

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-THIRD 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 January 9, 2018, when the Monitor’s Twenty-Second Periodic Report (Dkt. # 1821) was filed, to April 9, 2018. The report also summarizes activities relating to the implementation of the Parties’ settlement of Plaintiffs-Intervenors’ disparate treatment claims (the “Disparate Treatment Settlement”), which the Parties agreed would fall within the Monitor’s authority as defined in the Modified Remedial Order. *See* Stipulation and Order dated June 5, 2015 (Dkt. # 1599); *see also* Memorandum & Order dated June 5, 2015 (Dkt. # 1598) at 10.

Part II of the report summarizes activities relating to the FDNY’s recruitment campaign for the recent open competitive firefighter examination (Exam 7001), for which the testing period ended October 28, 2017. With the conclusion of testing, the City, the Monitor, and the other Parties have shifted their focus to the FDNY’s efforts to maintain contact with test-takers, sustain their interest in becoming firefighters, and provide the resources they will need to be prepared for further stages of the hiring process. Scores from Exam 7001 are projected to become available in the spring of this year, and the final hiring list for the exam will be established in the fall of 2018. The list will be active for four years from that date, and accordingly some candidates – specifically those with the lowest “reachable” scores (accounting for credits based on New York City residency and other factors) – may wait years before being called off the list and into the subsequent phases of the hiring process. To mitigate candidate attrition over such a long period, the City must be prepared to sustain an intensive, long-term engagement with test-takers.

Over the past 90 days, the City has focused particularly on two shorter-term tasks – (1) encouraging test-takers with “pending” applications to finalize their applications by the July 6, 2018 deadline set by the Department of City Administrative Services (“DCAS”) (either by paying application fees or by completing requests for fee waivers) and (2) ensuring that eligible New York City residents claim the residency credit, which adds five points to a candidate’s test score and accordingly moves that candidate to a relatively higher position on the eligible list.

Planning for the longer term, on February 26, 2018 the City circulated a high-level overview of attrition mitigation initiatives that it intends to develop and carry out. These include programs intended to prepare candidates for the Candidate Physical Ability Test (CPAT); a mentorship program; and a program to encourage candidates to maintain physical fitness and assist them in doing so. While the City’s planned initiatives appear worthwhile, it has not yet provided fully detailed descriptions or a precise timeline for their implementation. Based on an initial review, the Monitor is also concerned that the City’s CPAT preparation and mentorship programs are apparently available to candidates only once they have been called up from the hiring list. Given the long duration of the list, the City will need to do more to maintain candidates’ interest in the job in the period before they are called off the list. Such efforts should include frequent communications by text and social media, and the City has confirmed its intent to utilize updated communications and candidate tracking tools developed during the most recent recruitment campaign to facilitate such efforts. The City has also created additional outreach channels, including training sessions for subsequent steps in the candidate screening process, as described in further detail in Section II.A.3, below. Plaintiffs-Intervenors have made a series of recommendations for additional communications and engagement strategies aimed at reducing attrition amongst non-traditional candidates. The Monitor plans to convene a meeting on

attrition mitigation in the near term to discuss the City's plans along with proposals offered by the Monitor and the other Parties.

To complement its attrition mitigation initiatives, the City also plans to provide a web-based portal that candidates can use to track and manage their progress through the hiring process and to access relevant documents, information, and forms. The City demonstrated the portal to the Monitor and the other Parties at a meeting shortly before the Monitor's last Periodic Report, and it appears to have potential to be a useful resource to help candidates navigate the steps of the hiring process. The City reports that the candidate portal will be available to candidates when they are contacted regarding CPAT training and enrollment in the mentorship program. The Monitor plans to discuss with the City whether it should make the portal available to candidates throughout the process, as Plaintiffs-Intervenors have also suggested.

Another task that the City must carry out is completion of a comprehensive retrospective analysis of the recruitment campaign, assessing the effectiveness of its recruitment activities (including budgets and resource allocation) in persuading members of historically underrepresented groups to apply to the FDNY and take the open competitive exam. The City has begun a preliminary analysis, which it has stated will accelerate once finalized examination scores can be incorporated into the data analysis. The Monitor expects that this process will ultimately include analysis of examination results, candidate demographics, and other data points relevant to the effectiveness of the FDNY's recruitment of black and Hispanic candidates.<sup>1</sup> The goal of the analysis is to use historical data to help identify the most effective methods of attracting successful black and Hispanic firefighter candidates, as well as to identify whether

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<sup>1</sup> See Modified Remedial Order ¶¶ 15, 26(a), 32, 43(m).

there are areas where different strategies or resources may need to be implemented to aid in the goal of achieving a diverse workforce.

In addition to the retrospective analysis described above, the Parties will also evaluate the City's past performance under the Disparate Treatment Settlement, which obligates the City to use its "best efforts to recruit black test-takers in proportions closely approximating the representation of age eligible blacks in the New York City labor market, plus an additional 3%."

Part II also discusses the Monitor's efforts to resolve issues raised by Plaintiffs-Intervenors regarding whether the initial assignments given probationary firefighters on graduation from the Academy are consistent with the terms of the Disparate Treatment Settlement, as well as the Modified Remedial Order. It also provides an update on developments and discussions regarding initiatives associated with the Working Group established by the Disparate Treatment Settlement.

Part III focuses on the City's development of data systems that will help the City to comply with applicable equal employment laws, including the obligation to assess the impact of recruitment techniques and hiring policies on different demographic groups. In particular, this portion of the report discusses the City's Consolidated Candidate Tracking System ("CCTS"), which was demonstrated by the City at a December 19, 2017 meeting with the Monitor and the other Parties. As noted in the Monitor's previous Periodic Report, based on the demonstration, the CCTS appears to compile information from all the various stages of the recruitment and hiring process – from a prospective firefighter's first contact with the recruitment office through placement in a firehouse on graduation from the Academy; and it is capable of serving as a comprehensive data source and analytical tool for candidates on the eligible lists generated by

the recent promotional and open competitive examinations.<sup>2</sup> However, as also previously noted, some important search design capabilities appear to be available only to administrators through the “back end” of the system, rather than through user interfaces accessible to FDNY supervisors and other non-IT personnel. In order to work effectively with the City to make appropriate adjustments to the system, at the December 19, 2017 meeting, the Monitor requested a comprehensive data dictionary defining all the data fields in the CCTS and all the values with which those fields can be populated, and showing which fields can be viewed in different user interfaces. Although it has provided data definitions for categories of data from some of the sources for the CCTS (including the Electronic Medical Record database), the City has not yet provided the data dictionary for the CCTS, and the Monitor has renewed its request. Once the City provides the requested information, the Monitor and the Parties will be in a position to work together to develop appropriate ways of breaking down the CCTS data and using it to assess potential disparate impact in the various components of the FDNY’s hiring process.

Part III also provides an account of the City’s most recent efforts to update, and resolve gaps and inconsistencies in, its Candidate Tracking Spreadsheet (“CTS”) – a compilation of hiring process data for candidates on the Exam 2000 and 2500 lists, whose data is not included in the consolidated CCTS database. The City has produced two further iterations of the CTS since the last Periodic Report – one on January 17, 2018 and the other on March 2, 2018. The January 17 CTS was provided to resolve lingering issues that the City had identified in the previous version. The March 2 CTS was generated to address further anomalies identified by the Parties in the January 17 version. While the flaws in the most recent versions of the CTS have not been

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<sup>2</sup> The promotional exam is not within the scope of the Court’s Modified Remedial Order. However, the City has agreed to provide demographic data from Exam 7501 to facilitate analysis of any issues that may relate to the current open competitive exam.



as widespread as in the earliest versions, the delay in obtaining fully accurate, consistent data from the hiring process for these lists has continued to be an impediment to the work of the Monitorship. Given the downside of further delay, although the most recent iteration of the CTS may not have remedied all deficiencies in the City's data, it appears that any remaining problems are small in scale and therefore the Monitor plans to move forward with disparate impact analyses of the various Exam 2000/2500 hiring processes using the data in the March 2, 2018 CTS.

