

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 TENTH PERIODIC REPORT TO THE COURT**

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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 Tenth 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 September 15, 2014, when the Ninth Periodic Report was filed, to December 15, 2014.

As discussed in Part I, the Parties and the Monitor have continued to review and investigate issues relating to recruitment during this period. Among other things, the Parties and the Monitor have worked together to develop and refine potential long-term recruitment initiatives and to take steps to implement various proposals. These include a collaborative initiative arising out of the City's and Plaintiffs-Intervenors' settlement of the disparate treatment claims in the litigation. The Monitor also continues to seek information from the City regarding its substantial efforts at recruitment.

Part II discusses issues related to the next written exam for prospective firefighter candidates.

Part III discusses issues related to the FDNY Academy, including data regarding the current class and the schedule for the next class at the Academy. (The processing schedule for the upcoming Academy class is appended as Exhibit A.)

Part IV summarizes recent developments relating to the medical exam administered to firefighter candidates as part of the selection process. During the past three months the Monitor

has completed the initial phases of an in-depth look at the medical exam and, together with the Parties, addressed other issues related to that exam.

Part V summarizes developments within the FDNY with regard to the Personnel Review Board (the “PRB”), including the PRB’s composition, processes, and procedures as well as issues relating to appeals from decisions of the PRB filed by candidates with the New York City Civil Service Commission.

Part VI reports on the Monitor’s ongoing review and assessment of the FDNY’s EEO function, including policies and procedures for investigating allegations of retaliation and other EEO violations, the adequacy of the EEO budget, proposals for getting uniformed FDNY personnel more directly involved in EEO issues and making them more directly accountable for violations, and developing and sustaining an appropriate tone among senior FDNY officials.

Part VII discusses recent developments regarding delays in the processing of appeals filed by priority hire candidates who were disqualified for failing one or more components of the medical exam or rejected at the PRB stage.

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

## **I. Recruitment Issues**

As noted in the Monitor’s Ninth Periodic Report to the Court (the “Ninth Periodic Report”), the Court provided preliminary approval to a proposed settlement of Plaintiffs-Intervenors’ disparate treatment claims on April 23, 2014 (the “Disparate Treatment Settlement” or the “Settlement”). *See* Ninth Periodic Report (Dkt. # 1462) at 12; *see also* Order dated April

23, 2014 (Dkt. # 1293).<sup>1</sup> The Court also held a Fairness Hearing regarding the Settlement on October 1, 2014, during which the Court heard oral argument by Plaintiffs-Intervenors and the City in support of a final approval of the Settlement and testimony by objecting claimants in opposition to the proposed settlement. *See* Order dated November 13, 2014 at 2 (Dkt. # 1517).

Several provisions of the Disparate Treatment Settlement fall within the responsibility of the Monitor. 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; (ii) appoint a Diversity Advocate and a Chief Diversity and Inclusion Officer ("CDIO"); and (iii) 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 in connection with each of these aspects of the Settlement.

*First*, as to the general recruitment goals set forth in the Disparate Treatment Settlement, the Monitor has intensified his oversight of the FDNY's efforts to refine and enhance its recruitment programs. The Monitor's Recruitment Report to the Court and other prior reports describe many of those efforts in detail. *See* Monitor's Recruitment Report to the Court (Dkt. # 1464) (the "Recruitment Report"); Monitor's Fifth Periodic Report at 13-34. Shortly after that report was filed, the Monitor hosted a follow-up meeting on September 19, 2014 with FDNY Assistant Commissioner Michele Maglione, who heads the Office of Recruitment and Diversity, to supplement information provided at a meeting in July 2014. *See* Recruitment Report at 12-13. As previously described, the Monitor and the other Parties have requested a broad range of

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<sup>1</sup> After remand from the Second Circuit, the liability phase of the disparate treatment proceedings was assigned to a different judge in the Eastern District of New York, but was transferred to Judge Garaufis at the request of the Parties.

additional recruitment information from ORD and from the FDNY's Data Analytics Unit. *See id.* at 53-57. The City has supplied some of the requested information, and has represented that by the end of 2014 it will provide substantive updates on many of other recruitment initiatives, including outreach events, social media and advertising campaigns, and a detailed plan and schedule on upcoming recruiting activities. The goal is to equip the City and the Monitor with the information necessary to ensure that future recruitment activities contribute materially to the City's compliance with the Modified Remedial Order and the Disparate Treatment Settlement.

