

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 ELEVENTH PERIODIC REPORT TO THE COURT

Table of Contents

EXECUTIVE SUMMARY 1

I. Recruitment and Attrition Mitigation 3

 A. General Efforts to Improve Recruitment and Reduce Candidate Attrition..... 4

 1. Enhanced Efforts to Recruit Black and Hispanic Firefighter
 Candidates..... 5

 2. Attrition Mitigation..... 6

 3. Budgeting Issues 7

 B. Settlement Working Group..... 8

 C. Meetings with CDIO and Diversity Advocate..... 9

II. Next Exam 10

 A. Current Status..... 10

 B. Next Steps 11

 C. Exam Discovery Issues 12

III. Medical Exam Related Issues 13

 A. Review of the Medical Exam and Discussion of Potential Changes 13

 B. BHS Guidance Document..... 16

IV. Character Screening by the CID and PRB..... 16

 A. Overview..... 16

 B. Recent Developments and Ongoing Issues..... 17

 1. Disparate Impact Concerns 17

 2. Discussions About Revising the Guidelines 18

V. Civil Service Appeals 20

VI. EEO Compliance and Retaliation Investigations..... 22

 A. EEO Compliance Activities..... 22

B. EEO Retaliation Investigations..... 22

VII. Additional Issues..... 23

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

EXECUTIVE SUMMARY

This report summarizes activities relevant to the compliance of the City of New York (the "City") with the Modified Remedial Order from December 15, 2014, when the Tenth Periodic Report was filed, to March 16, 2015.

Part I of this report discusses the Parties' and the Monitor's ongoing review and investigation of issues relating to recruitment. During the past three months this work has focused on two principal areas. First, the Monitor and the Parties continued to engage on issues regarding the City's recruitment activities. The Monitor has received and analyzed new and updated information from the City, continued to research best practices, and consulted with the Parties on issues including scheduling, budgeting, compilation of recruitment data, and development of recruiting techniques in compliance with the mandates of the Modified Remedial Order. Second, the Monitor has facilitated meetings between the City and the Parties focused on exploring ways to improve existing recruitment activities and develop potential new recruitment programs as part of the settlement relief in connection with the Plaintiffs-Intervenors' disparate treatment claims agreed to by the City on March 18, 2014 and submitted for approval by the Court on April 22, 2014 (the "Disparate Treatment Settlement"). *See* Proposed Stipulation and Order (Dkt. # 1291-1) at 2-3. Among other things, the Parties and the Monitor have formed a committee (the "Working Group") to address these settlement issues.

Part II discusses issues related to the next computer-based exam for prospective firefighter candidates. As the Monitor has previously reported, the next computer-based exam administered to both open competitive candidates and promotional candidates will consist of “equivalent forms” of the test previously created by the Parties in accordance with the Court’s orders. Over the past three months, the Monitor and the Parties have discussed scheduling and logistical issues as well as several more substantive questions. The City’s test development contractor, PSI, developed a project schedule in consultation with the Monitor’s testing consultant, Dr. Shane Pitman, and PSI has undertaken the initial steps on the project. In addition, the City produced certain information requested by the United States, and the Monitor has begun to analyze that data.

Part III discusses recent efforts regarding the medical assessment that is administered to entry-level firefighter candidates as part of the selection process. During the past three months, the Monitor, with the help of its expert consultants, has continued its intensive factual and statistical analysis of the medical exam to determine whether any component has a disparate impact on black or Hispanic candidates that is not justified by job relatedness or consistent with business necessity and, if so, the causes of that impact. The Monitor also met with the Parties to discuss a consensual resolution of certain issues related to the medical exam, which culminated in an agreement by the City to take a series of steps to help address concerns regarding potential disparate impact. The Monitor and Parties are also continuing to evaluate aspects of the medical exam, for example by looking at requirements for follow up testing to determine whether the process of obtaining test results can be made easier and less costly for candidates of all races.

Part IV summarizes developments relating to the process for reviewing the character and background of firefighter candidates. As discussed in previous reports by the Monitor, this

process includes an initial review by the Candidate Investigations Division (“CID”) and, in certain cases, a second level of review by the Personnel Review Board (“PRB”). Since October 2012, the CID and PRB procedures have been governed by written guidelines developed by the City in coordination with the Monitor and the other Parties. The guidelines were provisionally approved by the Monitor and revised in December 2013 and in November 2014 based on experience. The Monitor has conducted an extensive review of PRB issues pursuant to Paragraphs 40 and 41 of the Modified Remedial Order and in consideration of possible disparate impact concerns raised by the Plaintiffs-Intervenors and United States. As part of that review, the Monitor has conducted a statistical analysis of PRB outcomes, as well as a review of specific candidate files and other material. The Monitor plans to meet with the Parties over the coming months in connection with issues raised related to the PRB process.

Part V discusses issues relating to the processing and review of appeals filed by candidates who were disqualified from appointment as firefighters, including candidates who were awarded potential priority hire relief by this Court.

