common. The Monitor hoped the survey data could be used to inform a recruitment plan that specifically targets those minority applicants most likely to succeed.

In April 2018, the City circulated a draft survey, which it made anonymous and confidential. After incorporating comments from the Monitor and other Parties, the City finalized the survey on August 8, 2018. The City informed the Monitor and other Parties that its vendor for survey administration, ideas42, would receive the demographic data associated with survey recipients but the City would remove identifying information so the vendor could not identify individual survey recipients. The City reported that, upon completion of the survey, ideas42 would give the City both aggregated data and individual-level data, but the latter would still be stripped of identifying information. Neither the City nor the vendor would be able to tie responses back to individual persons.

The City launched the survey on October 3 and 4, 2018 and informed the Monitor and other Parties on November 1, 2018 that the response rate had been lower than expected: only six percent of those who received the survey responded to it. Of the survey recipients who had become firefighters, 144 gave full responses and 180 gave partial responses; of the survey recipients who left the hiring process before being hired or disqualified, 102 gave full responses and 70 gave partial responses.

Although the number of respondents was small, the City reports that it has reviewed the data and believes the responses are representative and give useful insight. The Monitor notes that the focus groups used to develop advertising content for the recruitment campaign also

comprised fewer than 500 individuals, yet provided valuable insights. The survey respondents achieved very high scores on the exam and were not disqualified by further steps in the hiring process; it will be very useful to learn more about who these candidates are and how to recruit others like them. On February 6, 2019, the City provided the Monitor with a report on the survey findings, and has advised that it will provide a second report at the end of the first quarter of 2019.

## **VII. Additional Issues**

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

- Discussions regarding individual candidates who are or claim to be entitled to relief under the Court's Orders, including their interactions with the FDNY, documents they have received, and their rights and remedies;
- Addressing questions and disagreements among the Parties regarding the status of specific candidates and other issues that are not addressed elsewhere in this report and that fall within the Modified Remedial Order or Disparate Treatment Settlement;
- Frequent calls, meetings, and correspondence with the Parties regarding the full range of issues related to implementation of and compliance with the Modified Remedial Order; and
- Performing the remaining duties of the Special Master appointed by the Court in its Order filed May 22, 2012 (Dkt. # 883). The Court assigned these duties to the Monitor in an order dated August 17, 2016.

Dated: February 8, 2019  
New York, New York

/s/

Mark S. Cohen