*Second*, the City announced the appointment of Pamela Lassiter as CDIO on October 1, 2014. Ms. Lassiter took office on November 3, 2014, and the Monitor met with her shortly afterwards. Her position carries the rank of Deputy Commissioner; she will report directly to Commissioner Nigro, and the Assistant Commissioner for EEO and Director of Compliance will each report directly to Deputy Commissioner Lassiter. The Monitor has also continued to confer as appropriate with the Diversity Advocate, Lieutenant Michael Marshall, who, like the CDIO, was appointed pursuant to the Disparate Treatment Settlement. *See* Monitor's Eighth Periodic Report (Dkt. # 1412) at 4; *see also* Dkt. #1291-1 at 3-4. Both of these appointees will be central not only to the assessment and enhancement of recruitment efforts but in all aspects of the City's remedial and ongoing diversity efforts, and the Monitor looks forward to continued discussions with both of them.

*Third*, as required in the Settlement, the Parties formed a Working Group dedicated to exploring the creation or expansion of educational and other opportunities for minorities in pursuing careers in firefighting with the FDNY. *See* Dkt. # 1291-1 at 4. The Working Group is comprised of representatives from the City's Law Department, the FDNY (including FDNY First Deputy Fire Commissioner Robert Turner, Deputy Commissioner Lassiter, Assistant

Commissioner of the FDNY Office of Recruitment and Diversity Michele Maglione, and FDNY Diversity Advocate Lieutenant Michael Marshall), the Vulcan Society, Inc., the United States, the City's Department of Education, the City's Department of Citywide Administrative Services, and the City University of New York. The Monitor has facilitated meetings of the Working Group on October 23, 2014, November 10, 2014, and December 8, 2014 and provided minutes, agendas, background materials, and other assistance to the group. The Monitor has found the meetings productive and anticipates that the Working Group will develop and formalize a plan for the creation or expansion of educational programs in the coming months.

The Monitor anticipates the pace of all of these efforts to enhance the FDNY's recruitment tactics to accelerate in the near future as the FDNY prepares for the recruitment campaign in advance of the next exam cycle. *See* Part II.B.1, *infra*.

## **II. Next Written Exam**

### **A. Background**

As described in the Monitor's previous reports, Exam 2000 was developed following 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* Ninth Periodic Report at 7-8; *see also* Dkt. # 294 at 53-54; Dkt. # 390 at 3, 54. Special Master Mary Jo White oversaw the development and validation of the exam by the City's testing expert, PSI, in consultation with the other Parties and the Special Master's own testing expert. The Court approved the City's proposed rank-order and pass-fail use of Exam 2000 to create an eligible hire list on September 28, 2012. (Dkt. # 986). The Court found that the exam created a "statistically significant discrepancy in the pass-fail rates of minority candidates," but approved the specific uses proposed by the City based on its finding that the exam was job related and



consistent with business necessity. *Id.* at 2, 6, 9. Exam 2000 was first administered to firefighter applicants in March 2012.

Paragraph 7 of the Modified Remedial Order assigns responsibility for oversight of the next written exam to the Monitor.

## **B. The Next Written Exam**

### **1. Overview**

The City (including the Department of Citywide Administrative Services (“DCAS”), the FDNY, and the Law Department) are in the process of finalizing plans for the next written examinations for entry-level firefighters. As was true for the most recent set of exams, the upcoming exam cycle will include tests for promotional hires (meaning current employees of the FDNY’s Emergency Medical Services) and open competitive hires (all other applicants).