Part IV of this report focuses on the FDNY's EEO function, including activities relating to messaging, compliance and accountability, and investigations. In the last Periodic Report, the Monitor reported on delays in conducting a long-promised workplace climate survey and in circulating some kinds of EEO and diversity and inclusion messaging. Since that report, the City has launched additional messaging and is in the process of retaining a vendor to conduct a climate survey in the fall of 2018. In other areas (such as chain of command reporting and steps to manage certain types of workplace communications) the City has at least initially declined to adopt the Monitor's suggested reforms; and the Monitor is continuing to work with the City in these areas.

Part IV also discusses efforts by the City and the Monitor to analyze and remedy delays in the FDNY's investigation of EEO complaints. Pursuant to the Court's November 17, 2017 Order, the Monitor is in the process of preparing a report on the FDNY EEO Office, with a focus on the duration of its investigations, and it has requested and received data and materials from the City in connection with work on that report. The Monitor will also continue to track the effect of the City's planned staffing increases and other reforms relating to the duration of EEO investigations.

Part V reports on efforts to ensure that the various components of the Medical Exam do not have an unlawful disparate impact on black and Hispanic candidates.<sup>3</sup>

The Monitor is conducting disparate impact analyses of the Exam 2000/2500 medical results using available data from a combination of sources, including data from electronic sources, paper records, and spreadsheets produced by the City. The Monitor has requested further data from the City to complete these analyses.

With regard to the City's long-running efforts to validate the stairmill component of the Medical Exam, the City plans, as previously reported, to engage PSI Services LLC ("PSI"), which has assisted the City with validation of the written examination and the Functional Skills Test ("FST"), to conduct a validation study of its current stairmill test. The City first reported its intention to engage PSI for the study more than a year ago – on February 13, 2017. *See* Monitor's Nineteenth Periodic Report (Dkt. # 1761) at 6. Yet as recently as March 16, 2018, the City still had not finalized the relevant contract. Even more troubling, based on the City's draft study proposal and recent discussions, it is clear that fundamental components of the validation study have not yet been fully determined. As noted by the Court during the March 13, 2018 status conference, the process has been in pending status for an extremely long time. Accordingly, the City must greatly accelerate its work to complete this project.

Part VI reports on efforts by the Monitor and the Parties to determine whether and how the FDNY's character review process has a disparate impact on black and/or Hispanic candidates, and to develop reforms to reduce such impact and ensure that screening criteria and procedures are job-related. As previously reported, on October 13, 2017, the City responded to a series of recommendations from the Monitor for further changes in the character review process

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<sup>3</sup> The Medical Exam is administered by the Bureau of Health Services ("BHS").

(based on expert research and analysis), declining to adopt any of the Monitor's recommendations or propose alternative reforms. The Monitor's plans to respond to the City's position and convene further discussions on the recommendations have been delayed by continuing questions concerning PRB-related data in the CTS (*see* Part III.C). But with the production of the March 2, 2018 iteration of the CTS, the Monitor plans to complete its analysis of character review outcomes and move forward with discussions of further reforms in the process.

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

Part VIII summarizes a range of additional issues addressed by the Monitor and the Parties during the period covered by this report.

## **II. Recruitment and Attrition Mitigation**

### **A. Recruitment and Follow-Up with Test-Takers**

The testing period for the most recent open competitive firefighter examination, Exam 7001, ended on October 28, 2017. As previously reported, test-taker figures from the exam showed increased participation by black and Hispanic applicants compared to the previous open competitive exam: 24.6% of the test-takers were black (as compared to 19.3% for Exam 2000) and 26.6% were Hispanic (as compared to 22.7%). *See* Monitor's Twenty-Second Periodic Report (Dkt. #1821). Accordingly, black representation among test-takers increased by 27%, and Hispanic representation increased by 17%.

Since the examination period, the City's recruitment efforts have shifted from attracting applicants and test-takers to follow-up communications with candidates – encouraging pending applicants to complete applications, reminding eligible candidates to claim residency credits, and

developing plans to mitigate attrition among candidates on the hiring list that will eventually be established based on the exam results. Scores from the open competitive examination are expected to be communicated to test-takers in the spring of this year, and the final hiring list will be established in the fall of 2018.

1. Pending Applicants

According to the City's most recent report on pending applications, 474 black and 314 Hispanic candidates' applications remain pending because the applicants have neither paid application fees nor obtained fee waivers. On March 21, the City advised all pending applicants by email of a July 6, 2018 deadline for completion of all pending applications. The July 6 deadline was set by DCAS to provide sufficient time to process fee waiver applications before the hiring list is established in the fall of 2018. Test-takers who have not completed their pending applications were advised that they will not be able to receive their test scores when scores are released in the spring, and if they fail to complete their applications by the July 6 deadline, they will not be included in the final hiring list. The City has stated that it plans to continue efforts to encourage applicants to complete pending applications.

2. Residency Credits

As part of its efforts to follow up with test-takers, the City is also communicating with those who may be eligible for, but have not yet claimed, credits for New York City residency, which would add points to their exam scores and improve their positions on the hiring list. As of March 1, 2018, the City reported that a total of 5,758 test-takers with New York City contact addresses had not claimed the residency credit; that number includes 1,713 black test-takers and 1,599 Hispanic test-takers (approximately 15% and 12.5% of total test-takers for those groups, respectively). Because entitlement to the residency credit is not based on current residence,

many such test-takers may not be entitled to the credit, but to ensure that all those who are entitled claim the credit, the City plans to engage in follow-up communications with this population of test-takers, and Plaintiffs-Intervenors will continue to contribute to those efforts. The City has continued outreach efforts to these applicants and has provided the Vulcan Society with contact information for members of this group. Given the demographic composition of the City's resident population, ensuring that eligible residents claim the credit and reach their proper positions on the hiring list is an important contribution to the City's overall effort to increase black and Hispanic representation among successful candidates. The Monitor encourages the City to proceed with intensive efforts to follow up with this population of test-takers.

### 3. Attrition Mitigation

On February 26, 2018, the City provided the Monitor and the other Parties with an outline of its broader, longer-term plans to maintain contact with test-takers, sustain their interest in becoming firefighters, and provide and publicize resources that will prepare them for further stages of the hiring process. These efforts will need to keep candidates invested for the full duration of the hiring list, which will remain active for four years once it is established this fall.

The City's outline lists a number of initiatives:

- CPAT Preparation Program – a 10-12-week, “invitation only,” physical preparation program for candidates who have been called off the hiring list.
- Firefighter Candidate Mentoring Program – a voluntary program providing mentoring to candidates from the beginning of the hiring process through their first month in a firehouse.
- Fitness Awareness Program – a voluntary, “invitation only,” program intended to ensure that firefighter candidates maintain the level of physical fitness required for the Fire Academy.
- FDNY Social Media Communications – including coverage of FDNY events, and photo and video postings (planned postings include inspirational videos about firefighters).

- Coordination with affinity groups.

While these initiatives appear sensible and promising, the City has not yet provided complete plans for their implementation, a detailed timeline, or the content of its planned communications and instructional materials. The Monitor plans to provide comments on the City's outline of its plans and to request additional information. As an initial matter, the Monitor is concerned that the City's preparation and mentoring programs appear to focus narrowly on the period after candidates have been called off the hiring list and have entered the later stages of the hiring process. Given that, in some cases, years may elapse before a candidate is called off the list and that building and maintaining physical fitness is a long-term process, the Monitor believes the City should consider adding programs that both encourage candidates to maintain an appropriate level of preparedness before they are called off the list and assist them in doing so. The City should also ensure that it has appropriate plans to reach out to candidates by text and social media on a frequent basis over the projected life of the list.

In addition to the attrition mitigation plans outlined in the City's February 26 email, the City also plans to provide a new web-based candidate portal that candidates can use to track and manage their progress through the hiring process. The portal shows which requirements candidates have fulfilled and which they have yet to complete, lists required documents they need to provide, and provides forms and instructions. Assuming successful implementation and education, the portal could be a useful tool for candidates entering the hiring process and could diminish their risk of failing to fulfill requirements because of miscommunications or a lack of access to information. As reported by the City, the candidate portal will be made available to candidates when they are contacted regarding CPAT training and enrollment in the mentorship program. The City anticipates contact with the first group of candidates in May 2018. The

Monitor plans to discuss with the City whether it should make the portal available to candidates at an earlier stage of the process – given that, according to the City’s current plans, many candidates will not be contacted for CPAT training or the mentorship program for what could be a period of over three years.