Part VI reports on the Monitor’s ongoing review and assessment of the FDNY’s Equal Employment Opportunity (“EEO”) function, including analysis of existing EEO policies and practices, training, and the process for investigating EEO complaints. The Monitor also has continued monitoring the City’s investigations of instances of alleged retaliation.

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

I. Recruitment and Attrition Mitigation

During the past three months the Monitor has continued its oversight of the FDNY’s efforts to improve its recruitment programs. These efforts have taken place as part of ongoing

monitoring of the City's compliance with the provisions of the Modified Remedial Order relating to recruitment, as well as facilitating and monitoring implementation of recruitment actions agreed to as part of the Disparate Treatment Settlement, which fall within the Monitor's purview.¹ *See* Tenth Periodic Report (Dkt. # 1533) at 2.²

A. General Efforts to Improve Recruitment and Reduce Candidate Attrition

As previously described in the Monitor's Recruitment Report to the Court and other reports, the Modified Remedial Order requires the City to report on and suggest improvements to the FDNY's recruitment strategies. *See* Modified Remedial Order ¶¶ 26, 29. As part of this process, the Monitor, the City, and the other Parties have made a series of recommendations to enhance the FDNY's recruitment practices to meet the goals of the Modified Remedial Order and the Disparate Treatment Settlement. Among other things, the Monitor recommended that the City provide detailed information on a coordinated planning effort for its recruitment campaign, and consider increasing coordination between the Office of Recruitment and Diversity ("ORD") and the FDNY's Data Analytics Unit to improve ORD's use of data in its recruitment efforts. The City has adopted or is in the process of adopting some of these recommendations, with modifications where the City deems necessary to reflect operational needs or other preferred approaches.

In the Disparate Treatment Settlement, the City agreed to (among other things) "use best efforts to recruit African-American test-takers for the firefighter civil service exam in

¹ The Court provided preliminary approval to a proposed settlement of Plaintiffs-Intervenors' disparate treatment claims on April 23, 2014. *See* Order dated April 23, 2014 (Dkt. # 1293).

² Among other things, the settlement requires the City to: (i) use its best efforts to recruit black applicants to take the written exam for entry-level firefighters in proportions closely approximating the representation of age-eligible black New Yorkers in the City's labor market, plus three percent; and (ii) create or expand educational and other opportunities to enhance the ability of minorities to pursue careers in firefighting. The Monitor has continued to oversee the Parties' efforts regarding each of these aspects of the settlement.

proportions closely approximating the representation of age-eligible African American New Yorkers in the city's labor market, plus 3 percent." Proposed Stipulation and Order, April 22, 2014 (Dkt. # 1291-1) ¶ 1(a). Upon final approval of the settlement by the Court, the Court and the Monitor will have the authority to "administer and enforce" the Disparate Treatment Settlement. *Id.* ¶ 4. *See also id.* ¶¶ 9-10. (Other aspects of the Disparate Treatment Settlement are discussed in Parts I.B and I.C of this report.)

1. Enhanced Efforts to Recruit Black and Hispanic Firefighter Candidates

To assess the City's progress in complying with the Modified Remedial Order and Disparate Treatment Settlement, the Monitor, as well as other Parties, have requested a broad range of recruitment information from the ORD and from the FDNY's Data Analytics Unit. *See* Monitor's Recruitment Report to the Court (Dkt. # 1464) at 53-57; *see also, e.g.*, Monitor's Fifth Periodic Report (Dkt. # 1198) at 13-34. On December 31, 2014, the City produced some of the requested information and provided substantive updates on specific recruitment initiatives, including outreach events, social media and advertising campaigns and a detailed plan and schedule on upcoming recruitment activities.

The City currently estimates that the application period for the next entry-level firefighter examination will begin in April 2017. The City has retained an outside marketing firm to help with the next recruitment campaign, and this firm has previously been used by the New York City Police Department to assist in its recruitment efforts. The Monitor understands that many of ORD's recruitment efforts have yet to be finalized, and expects to focus more intently on specific recruitment programs and techniques as ORD's plans for the upcoming recruitment campaign crystallize. It is important from the Monitor's perspective, however, that even in advance of the application period, certain procedures and practices be put in place. These include not just ongoing outreach and other efforts designed to generate interest in the entry-level firefighter

position among various communities, but also the completion of a data-driven analysis of past recruitment techniques and the design and implementation of improvements in the FDNY's ability to gather and analyze relevant data. Accordingly, the Monitor expects that the City will continue to provide substantive updates regarding its recruitment efforts, and will supply the Monitor with requested information, to the extent not already provided. Based on this and other information, the Monitor expects continued discussions among the City (including ORD), the other Parties, and the Monitor regarding recruitment efforts in the future.