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 lists will enter the Academy in July 2017. The City thus plans to develop and administer the next round of exams in time to begin the screening process for a new class of entry-level firefighters in July 2017 and appoint a new Academy class to begin in January 2018.<sup>2</sup> To do so, the City has advised that it tentatively plans to administer the promotional exam in December 2016 and begin processing promotional candidates in May 2017 (after the eligible list for promotional candidates is made public), meaning that the first Academy class drawn from applicants who take the next set of exams will consist of promotional candidates. The open competitive exam is tentatively scheduled to be administered in September and October 2017, with the eligible list for open competitive candidates made public in April 2018 and finalized in December 2018.

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<sup>2</sup> The schedule for developing and administering the next promotional and open competitive exams is discussed more fully in Part II.B.3, *infra*.

2. The Use of Equivalent Forms of Exam 2000 and Exam 2500

At the time it developed Exam 2000 (given to priority hires and open competitive applicants) and Exam 2500 (the promotional exam), PSI created several “equivalent forms,” meaning sets of questions and testing materials that conformed to the technical specifications of the prototype but contain different questions. (Dkt. # 1280 at 18.) Each form was reviewed by PSI and experts for the United States, Plaintiffs-Intervenors, and the Special Master and then subjected to an “equivalency study.” *See* FDNY Firefighter Test Development and Validation Report (the “Technical Report”), filed September 26, 2012 (Dkt. # 976-1 at 62-63). Some of the equivalent forms developed and approved in this manner were not administered in the 2012 exam cycle and remain available for future exam cycles. (Dkt. # 1280 at 18.)

The City and PSI are currently in the process of developing four additional equivalent forms to be administered to promotional candidates in 2017 and to open competitive candidates in 2018. *Id.* This process was initiated by the City on February 19, 2014 in a letter seeking the Monitor’s approval for the City’s plan to retain PSI to develop these forms. *Id.* at 18-19. The Monitor discussed the City’s request with the Parties on several conference calls in February and March 2014. The Parties raised no objections to the City’s proposal, and the Monitor approved the request on April 23, 2014.

The City has advised the Monitor that the proposed contract between the City and PSI has been executed and submitted to the Comptroller’s Office for registration. In the interim, PSI and the City have begun work on the development of a project schedule and have kept the Monitor informed of the status of the project, which is still in its planning phases.

With the Court’s approval, the Monitor has retained Dr. Shane Pittman, the testing expert used by Special Master White in connection with the development of Exam 2000. The Monitor has consulted with Dr. Pittman regarding the development and use of additional equivalent forms

of Exam 2000 and other issues relating to the next exam cycle. Dr. Pittman has had preliminary conversations with PSI to provide oversight and assistance in the planning of the upcoming test development project.

The Monitor has also established a sub-group composed of counsel and experts of each of the Parties and the Monitor's team to discuss and handle the specific issues and topics related to the development of the future written examinations. The Monitor anticipates that this sub-group will meet early in the first quarter of 2015.

3. Anticipated Milestones in the Preparations for the Next Exam

The City has provided a tentative schedule for the development and administration of the next promotional and open competitive exams. The Monitor expects to consult with the City and PSI, as well as the other Parties, throughout the development and administration of the exams. The schedule as currently envisioned by the City will progress through a number of important milestones; the Monitor will report to the Court at each stage (as necessary throughout the process) and, where appropriate, obtain the Court's approval before the next steps can be taken. The most notable milestones and tentative dates, where available, are as follows:

- Test Development
  - Review of schedule for development and administration of promotional and open competitive exams (beginning in December 2014)
  - 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**

In previous presentations of data regarding the FDNY's remedial efforts, the FDNY's Data Analytics Unit provided preliminary information regarding the performance of candidates who took Exam 2000 at the FDNY Academy. Based on these presentations, the United States and Plaintiffs-Intervenors made several discovery requests with regard to the information utilized by the Data Analytics Unit in its analysis. The City initially agreed to produce some, but not all of the requested information. At the Monitor's request, the Parties reached agreement on most of the open discovery requests and provided written and oral statements of issues they were unable to resolve. After reviewing the Parties' submissions, the Monitor recommended on December 4, 2014 that the City produce the information requested. The Parties are currently discussing and working towards a deadline for the production of this information.