The Monitor plans to convene a meeting with the Parties within the next several weeks to discuss the City’s attrition mitigation plans, the Monitor’s concerns and suggestions, and further proposals from Plaintiffs-Intervenors and the United States. Plaintiffs-Intervenors have offered a number of recommendations including a system of benchmarks to measure progress based on expected rates of attrition; expanded access to the candidate portal; a candidate manual; and other specific suggestions regarding messaging and preparation.

#### **B. After-Action Analysis**

In addition to its ongoing work on the current campaign, attrition mitigation, and the hiring process, the City has also committed to conduct an “after-action” analysis to evaluate the success of the recent recruitment campaign, including the content and targeting of recruitment messaging, and the various channels and techniques that were employed to communicate those messages, cultivate applicants, and convert them to test-takers. *See* Monitor’s Twenty-Second Periodic Report at 14. The City is in a position to conduct some of the relevant analyses now – those that relate to its success in attracting raw numbers of test-takers from particular demographic groups. Other components of the analysis – those focusing on the City’s effectiveness in attracting *successful* black and Hispanic test-takers – will be possible once the scores from the recent exam are available and positions on the hiring list (which depend, in part, on residency and other credits) have been established.

As the Monitor has previously made clear, the City's analyses should include assessments of resources and budgeting, along with an evaluation of any survey data collected in the course of the campaign and in connection with the exam. *Id.* The after-action analysis must ultimately generate viable, data-driven plans for future recruitment efforts to attract successful black and Hispanic candidates to the FDNY.

Also to be evaluated is whether the City fulfilled its obligation under the Disparate Treatment Settlement to "use its best efforts to recruit black test-takers for open-competitive firefighter entrance exams in proportions closely approximating the representation of age eligible blacks in the New York City labor market, plus an additional 3% to remedy a history of underrepresentation of blacks in the New York City firefighter ranks." As noted in the Monitor's previous Periodic Report, the City and Plaintiffs-Intervenors are currently attempting to resolve a dispute regarding the level of black representation among test-takers that should serve as the goal for the City's "best efforts" under the Disparate Treatment Settlement. Before the active phase of test-taker recruitment began, the Parties agreed that the target figure for the City's "best efforts" in recruiting black test-takers should be 28% of all test-takers for the open competitive examination.<sup>4</sup> But in October 2017 – during the examination period – the City advised the Monitor and the Parties that it believed (based on a further examination of demographic data) that the 28% figure was higher than required under the terms of the Disparate Treatment Settlement, and the City has since advised the Court of its position that the 28% was merely an "interim" goal. The Plaintiffs-Intervenors dispute the City's position. The issue of compliance with the Disparate Treatment Settlement remains to be determined.

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<sup>4</sup> The representation of black test-takers among total test-takers for Exam 7001 fell below 28%.



### **C. Assignment Issue**

As discussed in detail in the Monitor's previous Periodic Report, Plaintiffs-Intervenors have raised issues relating to 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." *See* Monitor's Twenty-Second Periodic Report at 15. Following an analysis of an initial set of data provided by the City, the Monitor requested additional data and explanations to assess whether the City had sufficient explanation for those instances where firefighters had requested, but not received, assignments to their home divisions. The City provided additional information in response to the Monitor's request on January 19, 2018. The Monitor is evaluating the issues in light of the City's most recent response.

Plaintiffs-Intervenors have raised additional concerns relating to firefighter assignments, including assignments to engine and ladder companies, which Plaintiffs-Intervenors contend demonstrate a potential unlawful disparate impact. The City has disputed whether the Monitor has jurisdiction to evaluate the Plaintiffs-Intervenors' concerns in this area.<sup>5</sup> The Monitor asked both Parties to provide their positions in writing on this jurisdictional issue as well as on the underlying dispute. The Plaintiff-Intervenors and the City provided their position on February 1 and February 21, 2018, respectively, and the Monitor is considering the Parties' positions.

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<sup>5</sup> The City acknowledges that the Monitor has jurisdiction to ask whether the FDNY EEO Office has investigated potential disparate impact in engine and ladder assignments, and to make sure it conducts such analyses. The City nevertheless objects to the Monitor's becoming involved in this issue, based on the City's stated fears about positions the City alleges Plaintiffs-Intervenors may take in the future.

#### **D. Working Group**

Over the last 90 days, the City has continued to update the Monitor and the other Parties with respect to its 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 include the implementation of the Fire Cadet title and the continued operation and expansion of the FDNY’s Explorer Program.

The Fire Cadet title is being developed and implemented in accordance with the program proposal approved by the New York State Civil Service Commission (the “CSC”) at a public hearing held on June 16, 2016. *See* Monitor’s Seventeenth Periodic Report (Dkt. # 1714) at 11-12. The Parties and the Monitor held a conference call on February 6, 2018, during which the City provided an update and clarifications on information previously circulated regarding the steps and timeline for implementation of the Cadet Program. The current timeline projects that the first Fire Cadet class will begin in 2021, in order to allow the class to take the next scheduled promotional examination to entry-level firefighter in 2022, and to ensure that these cadets will be eligible for promotion to the firefighter title with a successful score on the examination. The City’s revised timeline sets out milestones for additional staffing and training (in 2019), recruitment (April through May 2020), an application period (in July 2020), and selection and investigation of prospective Cadets (October 2020 through May 2021). On March 19, 2018, the City provided follow-up information requested by the Parties, including additional detail on the City’s recruitment plans for the Fire Cadet title. The Monitor notes that the City’s most recent timeline provides later dates than previously provided for the key steps in the program, but the

Monitor does not expect the changes to cause a material delay that would diminish the impact of the Cadet Program.

The FDNY Explorers Program, a youth-focused initiative that provides training and mentoring to encourage participants to join the EMS, is operated under the auspices of the Department's Youth Workforce and Pipeline Programs Unit, whose mandate includes introducing diverse New York City youth to career opportunities in the FDNY and EMS. The Explorers program is conducted at posts located in high schools in diverse neighborhoods, with the goal of promoting greater diversity within the FDNY by providing pathways for participants to become firefighters through promotion from the EMS. *See* Monitor's Nineteenth Periodic Report at 17-18. On a February 6, 2018 call with the Monitor and the other Parties, the City reported that the Explorer program now has 174 Explorers registered at eight posts operating throughout New York City. Additionally, it has identified 66 potential future Explorers who submitted Expression of Interest forms at outreach events, including an open house held earlier in the year at FDNY headquarters at MetroTech.

The FDNY has also continued to work on the rollout of the EMS Trainee title, which establishes an additional pathway into the EMS for qualified candidates, including FDNY High School graduates and FDNY Explorers. *See id.*

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

Since the last Periodic Report, in consultation with the other Parties and the Monitor, the City has continued its work with several data systems developed under the Monitorship. These include (1) a recruitment database; (2) an end-to-end database tracking candidates through the recruitment and hiring processes (which will be the key database for tracking and analyzing candidates' progress through the hiring process for Exam 7001); and (3) a Candidate Tracking

Spreadsheet (“CTS”), which is a compilation of available data from each step in the hiring process for candidates who took Exams 2000 and 2500 (for which the hiring lists expired in 2017), and was created as a stopgap pending creation of the other electronic databases.

**A. Recruitment Database**

As described in detail in previous Periodic Reports, the City’s recruitment database, developed by its consultant Vanguard Communications, manages data relating to potential candidates gathered by the Office of Recruitment and Retention from the candidates’ first contact with the FDNY through the written examination. *See, e.g.*, Monitor’s Fifteenth Periodic Report (Dkt. # 1669) at 7-8. The database, known as “ARCS” was used to gather data, provide reports, and manage communications with recruitment contacts before, during, and after the application period (until the conclusion of the recent examination) – maintaining data on recruitment contacts and coordinating communications with applicants regarding exam preparation and logistics. *See* Monitor’s Twentieth Periodic Report at 21-23; Monitor’s Twenty-First Periodic Report at 20-21.