2. Attrition Mitigation

The City also advised the Monitor on ORD's progress towards reducing attrition among entry-level firefighting candidates. On December 31, 2014, the City provided the Monitor with a written update detailing the FDNY's efforts made during the course of 2014 to reduce candidate attrition, including statistics on candidate participation in the below-mentioned programs. Specifically, ORD has continued its work with the Firefighter Candidate Mentorship Program, the Communications and Social Media Program, and the Candidate Physical Ability Training Prep Program (the "CPAT Prep Program"). The Firefighter Candidate Mentorship Program pairs entry-level firefighter candidates with veteran uniformed members of the FDNY, who work with the candidates from the beginning of the hiring process through the Fire Academy. The Communications and Social Media Program was created by ORD to expand outreach and increase communication with candidates and consists of ongoing e-mail alerts, monthly e-mail newsletters, and posting of content on all Join FDNY social media accounts. ORD's CPAT Prep Program consists of a free, 12-week physical preparation program offered to entry-level firefighter candidates prior to the administration of the CPAT. The Monitor will continue to

examine the programs outlined in the City's written update and the progress made by the City in attrition mitigation efforts in the coming months.³

3. Budgeting Issues

In the course of the litigation, the Court identified the FDNY's budget for recruitment activities as both an area of concern and an important part of any lasting solution to the disparate treatment of black and Hispanic candidates in the FDNY's recruitment and hiring process. *See* Memorandum Findings of Fact (Dkt. #741) at 33-36. The Modified Remedial Order required the City to identify the resources needed for the Office of Recruitment and Diversity to meet its goals and obligations and to measure the effectiveness of recruitment activities against their cost. Modified Remedial Order ¶¶ 26(a), (f). Accordingly, the Monitor has made various budget-related recommendations, and has also asked for information to help assess whether these recommendations and initiatives proposed by the City are being carried out as well as whether the budgeting process going forward will reflect a sustained commitment to enhanced recruitment practices. *See, e.g.,* Monitor's Recruitment Report to the Court at 14-15, 55.

Over the past three months, the City has provided updated information on the current budget in various stages. In addition, the Monitor and the Parties have continued to communicate with ORD on budgeting issues. The Monitor and the Parties have also spoken with the FDNY's Assistant Commissioner of Budget and Finance regarding the City's and the FDNY's respective budgeting processes, as well as the allocation of funds within the FDNY to various departments and initiatives. The Monitor anticipates ongoing dialogue along these lines, including an increased focus on the use of data gathered during and after the recruitment process to assess the cost effectiveness of historical recruitment techniques and new approaches.

³ Issues relating to the medical exam, PRB, and the entry-level firefighter examination also involve aspects of attrition mitigation, but are discussed separately in Parts II, III and IV of this report.

B. Settlement Working Group

As part of the Disparate Treatment Settlement, the City and the Parties formed the Working Group committee, which is comprised of representatives from the City's Law, Education and Citywide Administrative Services Departments in conjunction with representatives from the FDNY, the Vulcan Society, the United States and the City University of New York ("CUNY"). *See* Monitor's Tenth Periodic Report at 4-5. The goals of the Working Group are:

to create educational and other opportunities that will enhance the ability of New York City students to pursue careers as New York City firefighters. This may include, among other things, the creation of a Fire Cadet title or special credit for completion of job-related fire science courses.

Proposed Stipulation and Order (Dkt. # 1291-1) ¶ 1(e).

Over the last 90 days, the Monitor has facilitated several meetings of the Working Group and helped to coordinate the group's efforts to propose and refine specific initiatives. The initiatives being discussed include the creation of a Fire Cadet title that would qualify for promotion to firefighter, most likely upon passage of a promotional exam. The parties have agreed to move forward with pursuing the establishment of this title, which requires approval at the state level, and are currently working to determine the procedures and criteria required under FDNY policies and applicable city and state law to develop a proposal for submission to the State Civil Service Commission to establish the title and its eligibility for promotion.

Other initiatives under consideration by the Working Group include the development of high school and college-based programs to expand opportunities for careers as FDNY firefighters. These potential initiatives include expansion of existing FDNY high school programs such as the FDNY High School for Fire & Life Safety and the FDNY Explorers

Program, and development of additional recruitment and awareness initiatives for high school students in coordination with the Department of Education. The Working Group is also working to develop college-based initiatives in coordination with the City University of New York, drawing on faculty and recruitment support to potentially build on existing fire science certificate programs and coursework that would be eligible for credit towards a degree or professional advancement. As with the Fire Cadet title, the Working Group is currently engaged in a detailed examination of the procedures and resources necessary to accomplish these other educational initiatives.

The Monitor anticipates that the Working Group will remain active in the coming months as it refines and implements these and other initiatives.