## **III. FDNY Academy**

### **A. July 2014 Class**

#### **1. Graduation**

On November 28, 2014, 280 probationary firefighters graduated from the FDNY's Fire Academy after eighteen weeks of intensive training out of a class of 294 who entered the

Academy in July 2014 (the “July 2014 Class”). This is the third class to include candidates who took the entry-level firefighter examination Open Competitive Exam 2000 in 2012. (Dkt. # 986.)

In remarks at the graduation ceremony, Mayor de Blasio praised the diversity of the July 2014 Class as well as the growing diversity in the department. He stated:

[W]e celebrate the next generation of service coming into the City . . . you are a crowd that represents every neighborhood of the City, every part of the metropolitan area, every background, you represent all of the greatness of New York City . . . this agency gets stronger, better all the time, as this department represents all of this City, and serves with extraordinary capacity that grows with each year . . . you make us all proud.

## 2. Composition of the July 2014 Class

The July 2014 Class included priority hires (black and Hispanic candidates who took one of the past exams that the Court found had an unlawful disparate impact and who also successfully completed the same entry-level firefighter selection process as all other applicants, including taking and passing Exam 2000 as required by this Court’s Final Relief Order (Dkt. #1012 at 12)), EMS promotional candidates (meaning those who took and passed Exam 2500), and open competitive candidates who took and passed Exam 2000. Priority hires made up 2.5% of the July 2014 Class, promotional candidates made up approximately 9.3%, and open competitive candidates made up about 88.2%. Black and Hispanic candidates together made up 33.2% (82 of 247) of all graduating open competitive candidates and 30.8% (8 of 26) of all graduating promotional candidates.

Data provided by the City shows that 37% of the class self-identifies as minority: approximately 15% of these identify as black, and 20% identify as Hispanic. *See* Table 1 below. In addition, the Fire Academy graduated 4 women firefighters, bringing the total number of women in the department to 44.

Table 1: July 2014 Class		
Race	No.	Pct.
Black	41	14.64%
Hispanic	56	20.00%
Asian	5	1.79%
Native American	2	0.71%
White	176	62.86%
<b>Total</b>	<b>280</b>	<b>100%</b>

3. Resignations and Terminations

The City has provided the Monitor and the other Parties on a weekly basis with data regarding probationary firefighters who were terminated or resigned from the Academy, including the reasons for the termination or resignation. *See* Table 2 below. The number of resignations for the July 2014 Class was significantly fewer than the corresponding number for the January 2014 Class: only 14 probationary firefighters resigned, of which 11 were white, 2 were Hispanic, and 1 was Asian. The City has advised that no probationary firefighters were terminated during the Academy. On weekly calls, the Monitor and the Parties tracked and discussed these resignations in an effort to ensure all candidates have had a meaningful opportunity to succeed at the Fire Academy.

<b>Table 2: Academy Resignations and Terminations: January 2014 and July 2014 Classes Compared by Race</b>									
	<b>Black</b>		<b>Hispanic</b>		<b>Asian / Native Am.</b>		<b>White</b>		<b>Total</b>
	<b>No.</b>	<b>Pct.</b>	<b>No.</b>	<b>Pct.</b>	<b>No.</b>	<b>Pct.</b>	<b>No.</b>	<b>Pct.</b>	<b>No.</b>
<b>Jan. '14</b>	3	12%	14	54%	0	0%	9	35%	26
<b>July '14</b>	0	0%	2	14%	1	7%	11	79%	14
<b>Total Jan' 14 &amp; July '14</b>	3	7%	16	40%	1	3%	20	50%	40