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

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

The City has continued work on its Consolidated Candidate Tracking System, (“CCTS”), and it has continued efforts to respond to questions and requests from the Monitor and the other Parties concerning the database.

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

As reported in the Monitor's Twenty-Second Periodic Report, the City provided the other Parties and the Monitor with a live demonstration of the CCTS on December 19, 2017. The CCTS collates a wide range of data and enables users with appropriate access rights to conduct searches by "field" or similar top-level filters, including candidate status and results from different steps in the hiring process. The CCTS can also display a sequential history of a selected candidate's progress through the screening process. *See* Monitor's Twenty-Second Periodic Report at 19-22. However, also as previously reported, the search capabilities of the database do not extend to all levels of information that are captured in the database; queries on some categories of data can only be run if administrators set up the query on the "back-end" of the database. *Id.* This constraint limits the number of users who can conduct analyses, as well as the ability of non-administrators to make adjustments in searches without lead time. The Monitor and Parties have agreed to discuss the creation of further queries. The City has

proposed to collect these created queries from the Monitor and the Parties and add those queries to its dashboard functions.<sup>6</sup>

At the December 19 meeting, the Monitor, Plaintiffs-Intervenors, and United States recommended that a number of data fields be added to “front-end” user interfaces of the CCTS, and the Monitor requested that the City provide a comprehensive data dictionary for the CCTS, showing all data fields, the available values for each field in the database, and which fields can be viewed in the current user interfaces. The City has provided definitions of some components of the CCTS, including a data dictionary for the Electronic Medical Record database, but it has not yet provided a complete data dictionary for the CCTS.

The Monitor will also consider asking the City to export data available through the CCTS, or otherwise provide it to the Monitor so that the Monitor can conduct analyses needed for its work and avoid the inefficiency and delay of having to rely on City employees to run each data search. In addition, in the future the City must ensure that it updates query capabilities as necessary to account for changes in the hiring process and in available data. *See* Monitor’s Twenty-Second Periodic Report at 21-22.

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

As detailed in previous Periodic Reports, the CTS is a compilation of data for candidates on the hiring lists produced by Exams 2000 and 2500, as well as Priority Hire candidates, which shows each candidate’s status and results from each step in the hiring process, from the written examination through the additional required screening tests. The CTS is compiled by the City, and does not automatically populate or update based on database changes or updates.

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<sup>6</sup> The Monitor also plans to discuss the City’s plans for enabling internally-generated queries and updating queries to reflect changes in the process, database and/or legal requirements as needed over time.

The most recent versions of the CTS, produced on September 5, 2017, January 17, 2018, and March 2, 2018 were compiled following completion of the hiring process for the last class to enter the Fire Academy from the Exam 2000 and 2500 lists; they include hiring-process data for all candidates on those lists through entry into the Academy. The January and March 2018 versions also include data from the Academy for candidates in the most recent class.

Gaps and inconsistencies in early versions of the CTS limited their usefulness for analyses of the hiring process. *See* Monitor's Twentieth Periodic Report at 24-25. In January 17, 2018 the City produced a revised version of the CTS. The Monitor and the other Parties identified some additional anomalies and asked some additional follow up questions. The City produced a further iteration of the CTS on March 2, 2018, along with explanations intended to address the outstanding questions. While this most recent version of the CTS still does not appear to have remedied all deficiencies in the data, the remaining issues appear limited, and the Monitor now plans to move forward with analyses of the Exam 2000 hiring process using the current CTS, assuming that further issues are not identified as analysis proceeds.

The City's inability to produce a fully accurate and consistent set of data from the hiring process for Exams 2000 and 2500, or even substantially reliable data until very recently – despite years of attempts – impeded the work of the Monitorship by preventing scrutiny of data and outcomes. Thankfully, although work remains to be done on the CCTS, there is reason to hope that data management and analysis for future hiring lists will be greatly improved.

The gaps and inconsistencies in successive versions of the CTS prevented reliable analysis of the Exam 2000 hiring process as it unfolded. In addition, as noted in the Monitor's previous Periodic Report, even if data for the Exam 2000 hiring list were complete and accurate, some changes in the hiring process are recent and have impacted only a small number of

candidates – providing a small statistical sample with insufficient statistical power to produce reliable conclusions; accordingly, it will likely be necessary to observe and analyze the effect of any reforms on the *next* group of open competitive candidates. *See* Monitor’s Twenty-Second Periodic Report at 25. And the Monitor understands the City intends to do so.

#### **IV. EEO**

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

Since the last Periodic Report, the Monitor and the Parties have continued discussions relating to the FDNY’s EEO function; and the Monitor, in consultation with its experts, has continued to work with the City to analyze EEO issues and implement initiatives and reforms. The ongoing discussions and activities have addressed a number of key areas of EEO messaging, compliance, accountability, and investigations. Detailed updates on developments in these areas are provided below.

As contemplated in the Monitor’s Twenty-Second Periodic Report, the Monitor held a series of meetings with the Parties in January and February to discuss EEO issues – a meeting with the City on January 26, 2018; a meeting with the Plaintiffs-Intervenors and the United States on January 29; and a general meeting with all Parties on February 2 (the “February EEO Meeting”). The meetings covered multiple EEO topics including messaging, EEO inspections, climate surveys, and investigations.

In addition, the Monitor has continued to receive and review materials from the FDNY’s investigations of potential EEO violations. And it has continued to gather and analyze information pursuant to the Court’s November 17, 2017 Order, which directed the Monitor to provide a report on the FDNY’s EEO Office, its staffing and procedures for conducting investigations, and the duration of EEO investigations. The Monitor has requested and received



information from the City showing the investigative steps taken in the course of EEO investigations, including activity logs for individual investigations that describe and provide the date of each step. At the status conference held on March 13, 2018, the Court directed the City to produce additional data relating to treatment of EEO complainants during EEO investigations (*i.e.* data showing the rates at which complainants and respondents in EEO matters are reassigned to desk duty pending investigations, including how rates of reassignment have changed annually over the past three years). The City plans to produce this additional data by April 12, and the Monitor will include a discussion of the data in its EEO report.

On March 28, 2018 Plaintiffs-Intervenors wrote to the Monitor to raise their concern that the City is not complying with the Statement of Principles<sup>7</sup> with respect to EEO related detail assignments; and they asked the Monitor to obtain several categories of information from the City relating to the placement of firefighters pending the resolution of EEO complaints. The Monitor is considering Plaintiffs-Intervenors' request.

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<sup>7</sup> The Statement of Principles was developed as part of the process overseen by the Court 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.

## **B. Policies and Messaging**

Since the last Periodic Report, the Monitor has engaged in extensive discussions with its experts, the City, and the other Parties to develop recommendations for the City's diversity and inclusion messaging, including its January 26, January 29, and February 2 meetings, and the City has committed to plans consistent with several of the Monitor's recommendations.

The Monitor's discussions with the Parties and its experts have confirmed the importance of involving FDNY uniformed leadership in the delivery of EEO messaging and the need to communicate such messaging through the same channels – and with the same emphasis – employed for operational training messages. On February 16, 2018, the Monitor communicated a number of action items to the City (copying the other Parties) based on its fact-finding and consultations. The Monitor's action items included the following:

- Delivery of messages by officers at roll call;
- Refresher training and communications via online videos and presentations, with verified attendance and quizzes;
- Involvement of senior leadership in Department-wide communications and visits to firehouses and multi-unit drills, including both live and video messaging;
- A program of posters, newsletters, and other printed or online materials communicating diversity and inclusion messaging;
- Communications depicting diversity and inclusion scenarios, demonstrating the importance of EEO policies and compliance;
- Incorporating messaging and interactions with personnel in EEO inspections (rather than limiting inspections to visual examination of the firehouse)<sup>8</sup>; and
- Use of EEO counselors in firehouse visits and related messaging.

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<sup>8</sup> The City also conducts visual inspections as part of its compliance activities. In past years these inspections have identified some violations; however in 2017 the FDNY found no violations during any firehouse inspection.