C. Meetings with CDIO and Diversity Advocate

The Monitor has met with the FDNY's Chief Diversity and Inclusion Officer ("CDIO"), Pamela Lassiter, and the Diversity Advocate, Lieutenant Michael Marshall, over the past months. Pursuant to the terms of the Disparate Treatment Settlement, the CDIO position carries the rank of Deputy Commissioner and reports directly to Commissioner Nigro. Additionally, the Assistant Commissioner for EEO, the Assistant Commissioner for Recruitment and Diversity, the Diversity Advocate, and the Director of Compliance each report directly to Deputy Commissioner Lassiter. The Diversity Advocate is empowered to raise concerns relating to fairness, transparency, and respect for firefighter candidates during the hiring process and through the Fire Academy. *See Proposed Stipulation and Order at 3-4.* The Diversity Advocate has also communicated directly with firefighter candidates who wished to raise particular concerns and has attended and participated in the Working Group meetings.

The CDIO is now engaged in the remedial process and has attended the Monitor's weekly conference calls with the Parties, meetings of the Working Group, and PRB meetings. At the

most recent Working Group meeting, the CDIO gave a presentation on a proposal regarding the Fire Cadet program. The Monitor plans on having one or more in-depth meetings with the CDIO and the Diversity Advocate in the near future to discuss the FDNY's progress in its remedial measures.

II. Next Exam

A. Current Status

As described in the Monitor's previous reports, Exam 2000 was developed in accordance with the Court's determination that prior written exams had a disparate impact on black and Hispanic candidates that was not justified by job-relatedness or consistent with business necessity. *See* Tenth Periodic Report at 5-6; Ninth Periodic Report (Dkt. # 1462) at 7-8. The development and validation of Exam 2000 by the City's testing expert, PSI, was overseen by Special Master Mary Jo White in consultation with the other Parties and the Special Master's own testing expert, Dr. Shane Pittman of The Pittman McLenagan Group, L.C.

Pursuant to Paragraph 7 of the Modified Remedial Order, the Monitor is responsible for oversight of the next computer-based exam. With the Court's approval, the Monitor retained Dr. Pittman, the testing expert used by Special Master White to assist the Monitor in this effort. The Monitor has continued to consult with Dr. Pittman regarding the development and use of additional equivalent forms of Exam 2000, as well as other issues relating to the next exam cycle. Dr. Pittman has likewise continued to have discussions with PSI to provide oversight and assistance in the execution of its test development plan.

The Monitor has also continued to communicate with a sub-group composed of counsel and experts to each of the Parties, which has a specific focus on issues related to the development

of the exams. The Monitor anticipates that this sub-group will continue to meet in the coming months.

B. Next Steps

As described in detail in the Monitor's Tenth Periodic Report, the eligible list of open competitive candidates who took Exam 2000 will expire on June 26, 2017, and the last class of entry-level firefighters drawn from the current eligible list will enter the Academy in June or July of 2017. *See* Tenth Periodic Report at 6. As a result, the City has created a plan to administer the promotional exam for firefighters in December 2016 and appoint probationary firefighters from the promotional list to a class in December 2017 or January 2018. The City anticipates administering the next open competitive exam in or around September or October 2017 and appoint the first Academy class from the next open competitive list in December 2018.

On December 19, 2014, the City and PSI provided the Monitor and Dr. Pittman with a preliminary schedule for the development and administration of the next promotional and open competitive exams. The Monitor provided its comments on proposed revisions to that schedule. On January 14, 2015, the Monitor, Dr. Pittman, and the sub-group composed of counsel and experts for each of the Parties participated in a kick-off presentation given by the City and PSI with regard to the examination development and administration process.⁴

As previously noted in the Monitor's Tenth Periodic Report, the schedule will progress through a number of important milestones, with the Monitor reporting to the Court at each stage

⁴ The United States has offered additional suggestions to the City and PSI regarding the examination process and requested that the City update the other Parties at specific junctures in the examination development process. The City intends to periodically provide information to the Monitor on the development of the new test forms; the United States has requested that it receive this information as well. The City has asked its expert to consult with Dr. Pittman, and to make recommendations to the Monitor with respect to each of the United States' requests. The Monitor believes that the City and the other Parties will be able to reach a consensus on a protocol under which all of the necessary stakeholders receive substantive updates and are able to provide comments at the relevant milestones in the examination development process.

and, where appropriate, obtaining the Court's approval. *See* Tenth Periodic Report at 8. Since the January 14, 2015 kick-off presentation (and the Monitor's Tenth Periodic Report), the City's proposed schedule has been revised slightly by the City and its testing expert. The most notable milestones and tentative dates in the exam development and administration process, as revised, are as follows:

- Test Development
 - Review of firefighter job analysis information (March 2015)
 - Review preliminary alternative forms
 - Establish scoring methodology
 - Review of equivalency study
 - Finalization of equivalent forms for use in upcoming exams and review of project summary report prepared by PSI (approximately August 2016)

- Promotional Exam
 - Finalization and review of the schedule and logistical plans for the promotional exam
 - Application period (August 2016)
 - Administration of exam (December 2016)
 - Analysis of adverse impact study
 - Review scoring algorithm for the promotional exam
 - Eligible list made public (May 2017)
 - Approval of eligible list for promotional candidates (December 2017)