### **B. Civil Service List**

A total of 17 priority hire candidates, including 8 black candidates and 9 Hispanic candidates, remain on the current active civil service list and are thus still eligible for consideration. This figure does not, however, capture all priority hire candidates who could still be appointed as entry-level firefighters. Additional priority hire candidates have temporarily declined appointment to the Academy due to temporary medical conditions and may seek to return to the civil service list in the future once those medical conditions have resolved. Also, some priority hire candidates have challenged the City's determination that they are not qualified for appointment and if any prevail on their appeals they may return to the civil service list as eligible for consideration. A total of 62 black priority hire candidates and 77 Hispanic priority hire candidates have been appointed in the last 4 classes.

### **C. December 2014 Class**

The FDNY is actively finalizing the roster for the next class, scheduled to be sworn in as probationary firefighters and begin at the Fire Academy on December 29, 2014. *See Exhibit A.* The Monitor is evaluating that selection process as part of its overall review of the hiring and selection process as set forth in the Modified Remedial Order.

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

During the past three months the Monitor has been involved in a number of issues related to the medical exam given to firefighter candidates. This section briefly summarizes those efforts and their current status.

##### **A. Review of the Medical Exam**

The Monitor is engaged in an ongoing and detailed review of the medical exam with the goal of determining whether any portion has a disparate impact on black or Hispanic candidates and, if so, considering ways to reduce such impact.

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. As discussed in the Ninth Periodic Report (Dkt. # 1462), Plaintiffs-Intervenors raised concerns regarding the possible disparate impact of the medical exam on black candidates in a letter dated June 18, 2014 and several subsequent communications. The United States also addressed the issue, beginning with a letter dated August 8, 2014. The United States and Plaintiffs-Intervenors both requested certain information from the City relating to the medical exam. Under an agreement among the Parties facilitated by the Monitor, the City has now provided much of that information.

The Monitor has also 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. Over the last three months the initial phases of this effort have been completed. As an initial matter, the Monitor’s analysis has focused on the specific tests that collectively comprise the medical exam. Toward that end, the Monitor has used redacted information provided by the City to compile a detailed set of data regarding candidates’ performance on



various medical tests. The Monitor has shared the database with the Parties, all of whom are engaged in their own analyses of the medical exam. With the assistance of its medical expert, Prof. Denise Smith, the Monitor and its outside expert, Manitou, Inc., have been analyzing this data to assess whether any particular components have had a disparate impact on certain races or ethnicities and, if so, why. In addition, the Monitor and his staff have met with the Fire Department's Bureau of Health Services ("BHS"), which oversees the medical exam to develop a working knowledge of the elements of the medical exam and the rationale behind it. Further, the Monitor's staff have gathered and reviewed information regarding national standards and practices relating to firefighter health and fitness requirements.

The Monitor's review of all of this information is ongoing but has already yielded useful results. For example, the Monitor and his expert have been able to isolate the portions of the medical exam that appear to be contributing the most to the overall difference in the pass rates of white, black and Hispanic candidates.

The Monitor has begun scheduling meetings with the Parties to discuss these results and to explore the appropriate way forward. The first of these meetings, with Plaintiffs-Intervenors and the United States, is scheduled for December 17, 2014. A meeting with the City is expected to take place shortly afterward. The Monitor expects these meetings and the preparations around them to be a focus of the next three months.

#### **B. Other Issues Related to the Medical Exam**

In addition to its work on the medical exam in general, the Monitor has, together with the Parties, addressed certain issues related to particular aspects of the medical exam.