The City replied to the Monitor on March 10, 2018, committing to take several steps in response to the Monitor's recommendations. For example, the City committed to introducing a system of "voice alarm" training drills: at or around roll call, firefighters will be required to view training videos, which will include participation by FDNY leadership and will communicate messages supporting diversity and inclusion and workplace professionalism goals. The City has reported that it plans to roll out this initiative beginning in May 2018. In its March 10 response, and in subsequent discussions on the Monitor's weekly calls with the Parties, the City has also confirmed that it plans to make EEO staff available to answer any questions or concerns of members while conducting inspections, and the Monitor and the Parties are discussing additional ways in which staff could communicate EEO messages in firehouse visits. The City also described, in general terms, plans to improve the availability of online training materials more generally. The Monitor suggested to the City that, in addition to including senior leadership in video training, it should endeavor to include personal appearances by uniformed leadership in firehouse EEO trainings to demonstrate the Department's commitment to its EEO messaging. Further, although the City has indicated that it intends to verify attendance in its EEO messaging and training efforts, it has not yet provided details on the methods it plans to employ (in particular online) to verify attendance and test knowledge of content. The Monitor will continue to follow up with the City to obtain further information.

Since the last Periodic Report, the City has also provided the Monitor with a collection of EEO messaging materials, including posters, newsletters, and Department orders. The City has also stated that it will integrate EEO Counselors into EEO messaging and online content.

The Monitor expects that the City will expand and intensify the EEO messaging that it communicates in its posters and publications. Based on the City's reports and the materials

provided to the Monitor, although some progress has been made in plans for firehouse-level communications, the FDNY's messaging activities continue to focus heavily on strategic planning, general mission statements, special events, and other projects or communications that do not necessarily penetrate to the firehouse level. It is essential for the FDNY to move forward energetically with the plans it has outlined for messaging and training that demonstrate and reinforce the Department's commitment to diversity and inclusion in all its workplaces.

Hopefully, the EEO counselor program will also prove to be a useful resource at the firehouse level. The City has introduced the program with a small number of counselors, all officers, and plans to expand it. The Monitor and the other Parties have expressed the concern that the FDNY should draw counselors from the ranks of firefighters as well as officers, and the City has indicated that it plans to do so.

### **C. Compliance and Accountability**

#### **1. Workplace Communications and Social Media**

Since the last Periodic Report, the Monitor has continued its efforts to work with the City to prevent and deter EEO violations and to identify and monitor areas where such violations may occur. One area that has remained a source of concern is the use of personal messaging and social media accounts for FDNY-related communications, such as notification of the availability of overtime shifts and the dissemination of other job-related information, which have been implicated in a number of EEO complaints. Based on its consultations with its experts and the Parties, and based on its review of EEO complaints and investigations, the Monitor expressed its concern to the City that these platforms have been used to circulate offensive or harassing messages in what amounts to a virtual workplace environment, and that they can also be used as

instruments of discrimination, causing firefighters to be excluded from communications and thus to miss out on overtime and other work opportunities.

To address these concerns, and based on consultation with its experts and a review of best practices, the Monitor suggested to the City that it consider providing employees with a comprehensive, authorized system of electronic communications regarding work assignments (such as a departmental email system, an authorized group messaging system, or a scheduling application) and requiring that communications regarding overtime and other assignments take place over the approved system, which would also be subject to monitoring by representatives of the EEO Office. Based on research conducted by the Monitor's experts, a wide variety of cities supply their fire service employees with business email addresses, or use another centralized communication medium on which work can be conducted and messages can be preserved if needed for investigative purposes. The City has rejected the Monitor's recommendation, citing logistical and privacy concerns.

To address the specific issue of use of group texts to allocate overtime (a practice whose frequency is disputed among the Parties), however, the City issued a Department order reemphasizing existing policy requiring that communications regarding overtime assignments be conducted through authorized channels, and it has ordered that a large messaging group commonly used for overtime assignments be disbanded. The City required all officers to certify that they had delivered this message, but it is unclear how the City is verifying the dismantling of the messaging group and ensuring that no substitute has arisen to replace the suspended text chain. Under its current policy, the City requires all overtime assignments to be allocated based on lists maintained by battalion aides (based on factors including seniority and previously accumulated overtime) and communicated between battalion aides and duty officers in

individual firehouses. The City asserts that, given the transparency of overtime assignments, individual firefighters are in a position to ensure that assignments are allocated based on appropriate, established criteria. While these steps, if complied with, appear sufficient to address the issue of overtime assignments, the Monitor remains concerned that, if only as a matter of convenience, FDNY personnel may still resort to unauthorized channels for communications regarding overtime.

Further, the City's measures do not address or provide a substitute for the use of personal channels of communication for other FDNY business, which can create environments conducive to harassment, or instruments of discrimination or exclusion. While the Monitor recognizes that the FDNY cannot bar all discussion of FDNY affairs over personal social media or other personal accounts, it should endeavor to discourage such communications; and at a minimum it should emphasize that violations of law or policy using such personal channels are subject to investigation and discipline. Further, like all employers, the FDNY may need access to documents during workplace investigations, and may have legal obligations to preserve or avoid destruction of documents in certain circumstances.

## 2. Chain of Command Reporting and Performance Reviews

As discussed in detail in previous reports, in a Department Order dated July 12, 2017, the City implemented a system of chain of command reporting, in which officers are instructed 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. *See* Monitor's Twenty-Second Periodic Report at 34. The Monitor has previously recommended that the City use a template format – which could be as simple as a one-page checklist – to ensure that items are discussed at each meeting and that officers memorialize, in brief format, whether or not any

problems exist; this would ensure that action is taken when needed and that a record of what has been observed over time is preserved in the event a problem arises in the future.<sup>9</sup> The Monitor has also recommended that officers be provided with detailed instructions identifying potential indicia of discrimination or harassment. The City has advised it will provide officers with more guidance on topics that should be addressed. The Monitor remains convinced that, in order to assess its success in preventing and/or remedying EEO violations, the FDNY must provide a reporting system in which officers are required to document their observations bearing upon the EEO climate in the workplace, along with their efforts to address conduct or conditions that may have an adverse effect on that climate.

The Monitor remains very concerned that if officers at each level of command are not required to provide substantive reports in writing to their superiors, and if they are not provided with more detailed guidance on the conduct or conditions that may be symptomatic of or conducive to EEO violations, the FDNY's chain of command reporting system will not be an effective means of ensuring that officers report relevant issues, or of holding them accountable for the failure to do so. The United States has indicated that it shares this concern and believes that officers at each level of command should provide substantive reports to their superiors. Thus far, the City has agreed to provide more detailed guidance to officers regarding the types of conduct that should be discussed. But it has declined to implement the Monitor's recommendations regarding written reports. The Monitor plans to continue discussions with the City on forms and procedures for the chain of command reports.

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<sup>9</sup> The FDNY currently requires substantive, written reports from only Division Commanders and only if, in their judgment, the oral reports contain "relevant information that may require attention or review." Department Order dated July 12, 2017. Otherwise, only the mere fact that the meeting occurred is recorded.

The City has also declined the Monitor's request to review any written records that have arisen from command conferences to date and documents that would show what actions have been taken, contending that the Monitor's jurisdiction does not extend to review of such records and that the Monitor can speak to personnel to get a description of the process. The Monitor has advised the City that, insofar as the City maintains that the chain of command accountability initiative does not fall within the scope of the Monitor's duty to review City practices in actual effect, the City cannot continue to cite the workplace conferences as an EEO initiative intended to contribute to improved EEO compliance or a more favorable EEO climate within the FDNY. The Monitor has proposed, however, to move forward, at least initially, by speaking to City employees and reviewing reports, if any, that relate to EEO or hazing, as well as documents that would show any corrective actions taken as a result of such reports (without waiver of any arguments regarding jurisdiction).

With regard to officer performance evaluations, the City has moved forward with implementation of EEO criteria in officer performance reviews, and it provided a blank copy of the relevant evaluation form to the Monitor and the other Parties on March 20, 2018. The Monitor expects to work with the City going forward to gather information regarding the reviews, and to confirm that the EEO office will continue to be informed and appropriately involved in the review process. The Parties and the Monitor are discussing ways to gather information regarding the performance reviews to ensure the implementation of the EEO criteria is working as intended.