- Open Competitive Exam
 - Finalization and review of the schedule and logistical plans for the open competitive exam
 - Application period (April 2017)
 - Administration of exam (September 2017 to October 2017)
 - Analysis of adverse impact study of open competitive exam
 - Review scoring algorithm for the open competitive exam
 - Approval of eligible list for open competitive candidates (December 2018)

C. Exam Discovery Issues

As discussed in the Monitor's Tenth Periodic Report, the FDNY's Data Analytics Unit previously provided summary information to the Monitor and the other Parties regarding performance at the FDNY Fire Academy of candidates who took Exam 2000. Tenth Periodic

Report at 9. The United States and Plaintiffs-Intervenors made several discovery requests directed at the underlying information that the Data Analytics Unit used in making its analysis. After receiving written and oral submissions on the topic, the Monitor recommended on December 4, 2014 that the City produce the information requested. The City timely produced the requested information in late December and early January. The United States, the Plaintiffs-Intervenors, and the Monitor are reviewing the information provided and will be discussing it with the City.

III. Medical Exam Related Issues

During the past three months the Monitor has been actively investigating and discussing a number of issues related to the medical assessment given to firefighter candidates (the “Medical Exam”). This section briefly summarizes those efforts and their current status.

A. Review of the Medical Exam and Discussion of Potential Changes

The Monitor is engaged in a review and ongoing dialogue with the Parties regarding portions of the medical exam that may have a disparate impact on black or Hispanic candidates that is not job related or justified by business necessity and, if so, considering ways to attempt to reduce such impact. *See* Monitor’s Tenth Periodic Report (Dkt. #1533) at 13-16; Monitor’s Ninth Periodic Report (Dkt. #1462) at 3-6. The Modified Remedial Order requires the City to “take all steps necessary to eliminate all policies and procedures that are not job related or required by business necessity and either have a disparate impact on black and Hispanic firefighter candidates or perpetuate the effects of said disparate impact.” Modified Remedial Order ¶ 19; *see also id.* ¶ 15 (forbidding the City to use “as part of any entry-level firefighter selection process, any examination that in any way results in a disparate impact upon black or Hispanic applicants” except as permitted by law). As the Monitor has previously reported, the

Plaintiffs-Intervenors raised concerns regarding the possible disparate impact of the medical exam on black candidates, and the United States raised the same concerns with respect to both black and Hispanic candidates.⁵ *See* Monitor's Tenth Periodic Report at 13; Monitor's Ninth Periodic Report at 4-5.⁶

The Monitor has undertaken its own intensive examination of the possible disparate impact of the medical exam on black and Hispanic firefighter candidates. *See* Ninth Periodic Report at 5-6; Tenth Periodic Report at 13-14. As described in the Tenth Periodic Report, the initial phases of this effort have been completed. *See* Tenth Periodic Report at 13-14. With the assistance of its expert consultants, the Monitor has, among other activities, compiled and analyzed data related to the medical exam, reviewed detailed information regarding the FDNY's medical exam, met with representatives of the FDNY's Bureau of Health Services ("BHS"), and reviewed national standards and the practices of fire departments in other large metropolitan areas. *Id.* at 14. The Monitor has also shared the data it compiled with the Parties to facilitate their own analyses. *See* Tenth Periodic Report at 14.

Parts of the Monitor's analysis are still ongoing. Using the results of the analysis so far, the Monitor has isolated portions of the medical exam that may have meaningful levels of disparate impact on candidate groups. The way in which the City has historically recorded results of particular medical exam components, however, makes it difficult to identify all of the causes of candidate disqualification with specificity. The Monitor has requested and begun

⁵ The FDNY's medical screening process consists of a number of discrete tests, and the data indicates that individual elements of the medical exam may have had different effects on minority applicants.

⁶ As discussed, in the Monitor's Tenth Periodic Report, the United States and the Plaintiffs-Intervenors also asked for certain information from the City related to the medical exam. The City provided most of this information pursuant to an agreement facilitated by the Monitor. Tenth Periodic Report at 13.

receiving information intended to permit more granular analysis on portions of the medical exam that require additional study.

During the past three months, the Monitor has also worked with the Parties to devise, reach agreement upon, and begin to implement measures that (based on the information available), appear likely to mitigate possible causes of disparate impact as well as make the medical exam process easier to navigate and complete for all candidates. The Monitor held a series of meetings and conference calls with all of the Parties (including representatives of BHS) to discuss recommendations developed by the Monitor that might reduce the differences in passage rates between black and Hispanic candidates, on the one hand, and white candidates, on the other hand. These conversations have been productive. The Monitor and the Parties have agreed in principle that the City will:

- Conduct a validation study of the stairmill exam;
- Provide candidates with more information;
- Pay for additional testing in connection with the stairmill;
- Fund other diagnostic testing;
- Allow certain FDNY personnel to audit the stairmill exam;
- Track and record specific data regarding the medical exam; and
- Retest some candidates, in appropriate circumstances.