BHS Guidance Document. The Disparate Treatment Settlement requires the City to provide firefighter candidates 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 to prepare and maximize their chances of success. As discussed in the Ninth Periodic Report, the City has prepared a summary of the medical exam to be included in the Intake Packet distributed to candidates, which the Monitor and the other Parties have commented on. *See* Ninth Periodic Report at 14. Since that Periodic Report was filed, the City has revised the guidance document based upon comments from the Monitor and the other Parties. The Monitor has reviewed the revised document and provided additional comments to reflect the work that has been done on the medical exam to date. The United States and Plaintiff-Intervenors have also provided comments, and the final document is expected to be released in the near future.

Questions Regarding External Testing. The BHS administers the basic battery of tests that make up the medical exam without charge to the candidates. However, candidates who fail certain aspects of the medical exam or whose test results require further inquiry must often obtain testing from outside sources at their own expense. The United States and Plaintiffs-Intervenors have raised questions about the cost and inconvenience to candidates of these external follow-up tests and the need for clear communication regarding the deadlines and other practical aspects of these tests. These Parties have raised the concern that many candidates may be unable to afford outside testing, and that black and Hispanic candidates – who are less likely than white candidates to have friends or relatives in the department to provide encouragement and answer questions about the medical exam, and who may view outside testing as one of many obstacles unfairly placed in their path – may be less likely to obtain the additional tests. The Monitor’s own review of the potential disparate impact of the medical exam has raised similar concerns, and the Monitor will continue to assess the issue as it brings its analysis to conclusion.

The City, at the Monitor's request, has provided more information on the subject. In addition, the Monitor is working with the Parties to ensure that information on external testing is collected in electronic format going forward.

**V. Personnel Review Board Issues**

**A. Overview**

The Modified Remedial Order prescribes a number of measures regarding the post-exam candidate screening process performed by the Candidate Investigation Division ("CID") and the PRB. *See* Modified Remedial Order ¶¶ 37-42. As described in previous reports by the Monitor, the CID collects and reviews information on each candidate's background and determines if the candidate meets the qualifications set forth in the Notice of Examination. *See generally* Monitor's First Interim Report (Dkt. #1023). If the CID's investigation reveals certain types of negative information regarding the candidate's background, the CID prepares a report and refers the candidate to the PRB for evaluation. *Id.* The report does not divulge the candidate's name, race, or other identifying information. The PRB reviews the report and determines whether the candidate should be approved to progress to the next stage of the hiring process, be disqualified from the hiring process, or be approved subject to either an extended probationary period or a stipulation requiring more frequent drug and alcohol testing. *Id.*

**B. Recent Developments and Ongoing Issues**

**1. Disparate Impact Concerns**

As described in the Monitor's Ninth Periodic Report, Plaintiffs-Intervenors alleged in a letter dated June 18, 2014 and in follow-up correspondence that the PRB process for candidates who took Exam 2000 and Exam 2500 has resulted in the disqualification of a disproportionate number of black and Hispanic candidates. The United States raised similar concerns in a letter dated August 8, 2014 and subsequent correspondence. The Monitor is carefully reviewing these

allegations as part of its assessment of the PRB's performance pursuant to Paragraphs 40 and 41 of the Modified Remedial Order. That assessment is nearly complete, and the Monitor will report the results in near future.

2. Revisions to PRB Guidelines.

The CID and PRB review process is governed by guidelines developed in 2012 by the Parties and the Monitor pursuant to Paragraphs 37-38 of the Modified Remedial Order. *See* Monitor's First Interim Report to the Court (Dkt. #1023). The CID Guidelines were revised in December 2013 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* Sixth Periodic Report (Dkt. #1249) at 26-28; Seventh Periodic Report (Dkt. #1280) at 14-16. The FDNY began applying the revised CID Guidelines upon approval by the Monitor in December 2013.

In October 2014, the City proposed additional revisions to the PRB Guidelines. The revisions included changes to the composition of the PRB and further modifications to the criteria for referral to the PRB, particularly the criteria relating to candidates' criminal history, negative employment history, and education discipline history. The revisions with regard to criminal history and negative employment history are likely to further reduce the number of candidates referred to the PRB. With regard to education discipline history, however, the revisions could increase the number of candidates that are referred to the PRB for school suspensions or other school-related disciplinary issues, because the new PRB guidelines include a requirement that school disciplinary or behavioral concerns occurring within five years of a candidate's intake date be considered.