### 3. Climate Survey

The Monitor has continued to work with the City on development of a workplace climate survey. At least as long ago as its EEO Report in 2013, the City recognized the usefulness of



such a survey in evaluating its EEO climate and identifying concerns that need to be addressed. *See* City of New York's EEO Report at 61. The Monitor has also long advocated that the City perform such a survey and provided a draft survey in October 2016. After several discussions and exchanges of ideas, and after a meeting between the Monitor and FDNY leadership on October 31, 2017, the City agreed to conduct a pilot survey and provided a draft survey to the Monitor. The Monitor advised the City of its concern that neither the City's draft survey nor the limited scope proposed for the pilot survey would be sufficient to provide the FDNY or the Monitor with meaningful data regarding the FDNY's workplace climate. Since the last Periodic Report, the City has responded to the Monitor's concerns by agreeing to work with one of the two vendors suggested by the Monitor to develop an appropriately comprehensive and informative survey to be administered to all employees. The City is currently in discussions with the vendor to establish the scope of work and the terms of an engagement. Once the vendor has been retained, the City plans to convene a meeting of the vendor, all Parties, and the Monitor to gather suggestions and hear concerns that the vendor can take into account in designing and administering the survey. The City's current plan is to administer the survey by September 2018. Based on general information the Monitor previously obtained from the vendor regarding the projected length of surveys, administering the survey and analyzing results could be completed in approximately six to nine weeks after the survey is developed.

#### **D. Investigations**

The Monitor continues to receive periodic updates and materials relating to ongoing EEO investigations, including intake documents, draft memoranda detailing investigators' findings and conclusions, and investigative files and interview memos for certain cases. The Monitor has continued to provide the FDNY with comments identifying areas where it observes deficiencies

in the investigative process (including, but not limited to, deficiencies detailed in recommendations sent by the Monitor to the City on June 6, 2017 – *see* Twenty-Second Periodic Report at 46). The Monitor’s comments and suggestions are intended to ensure that the FDNY EEO Office adheres consistently to investigative best practices and to provide guidance on investigative methods. The Monitor has reviewed draft conclusions and offered suggestions, including some regarding additional lines of inquiry, but does not dictate results in particular cases or require the City to obtain Monitor approval before issuing findings. The City states that it has stayed some investigations pending feedback from the Monitor.

Also in the area of investigations, the Monitor has continued work on a 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.<sup>10</sup> The Report is intended primarily to address concerns, raised by Plaintiffs-Intervenors and shared by the Monitor, regarding the long duration of FDNY EEO investigations. Both the City EEO guidelines and the FDNY’s own EEO Policy establish a presumptive 90-day limit for the completion of investigations, absent exceptional circumstances. But in many cases, FDNY EEO investigations take more than 90 days to complete, and in some cases more than 180 days. These protracted investigations impose hardships on complainants (and in some cases on respondents), especially where they are removed from regular duties pending the investigation; and by delaying resolution of EEO matters they risk deterring potential complainants from coming forward with reports of violations.

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<sup>10</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.

In the course of work on the EEO report and related discussions with the Parties, the Monitor has identified and requested additional relevant information and materials from the City. On February 9, 2018, the Monitor requested activity logs for the EEO investigations that it has been analyzing for the report; and the City provided the logs in a series of productions – the last on March 12, 2018. The logs record the steps taken in each investigation and the date of each step – such as intake, communications with complainants and witnesses, the dates of interviews, and the completion of investigative findings. (The most recent logs, generated after the introduction of the EEO database in 2016, provide more detailed and comprehensive accounts than those from earlier investigations.)

At the status conference held on March 13, 2018, the Court directed the City to produce further information relevant to the Monitor’s report on EEO investigations – statistics showing the rate at which complainants and respondents in EEO investigation have been reassigned to desk duty, and the duration of those assignments. The City has committed to producing the requested information by April 12, and the Monitor plans to analyze the additional data and incorporate a discussion in its EEO Report.

One area in which improvement has occurred since the last Periodic Report is EEO Office staffing. As of the March 6, 2018, the City provided an account of its current staffing, which consists of 9 attorneys and 6 non-attorney staff, as follows:

- EEO Assistant Commissioner
- The EEO Deputy Director
- 4 Investigative Attorneys
- 2 Contract attorneys
- 2 Disability Rights Coordinators
- 1 Training Attorney

- 1 EMS Lieutenant
- 2 EEO Analysts
- 1 Executive Assistant

FDNY EEO investigations are conducted by attorneys, a practice that the FDNY has stated it prefers to continue. Accordingly, it is the number of attorneys that largely determines the Office's capacity to investigate complaints. The City reports that interviews are being conducted for two additional attorney positions, and that two additional contract attorney positions also remain to be filled. The City also reports that the EEO Office has pending requests for additional attorney positions. To the extent that these requests for additional staffing remain under consideration, the Monitor recommends that they be fulfilled. Although these developments are positive, it remains to be determined whether these staffing increases, combined with the other steps the City has outlined, will be sufficient to materially reduce the long delays in the resolution of EEO matters. The Monitor will continue to track the duration of EEO investigations and the workload of EEO staff and will make further recommendations as warranted.

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

Pursuant to the Modified Remedial Order, the Monitor continues to address allegations by Plaintiffs-Intervenors and the United States that certain steps in the Medical Exam may have a disparate impact on black and Hispanic candidates. *See, e.g.*, Monitor's Nineteenth Periodic Report at 29-37; Monitor's Fifteenth Periodic Report at 17-23; Monitor's Thirteenth Periodic Report at 11-17 (citing Modified Remedial Order ¶¶ 15, 19); *see generally* Monitor's Eleventh Periodic Report (Dkt. # 1575) at 13-14.

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

As described in previous Periodic Reports, the City's prior record-keeping practices with respect to the Medical Exam have made it difficult for the Monitor and Parties to identify and analyze root causes of medical disqualification for black and Hispanic candidates compared to white candidates, and to analyze disparities in rates of disqualification among the groups. *See* Monitor's Twentieth Periodic Report at 31-34; Monitor's Nineteenth Periodic Report at 34-35; Monitor's Fifteenth Periodic Report at 23; Monitor's Thirteenth Periodic Report at 16-17; Monitor's Twelfth Periodic Report at 17-18. Nevertheless, the Monitor has proceeded with analyses of data from a number of different sources, in an effort to work around these limitations and evaluate the impact of the Medical Exam and its components to the extent possible.

As reported in the last Periodic Report, the City's August 2, 2017 "Fire Department of New York City Firefighter Candidate Bureau of Health Services Testing Attrition Metrics" report (the "BHS Attrition Metrics Report") showed rates of disqualification for candidates who have their medical testing data in the Electronic Medical Record ("EMR") database and whose overall medical qualification status is either qualified, disqualified, or reserved. *See* Monitor's Twenty-Second Periodic Report at 41. The City has indicated its belief that, in the future, such analyses will be easier and faster because much of the required information will be contained in the EMR dataset, which the FDNY began using in November 2015. The City has continued to refine the data it collects and has said that it continues to incorporate data points requested by the Monitor.

The Candidate Tracking Spreadsheet ("CTS") provides complete and final Exam 2000/2500 medical exam pass rate data for all candidates for the entire life of the hiring lists produced by those exams; and the Monitor has begun an adverse impact analysis of the entire

Exam 2000/2500 medical testing period by calculating the pass rates for white, black, and Hispanic candidates, as recorded in the CTS.<sup>11</sup> The CTS does not, however, identify the specific reason(s) each candidate was disqualified; accordingly, it does not support analyses of the impact of specific components or “stations” of the Medical Exam. This information will need to be gleaned from a combination of other sources.