The specifics of how these measures will be carried out are still being worked out and the Monitor is continuing to work with the Parties. Together with the completion of the Monitor's independent analysis, the finalization and implementation of the elements agreed upon above will likely be a significant focus of the next three months and beyond.

B. BHS Guidance Document

The Disparate Treatment Settlement requires the City to provide firefighter candidates with complete information regarding the components of the medical screening exam and the standards that must be met to pass each component. *See* Dkt # 1291-1 at 4. Complete and clear information will help firefighter candidates know what to expect regarding the medical exam and how to prepare so as to maximize their chances of success. As discussed in the Monitor's Ninth and Tenth Periodic Reports, the City has prepared a summary of the medical exam that is to be included in the Intake Packet distributed to candidates, to which the Monitor and the other Parties have provided comments. *See* Ninth Periodic Report at 14; Tenth Periodic Report at 15. In January the City provided a further revised draft, which the other Parties and the Monitor have commented upon. The City has advised that the guidance document will be finalized in the near future and thus available to provide candidates with critical information about the medical exam.

IV. Character Screening by the CID and PRB

A. Overview

In the period since the Monitor filed its Tenth Periodic Report, the Monitor has continued its analysis of the CID and PRB processes and data and is preparing for the next round of PRB meetings to review candidates for the next Academy class. The character review process consists of two principal stages: an initial review of all candidates by the CID, and a review of certain candidates by the PRB. Both levels of review are governed by guidelines. The CID conducts the initial background screening to identify candidates who should be allowed to proceed to the next stage of the selection process, be disqualified because they do not meet the qualifications set forth in the Notice of Examination, or be referred to the PRB for further consideration based on the presence of certain types of negative information in the candidates' files. *See generally*

Monitor's First Interim Report to the Court (Dkt. # 1023). For each candidate referred to the PRB, the PRB reviews a summary of negative information and employment history prepared by CID (which does not reveal the candidate's name or race), as well as a brief written statement by the candidate discussing any negative information, and meets to determine whether the candidate should: (1) be approved to progress to the next stage of the hiring process; (2) be disqualified from the hiring process; or (3) be approved subject to either an extended probationary period or a stipulation requiring more frequent drug and alcohol testing. *Id.* (Pursuant to Paragraph 39 of the Modified Remedial Order, the Monitor or his staff attends each of the PRB meetings.)

B. Recent Developments and Ongoing Issues

1. Disparate Impact Concerns

The Monitor has been conducting an intensive review of the CID and PRB's performance pursuant to Paragraphs 40 and 41 of the Modified Remedial Order and in consideration of disparate impact concerns raised by the Plaintiffs-Intervenors and the United States. As described in the Monitor's Ninth and Tenth Periodic Reports, the Plaintiffs-Intervenors have alleged that the PRB process for candidates who took Exams 2000 and 2500 has resulted in the disqualification of a statistically disproportionate number of black candidates. The United States has raised similar concerns regarding both black and Hispanic candidates. In particular, the United States has noted that the PRB has disqualified a disproportionately large number of priority hire candidates. As part of its review process, the Monitor has asked its expert consultants to perform a statistical analysis of CID and PRB outcomes, categorized every individual PRB file for purposes of statistical analysis, and investigated best practices in character screening in hiring processes from other jurisdictions.

The Monitor has recently begun meeting with the Parties to discuss the results of its work, the Parties' own analyses, and potential steps to address the concerns raised by Plaintiffs-

Intervenors. The Monitor intends to approach the potential disparate impact of the character screening process using the process of consultation that it followed in the review of the medical exam and development of recommendations for discussion and adoption by the Parties.⁷

2. Discussions About Revising the Guidelines

Pursuant to Paragraphs 37-38 of the Modified Remedial Order, the Parties and the Monitor, in 2012, collaborated on the development of the guidelines that govern the character review process. *See* Monitor's First Interim Report to the Court. The CID guidelines were revised in December 2013 and the PRB guidelines were revised in November 2014 in response to the City's concern that too many candidates whose backgrounds should not disqualify them from the hiring process were being referred to the PRB. *See* Tenth Periodic Report (Dkt. 1533) at 17-18; Seventh Periodic Report (Dkt. # 1280) at 14-16; Sixth Periodic Report (Dkt. # 1249) at 26-28.

As detailed in the Monitor's Tenth Periodic Report to the Court, the FDNY began applying the PRB guidelines as revised in November 2014. The Monitor provisionally approved such use, pending further review. Tenth Periodic Report at 17-18. Among other things, the amendments added "education history" as a criterion for referral to the PRB, requiring that school disciplinary or behavioral concerns occurring within five years of a candidate's intake date are grounds for referral to and consideration by the PRB. *Id.*

Plaintiffs-Intervenors objected to the November 2014 education discipline revision to the PRB guidelines on the ground that the revision would likely have a disparate impact on black and Hispanic candidates, based on reported data indicating that school disciplinary actions

⁷ The United States and the Plaintiffs-Intervenors have requested that the City produce certain documents and information regarding the PRB process. The City has objected to these requests. The Monitor has reserved ruling on the City's objections but these requests will be a topic of further discussion during meetings with the Parties and the City.

disproportionately affect minority youths. The United States did not object to the use of the revised PRB guidelines as proposed by the City, but reserved its right to suggest alterations in the future.