Plaintiff-Intervenors objected to the proposed revisions to the CID and PRB Guidelines, principally on the ground that the revisions would likely have a disparate impact on black and

Hispanic candidates by leaving in place the requirement that candidates with arrests but no convictions be referred to the PRB and expanding the basis for referral to the PRB beyond school suspensions occurring within five years of the candidate's intake date, since both arrests and school disciplinary actions disproportionately impact black youths and given that they often occur in tandem. 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. The Monitor evaluated the City's proposed revisions and considered Plaintiffs-Intervenors' objections carefully. Given the time sensitivity, the Monitor approved the use of the revised PRB Guidelines proposed by the City on a provisional basis. The Monitor continues its in-depth review and analysis of the CID and PRB process as required by the Modified Remedial Order, and in light of the disparate impact concerns raised by Plaintiffs-Intervenors. The Monitor will be meeting with the Plaintiffs-Intervenors, the United States, and the City, to share its analysis and discuss next steps shortly.

## **VI. EEO Issues**

The Monitor continues to work with the Parties to evaluate and recommend enhancements to the FDNY's EEO compliance activities in accordance with the requirements of the Modified Remedial Order. This section summarizes certain aspects of this broad mandate that have been active over the past three months.

### **A. The City's Progress toward EEO Objectives Identified in Prior Reports**

The Monitor's EEO Report to the Court addressed the status of the City's compliance with the Modified Remedial Order, which requires the City to review its EEO policies and procedures, recommend changes and enhancements, and outline how and when it will implement those recommendations. *See* Modified Remedial Order ¶¶ 43-47.

The Monitor has continued to monitor the City's progress in this regard. Much of the current focus is on gathering information from the City regarding financial and human resources, EEO training, internal and external messaging regarding EEO, promoting accountability for EEO issues among uniformed officers, and the EEO investigations process. The Monitor has issued a range of requests to follow up on information provided in the City's EEO Report and in the parties' special purpose meetings with Assistant Commissioner Margo Ferrandino. Other open requests seek information required under the Modified Remedial Order but not yet provided.

The City has been responsive to many of the Monitor's requests and has committed to providing additional information on a rolling basis, including a substantial amount of information by the end of the year.

For example, in response to the Monitor's request for additional detail on the EEO budget, the City has provided certain information to date regarding the current year budget for the FDNY's Office of EEO (the "EEO Office"); however, the Monitor is still awaiting additional historical information on the EEO Office's fiscal resources and, when available, the budget for 2015.

#### **B. Messaging and Tone at the Top**

The importance of consistent and clear statements from all levels of leadership regarding retaliation, hazing, discrimination, and the benefits of diversity has been consistently stressed by the Monitor in virtually every report, by the City's EEO expert in a draft report on EEO, and by the City itself in its EEO Report. *See, e.g.*, Monitor's Eighth Periodic Report at 19-20; Draft EEO Report of Professor Merrick T. Rossein at 59-68, 118-19; City of New York's EEO Report Pursuant to Modified Remedial Order Paragraph 43 (Dkt. # 1167) at 47-48. In response to the Monitor's inquiries, the City has promulgated certain internal communications, primarily in the form of departmental orders reiterating the FDNY's prohibitions on hazing and retaliation.

Mayor de Blasio, Fire Commissioner Nigro, and senior FDNY Officers have also made a series of public statements regarding the value and importance of these initiatives. After significant discussions with the Parties, the Monitor received assurances that similar messages would be delivered personally by leadership at all levels of command, from the Commissioner to the firehouse level. The Monitor anticipates continuing updates confirming that this is a regular and an ongoing process.