The City has produced some of the documentation needed to assess the impact of specific components of the Medical Exam. Specifically, it has produced Notices of Final Disqualification (“NOFDs”) for candidates who were disqualified by the Medical Exam from the beginning of medical testing for Exam 2000/2500 in March 2013 through May 2015. The medical NOFDs are one-page notices sent to candidates, advising them which component(s) of the Medical Exam they failed. The spreadsheets generated by the City’s Electronic Medical Record (“EMR”) database and provided to the Monitor also contain the disqualification reason(s) for some of the candidates who failed the Medical Exam between November 2015 and the expiration of the lists in June 2017. On March 16, 2018, the Monitor requested paper NOFDs for candidates who were ultimately disqualified by the Medical Exam – as recorded in the final CTS – but for whom the Monitor does not yet have a disqualification reason, either in a paper NOFD or in data recorded in the EMR spreadsheets. These NOFDs – in addition to the NOFDs and EMR records the Monitor already has – will permit the Monitor to conduct adverse impact analyses of the pass rates for each component of the Medical Exam for the entire Exam 2000/2500 medical testing period.

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<sup>11</sup> The Monitor’s analysis will consider pass rates before and after changes were made to the Medical Exam to reduce adverse impact and will examine pass rates of different candidate populations.

While the Monitor has endeavored to assemble sufficient data from a variety of sources to perform meaningful analyses, the piecemeal, labor-intensive approach it has been compelled to adopt is not a viable or acceptable method for gathering and analyzing data from the Medical Exam. For future analyses, it is essential that the FDNY complete the development of the EMR database and ensure that it is capable of performing the searches and calculations needed to identify disparate impact in components of the Medical Exam.

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

Plaintiffs-Intervenors and the United States have expressed concern that the stairmill portion of the Medical Exam has a disparate impact on black and Hispanic candidates; and, as previously reported, the Monitor's analyses of medical files produced by the City and the BHS Attrition Metrics Report indicate that this concern is valid. *See* Monitor's Twenty-Second Periodic Report at 42.

As the Monitor reported in its Nineteenth Periodic Report, on February 13, 2017, the City advised that it planned to engage PSI Services LLC ("PSI") to conduct a validation study of the stairmill test.<sup>12</sup> Monitor's Nineteenth Periodic Report at 6, 31. The City has provided the Monitor with three drafts of PSI's validation study proposal since February 2017. (Only the third draft was shared with the other Parties -- on March 9, 2018.) The current proposal describes in very broad terms a study that will seek to determine the aerobic demands of the stairmill test by measuring oxygen consumption. PSI also proposes to assess the aerobic demands of the Academy's FST test to establish an appropriate cut-off value or to determine whether the aerobic demands associated with the stairmill are job related; but, under the current proposal, PSI would only estimate the aerobic demands of the FST by measuring heart rate,

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<sup>12</sup> As of March 16, 2018 -- more than a year later -- PSI had only just been contracted to perform this work.

rather than actually measuring oxygen consumption. The Monitor's team has reservations about this approach and would like to see more detail about how the City plans to use data from the FST testing. The Monitor has continued to give feedback and to request greater detail, but the PSI proposal remains a very high level outline of the proposed study without a sufficiently detailed description of the purpose, design, methods, sample sizes that will be used, data that will be collected, analyses that will be performed, or the study's anticipated timeline.

The City circulated PSI's most recent validation study proposal to the other Parties on March 9. (As noted in earlier Periodic Reports, Plaintiffs-Intervenors and the United States have reserved their right to raise objections to the validation study. *See, e.g.*, Monitor's Twentieth Periodic Report at 33.) Both the United States and Plaintiffs-Intervenors have raised initial questions and concerns, but both have made clear that their responses to the validation proposal are necessarily limited because important details have not yet been provided by PSI. The City has agreed to respond to the Monitor's and the other Parties' questions and to provide additional information as the validation study is further defined and implemented, and that the Monitor and the other Parties will be given the opportunity to comment and request further information.

Based on representations by the City, the Monitor has reported in numerous previous Periodic Reports that the City would complete the validation study by April 30, 2018. *See* Monitor's Twentieth Periodic Report at 34, Monitor's Twenty-First Periodic Report at 36, Monitor's Twenty-Second Periodic Report at 9, 45. However, the City can no longer meet this deadline. The City intends to begin collecting data about the aerobic demands of the stairmill in late April and data about the aerobic demands of the FST in July. The City must devote whatever resources are required to complete the study well before Exam 7001 candidates begin medical testing at BHS, to give the Monitor and the other Parties time to analyze and comment



on the results and request further steps, analyses, etc. The prospect of a second examination list being processed without benefit of validation or data analysis is not acceptable.

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

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

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

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. *See* Monitor's Sixteenth Periodic Report at 29-31; Monitor's Seventeenth Periodic Report at 29-30.<sup>13</sup> The guidelines were instituted to enhance the consistency and predictability of outcomes in the character review process, to limit discretion, to reduce any unlawful disparate impact on black or Hispanic candidates, and to ensure that PRB decision making is not influenced by personal connections within the Department.

Recently, the Monitor and the Parties have continued to consider further potential reforms in the process. As previously reported, on July 27, 2017, the Monitor and its expert Alison Wilkey<sup>14</sup> met with the City to discuss potential reforms that the Monitor developed in consultation with Ms. Wilkey – taking into account concerns and suggestions from the United

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<sup>13</sup> As noted in prior Periodic Reports, the revisions were agreed upon by the Parties with the understanding that they may be subject to additional changes based on further analysis. *See* Monitor's Seventeenth Periodic Report at 30.

<sup>14</sup> Ms. Wilkey's qualifications and expertise are summarized in the Monitor's Eighteenth Periodic Report at 39.

States and Plaintiffs-Intervenors. *See* Monitor's Twenty-First Periodic Report at 10. The City responded to the Monitor's recommendations in writing on October 13, 2017, and the Monitor shared its recommendations and the City's responses with the United States and Plaintiffs-Intervenors on October 27, 2017.

The Monitor's recommendations, described in detail in the Monitor's previous Periodic Report, include revised procedures intended to relieve unnecessary burdens on 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 promote consistency and facilitate analysis of PRB outcomes. *See* Monitor's Twenty-Second Periodic Report at 45-48. The City has expressed a number of concerns regarding each of the Monitor's recommendations, contending that its current procedures are at least in part required by generally applicable rules for City employment, and that its standards for PRB referral and decision making are job-related. The Monitor plans to respond to the City's concerns in writing and convene a meeting of the Parties to discuss the potential reforms. The Monitor had postponed responding to the City while the City worked to resolve issues identified by the Monitor and the other Parties in CTS data relating to PRB referrals and outcomes. The Monitor plans to provide the City and the other Parties with its analyses of PRB related data as part of its response to the City regarding recommended reforms. The City produced its most recent version of the CTS (purportedly resolving remaining issues) on March 2, 2018. The United States had also indicated that it intended to complete its disparate impact analysis once the City provided the corrections to the CTS, and it may also offer further suggestions for reforms.

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

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

As discussed above in Part III.C, the most recent iterations of the CTS, starting with the version provided September 5, 2017, include complete hiring-process data for all candidates on the Exam 2000 and 2500 lists, including the outcome of reconsideration for those candidates disqualified under discontinued standards who were reconsidered using the current criteria and procedures. However, on December 5, 2017, the City advised the Monitor that it had identified previously unobserved errors in some CTS data, raising concerns that the data may not be a reliable basis for analyses of the character review process. *See* Monitor's Twenty-Second Periodic Report at 48-49. Since then the City has produced two more iterations of the CTS – one on January 17, 2018 and the most recent on March 2, 2018. Shortly after it was produced, the City, the other Parties and the Monitor identified a number of issues in the January CTS, and the

Monitor, the United States, and Plaintiffs-Intervenors asked a number of follow up questions – some of which concerned PRB related data. The City responded to those questions and produced the March 2, 2018 CTS to address the remaining issues. The Monitor and the United States are now proceeding with their analyses of PRB referrals and outcomes using the March 2, 2018 CTS – in an effort to determine whether the process continues to produce higher rates of referral and disqualification for black and Hispanic candidates than for white candidates. The Monitor’s analysis includes rates of referral and disqualification for different time frames (both before and after the most recent changes in standards and procedures), and the effect of referral to the PRB on delays in appointment or on the terms of employment for candidates who are appointed to the FDNY.