In a letter dated February 12, 2015 and in subsequent correspondence, the Plaintiffs-Intervenors reiterated their concerns regarding use of school disciplinary suspensions as a basis for the referral of candidates to the PRB, and requested that the Monitor bar the FDNY from considering this criterion in its background review of candidates for firefighter. The City responded by asserting that the use of education history in the character screening process has not been shown to have a disparate impact in practice thus far. At the time of the City's response on February 13, 2015, only 19 candidates had been referred to the PRB for reasons including education history and no candidate had been disqualified solely on the basis of education history. At the request of the Monitor, the City further responded by providing a written description of its rationale for adding education history as a reason for referral to the PRB. The City responded that the PRB reviews school disciplinary suspensions as part of its whole person analysis, with a focus on whether a candidate cheated on exams or coursework, committed theft, and/or engaged in violent behavior. The other Parties have questioned whether this type of conduct during a candidate's schooling is relevant to the candidate's employment as a firefighter.

The Monitor and the Parties have discussed this issue on weekly calls and the Monitor's analysis of the character review process includes a review of the impact (and potential future impact) of the guidelines including the use of school discipline. The results of that analysis will be included among the issues discussed with the Parties in the near future.

V. Civil Service Appeals

As detailed in the Monitor's Tenth Periodic Report to the Court, the United States and the Plaintiffs-Intervenors raised concerns in September 2014 about the pace of claimants' appeals at the Civil Service Commission ("CSC"). Tenth Periodic Report at 22-23. The Monitor reviewed the issue, recognizing that, among other things, long processing periods at the appeals level could delay the hiring of candidates who were awarded priority hiring relief under the Court's Modified Remedial Order whose appeals prove successful, inconsistent with their entitlement to priority hiring. In response to requests for information by the Monitor, the City provided data on the status of all pending priority hire CSC appeals.

At the time, CSC appeals based on character disqualification by candidates who had received priority hiring relief made up the largest number of pending appeals, and were delayed for periods ranging from a few months to over a year. Much of the delay was due to the fact that the CSC had not yet received reports from the Department of Citywide Administrative Services ("DCAS") in response to the former candidates' filings for appeal, which were required to be made within 30 days.⁸ The Monitor held a conference call with representatives from DCAS and the City to discuss potential solutions to the delays. After additional discussion with the Parties, the City agreed to add temporary staff and to shift existing resources to the appeals process, and projected that, through these efforts, it could clear the backlog of reports that were due to the CSC for pending appeals by priority hire candidates within three months. DCAS has since submitted reports to the CSC regarding all priority hire candidate appeals, with two exceptions where DCAS asked the FDNY to reconsider its decision to disqualify the candidate. The CSC has begun holding hearings and making decisions regarding the appeals before it. In the event

⁸ For a detailed description of the CSC appeals process, see the Monitor's Tenth Periodic Report at 22.

that any priority hire candidates are successful in their appeals, the Monitor will work with the Parties to ensure such candidates' timely processing and entrance into the Academy.

The Monitor and the Parties are discussing longer term solutions to the delays faced by disqualified candidates who appeal to the CSC. One such solution was recently put into practice: in January 2015, DCAS delegated to the FDNY responsibility for submitting reports in response to the filing of CSC appeals based on character disqualification. As discussed above, DCAS was previously tasked with the preparation and submission to the CSC of reports in response to filings of appeal based on the character disqualification of candidates. In order to prepare a report, DCAS would have to coordinate with the FDNY to familiarize itself with the appellant's file, as character background screening and determinations are made by the CID and the PRB at the FDNY. In addition, DCAS must devote limited resources to preparing similar reports in response to appeals by candidates to other City agencies and departments, among several other tasks. Under City rules, DCAS was able to delegate the preparation and submission of reports in response to character disqualification appeals to the FDNY. The City has assured the Monitor that the FDNY has sufficient resources to prepare the reports in a more timely fashion than DCAS, aided by the advantage that the FDNY will be familiar with the appellants' files and the report preparer will be able to easily collaborate with FDNY Human Resources and CID personnel, who work in the same offices, to complete reports. This delegation will align character-related appeals with appeals based on medical disqualifications, where the FDNY was already preparing reports in response to appeals. The speed at which the reports are prepared going forward will be monitored to make sure that no new backlog develops.

The Monitor continues to track the pace of appeals based on medical disqualification as well and will report on additional developments as appropriate.