In addition to analyzing character review results for candidates on the Exam 2000 hiring list, the Monitor also plans to conduct similar analyses for candidates on the hiring list that will be based on the recent open competitive exam (Exam 7001). Once a statistically sufficient number of candidates from the new hiring list have completed the character review process, the Monitor and the United States will conduct analyses to determine whether the process (as modified by any further changes) has a disparate adverse impact on black or Hispanic candidates. If the analysis does reveal disparate impact, the City will be required to implement further changes, or to show how the criteria and procedures for character review are job-related and consistent with business necessity.

## **VII. Firefighter Exams**

Pursuant to Paragraph 7 of the Modified Remedial Order, the Monitor is charged with overseeing the current computer-based test (“CBT”) for the position of entry-level firefighter. Consistent with the provisions of the Modified Remedial Order, the City and its testing

consultant PSI have continued to work in coordination with the Monitor and the other Parties on the administration and scoring of the examination. The Monitor continues to be assisted by its testing expert, Dr. Shane Pittman of The Pittman McLenagan Group, L.C.

**A. December 2016 Promotional Exam**

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

As reported in the Monitor's Twentieth Periodic Report, of the 1,285 promotional candidates who reported their race/ethnicity to PSI, 49% were white, 27% were Hispanic, and 18% were black. Monitor's Twentieth Periodic Report at 43. Only four people failed the exam, two of whom were white, one of whom was black, and one of whom was an individual who did not provide race/ethnicity data. PSI thus found that overall pass rates were comparable as between racial/ethnic subgroups, any differences were well below two standard deviations, and the AI ratios were all near 1.0, reflecting no significant disparate impact.

PSI also projected the racial/ethnic makeup of the five classes expected to be filled by promotional candidates, based on rank order determined by adjusted final score (i.e., score on the CBT plus bonus points). PSI's standard deviation analyses indicated that race/ethnicity differences in selection rates exceeded chance levels (more than two standard deviations) in year one for all subgroups except Native Americans, but none of the selection rate differences

exceeded chance levels for the 2-year period and through the expiration of the list. *See* Monitor's Twentieth Periodic Report 43-45.

## **B. Open Competitive Exam**

Exam 7001 was administered from September 5 through October 28, 2017. Protest Review Sessions (in which candidates are permitted to view the answer key and given the opportunity to contend that they should receive credit for answers that were marked incorrect, based on the key) were conducted in November 2017, and the Test Validation Board ("TVB") reviewed the protests in January 2017. Also in January, PSI circulated preliminary adverse impact analyses. After scoring was adjusted as a result of the TVB's protest decisions, PSI computed Exam 7001 test scores and pass rates using the scoring formulas and passing score established for Exam 2000.

### **1. Adverse Impact Analyses**

#### ***a) Impact Analyses Overall***

The current milestone in the exam process is for PSI to conduct follow-up adverse impact analyses in light of changes made to scoring as a result of the TVB's protest review. PSI's mandate includes analyses of the pass rates (*i.e.*, the rate at which test-takers scored at or above the cut score of 70) by race/ethnicity and statistical analyses of disparities in pass rates between different demographic groups.

As with Exam 2000, PSI's mandate also includes projecting the racial/ethnic mix of candidates who will be called off the open competitive eligible list for further processing in each of the years the list will be in use. These projections are based on a number of City rules and historical trends:

- open competitive candidates are not called from the list until the second year of the existence of the list (because promotional candidates are called first);

- candidates are selected in rank order, beginning with the highest scoring candidates;
- the number of Academy positions to be filled is 320 per class, and there will be two classes per year, so 640 candidates will be needed to fill classes each year;
- the ratio of candidates called from the open competitive list to candidates who make it through the entire hiring process and into the Academy (*i.e.*, the historic attrition rate) is 3.5 to 1, so at least 2,240 open competitive candidates should be called each year to fill the 640 available positions; and
- all open competitive candidates with tied adjusted final scores – *i.e.*, scores with bonus points included – must be called off the list for processing at the same time, so more than the required 2,240 candidates may be called off the list in any given year.

Applying these rules and historical trends to the actual eligible list, PSI projects how far down the list DCAS is likely to get – *i.e.*, what minimum score is likely to be reached – before the list expires. PSI also performs statistical comparisons between demographic groups for the candidates who achieve those scores. PSI will also compare the Exam 2000 and Exam 7001 results – comparing the extent to which each test produces disparities between groups in pass rates and in the projected annual selection rates.

*b) Analyses by Test Section and by Question*

In addition to overall pass rates and projected annual selection rates, PSI's analyses will also include more targeted adverse impact analyses on various sections of the exam – including the cognitive and non-cognitive sections, as well as on individual questions. Further analyses, based on survey responses and other criteria, are also planned. The Monitor's expert and the United States' expert, Dr. David Jones, continue to work with PSI to identify and request additional searches.

*c) Residency Bonus Points*

One difference that has emerged between Exam 2000 and Exam 7001 is the rate at which test-takers have claimed New York City residency bonus points. Approximately 61% of Exam 7001 test-takers have claimed residency points thus far.<sup>15</sup>

As discussed above in Part II, test-takers who are entitled to the residency credit may still claim it, and the City's plans for continuing communications with test-takers include efforts to ensure that all eligible test-takers do so. Nevertheless, the overall percentage of Exam 7001 test-takers claiming residency bonus points to date is lower than it was for Exam 2000. While Exam 7001 black test-takers continued to claim residency points at a higher rate than white or Hispanic test-takers (76.12% for black candidates compared to 71.45% and 44.36% respectively for white and Hispanic candidates), the percentage of white Exam 7001 test-takers claiming residency points went up very slightly (as compared to Exam 2000), and the percentage of black and Hispanic test-takers claiming residency for Exam 7001 went down. (The cause of the decline has not been determined. Potential factors include changes in the requirements for claiming and substantiating entitlement to the credit between Exam 2000 and Exam 7001.)

Also as discussed in Part II, as of March 1, 2018, the City reported that a total of 5,758 test-takers with New York City contact addresses had not claimed the residency credit – including 1,713 black test-takers and 1,599 Hispanic test-takers (approximately 15% and 12.5% of total test-takers for those groups, respectively). Many such test-takers may not be entitled to the credit because they were not residents in the relevant time frame. But as noted above, the

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<sup>15</sup> By comparison, only approximately 4% of all test-takers claimed veteran bonus points, and claims for disabled veteran bonus points and legacy bonus points were each made by less than 1% of test-takers.



City intends to communicate with them to ensure that those entitled to the credit take advantage of it.

## 2. Next Steps

The adverse impact analysis segment of the exam development process was originally expected to be completed by March 19, but analyses are ongoing. The next milestone, publication of the eligible list, was originally projected for April 4, 2018, but will be delayed somewhat. This is not likely to delay the establishment of the list this fall, however.

Although it is important to compare the Exam 7001 and Exam 2000 versions of the CBT, PSI will also attempt to analyze the effect of other factors potentially affecting scores including, but not limited to: the numbers and percentage by race/ethnicity of candidates claiming various bonus points; possible effects of candidate pre-test training; the effect of recruitment techniques on exam results; and any other factors that may be deemed relevant by the Monitor or the Parties. These additional analyses will depend, however, on the availability of relevant data and the ability to attribute differences/changes to any particular factor, which may not be possible.

## **VIII. Additional Issues**

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

- Discussions regarding individual candidates who are or claim to be entitled to relief under the Court's Orders, including their interactions with the FDNY, documents they have received, and their rights and remedies;
- Addressing questions and disagreements among the Parties regarding the status of specific candidates and other issues that are not addressed elsewhere in this report

and that fall within the Modified Remedial Order or Disparate Treatment Settlement;

- Frequent calls, meetings, and correspondence with the Parties regarding the full range of issues related to implementation of and compliance with the Modified Remedial Order; and
- Performing the remaining duties of the Special Master appointed by the Court in its Order filed May 22, 2012 (Dkt. # 883). The Court assigned these duties to the Monitor in an order dated August 17, 2016.

Dated: April 9, 2018

New York, New York

/s/

Mark S. Cohen