VI. EEO Compliance and Retaliation Investigations

A. EEO Compliance Activities

On January 30, 2015, Pamela Lassiter was sworn in as the FDNY's first Deputy Fire Commissioner, CDIO. The CDIO position, which was created pursuant to the terms of the Disparate Treatment Settlement, has responsibility for overseeing the FDNY's EEO compliance activities, with the FDNY's Assistant Commissioner for EEO reporting directly to the CDIO. Since appointment, Deputy Commissioner Lassiter has assumed direct oversight of the FDNY's EEO Office pending the FDNY's selection of a new Assistant Commissioner. In the interim, the Monitor is working directly with Deputy Commissioner Lassiter to review the status of recommendations made by the other Parties and the Monitor to address some of the persistent EEO concerns that have been a focus in the underlying litigation. *See* Findings of Fact (Dkt. # 741) at 60.

B. EEO Retaliation Investigations

In addition to working with the parties regarding the implementation of recommendations to improve the FDNY's EEO compliance activities, the Monitor also worked with the City to closely review certain EEO retaliation investigations being conducted by the EEO Office, many of which have been conducted in coordination with the FDNY's Bureau of Investigations and Trials ("BITS"). While the City has been forthcoming in providing the Monitor with information regarding the status of these investigations, the length of time that is required to conduct investigations, reach conclusions and produce reports and/or recommendations remains a concern. Such delays have often, directly or indirectly, prompted complainants to seek redress outside of the FDNY's EEO investigative process, thus removing the dispute from the ambit of the FDNY's internal dispute resolution procedures. This dynamic both demonstrates and reinforces one of the persistent EEO concerns previously cited by the Monitor, namely that

firefighters feel that the FDNY's EEO complaint process is an ineffective means of resolving conflicts that implicate EEO-related issues. *See* Monitor's EEO Report at 8, 52.

The Monitor will continue to work with the City and the Parties to monitor and review the EEO investigative process, and in particular will evaluate the impact of the EEO staff's investigative training and their use of the investigation manual, once it is completed, on the investigative process. The Monitor anticipates that these efforts by the City will result in, among other improvements:

- The development of written investigative plans,
- An improved intake process which leads to clear and consistent assignment of complaints between the EEO Office and BITs (including coordinating joint investigations that implicate both EEO and disciplinary issues);
- Improved communication with complainants during the investigative process; and
- More prompt issuance of reports and recommendations to the Commissioner and EEO complainants.

The Monitor also anticipates that the CDIO will play an instrumental role in these efforts and looks forward to working closely with her to enhance the FDNY's EEO compliance activities.

VII. Additional Issues

In addition to the activities discussed above, the Monitor has been involved in a range of additional issues over the past three months. The most notable of these are described below.

Data Collection and Analysis. One of the main themes in the Monitor's periodic reports has been the importance of collecting and analyzing data regarding the FDNY's recruitment, attrition mitigation, and EEO activities. *See, e.g.,* First Periodic Report (Dkt. # 823) at 20.

Optimally, the City will implement robust systems to track recruitment and hiring of candidates, so that effectiveness of various measures can be assessed and patterns of attrition in the hiring process that impact diversity, if any, can be identified in real time. In the interim, at the

Monitor's request, the City has prepared a series of spreadsheets which track some of this information, which the City has been populating on an approximately biannual basis using information culled from multiple discrete sources of data. *See* Ninth Periodic Report at 13. At the request of the Monitor and the other Parties, the City has taken steps to automate this process so that spreadsheets can be generated faster and with less effort. The Monitor intends to meet with the City's Data Analytics Unit (and other City personnel as needed) to continue discussing recommended improvements to the City's ability to track information in real time.

Residency Credit Issues. Entry-level firefighter applicants may receive points on top of their exam score in connection with their ranking on civil service lists if they can demonstrate that they were New York City residents for the full year immediately preceding the first date of the application period for the open competitive civil service exam. The standards for awarding the residency credit were amended in connection with Exam 2000 at Plaintiffs-Intervenors' urging in order to reduce opportunities for fraud. The FDNY recently completed an audit of the application of the new standard. Plaintiffs-Intervenors have raised a series of questions about the audit and the residency credit process in general. The Monitor facilitated an initial call among the Parties to discuss these issues on January 6, 2015. The Plaintiffs-Intervenors have raised some additional questions regarding residency credit issues and the Monitor is continuing to facilitate the flow of information and further discussion on these issues.

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

- Communications with priority hires regarding retroactive seniority benefits, their status as probationary firefighters, and other issues;

- Terminations of priority hires, including the reasons for such terminations and the status of such priority hires at the time of termination;
- Other discussions regarding particular claimants, including their interactions with the Fire Department, documents they have received, and their rights and remedies;
- A supplemental protective order negotiated by the Parties to govern information provided to the United States and the Plaintiffs-Intervenors;
- Understanding the City's budgeting process as it relates to the requirements and goals of the Modified Remedial Order;
- Notifications by the City to Plaintiffs-Intervenors and the United States regarding the processing of priority hire candidates; and
- Monitoring the resignations of probationary firefighters at the Fire Academy.

Dated: March 16, 2015
New York, New York

/s/
Mark S. Cohen