**C. Accountability Measures**

The Monitor, as well as the City's EEO expert and the City's own EEO Report, also stressed the need to make officers throughout the department – particularly at the firehouse and battalion levels – more accountable for EEO violations and affirmatively involved in EEO enhancements. Accordingly, the Monitor has requested updates on the City's plans to develop training and performance evaluations with respect the ability of every officer to appropriately manage any EEO issues that arise under their command, in addition to ensuring that there are repercussions for any failure to do so. Although many of these initiatives are still in the formative stages or have been placed on indefinite hold, the City has stressed that the CDIO and the Diversity Advocate are expected to give new momentum to these efforts. With the finalization of Deputy Commissioner Lassiter's appointment, the Monitor expects that the City will proceed with these efforts and provide updates before the end of the year on concrete initial steps being taken to implement these initiatives.

**D. EEO Investigations**

The Modified Remedial Order requires the City to evaluate and recommend improvements to the FDNY's process for identifying and investigating EEO violations and imposing penalties where appropriate. Although the City announced that certain steps would be taken in this regard, including the creation of an investigation manual and investigations training

for EEO staff, progress remains slow and many of the Monitor's information requests have not been fulfilled. The Monitor is hopeful that Deputy Commissioner Lassiter will facilitate speedier action.

In addition to the general review of EEO investigations, the Monitor has been in frequent communication with the City's law department, the EEO Office, and the Bureau of Investigations and Trials concerning ongoing EEO investigations and allegations of retaliation against firefighters who have reported alleged incidents of retaliation during the Academy training process or while firefighters assigned to firehouses. *See* Monitor's Eighth Periodic Report at 17-19; Monitor's Ninth Periodic Report at 6-7. The City continues to provide weekly updates on several specific investigations. However, the information provided by the City often remains unchanged for long periods of time. The length of these investigations, which have often been delayed due to scheduling issues which are unduly delayed in resolving, results in a continuing pattern of cases that remain open until firefighters are compelled to seek redress through the filing of external complaints with the EEOC, which consequently brings the FDNY's EEO investigation process to a halt without resolution or disciplinary action. The consistent delay in resolving investigations was one of the primary reasons noted in past reports filed with the Court and in the Court's own finding that FDNY personnel did not have full confidence in the efficacy of the EEO process.

#### **E. Training**

EEO training is a core compliance activity performed by the EEO Office, and the Monitor has therefore requested detailed information on the steps the City has taken to implement its own recommendations, in addition to those put forth by the Monitor and the other Parties to continue to update and improve its EEO training programs. The City has not yet fulfilled the Monitor's request for a chance to either observe an EEO training session using new



materials developed by Assistant Commissioner Ferrandino or to receive a video recording of such a session. The Monitor has also requested ongoing information on the development of new EEO diversity and training programs to be developed in conjunction with outside consultants. While the City has discussed in general terms its intentions to develop and implement these programs, the Monitor has not recently received progress updates on concrete steps to implement and provide these new programs to FDNY staff.

## **VII. Candidate Appeals to the Civil Service Commission**

Candidates who are disqualified during the post-exam screening process for entry-level firefighters may file an appeal with the New York City Civil Service Commission (the “CSC”) within 30 days of receipt of a Notice of Disqualification (“NOD”). The CSC considers the candidates’ submission as well as a responsive submission from the City, and sometimes conducts hearings. DCAS provides the responsive submission for appeals from disqualifications by the PRB on character grounds, and the FDNY provides responsive submission for appeals from disqualifications based on the medical exam. The CSC’s decision is binding unless successfully appealed to the New York State Supreme Court.

In September 2014 the United States and Plaintiff-Intervenors raised concerns regarding the pace at which certain claimants’ appeals at the CSC were progressing. After inquiry by the Monitor, the City provided information on the status of all pending CSC appeals by priority hire candidates. The City’s data showed that a total of 107 appeals by firefighter candidates – including 39 appeals by priority hire candidates – were pending before the CSC as of September 18, 2014. Of the 39 appeals by priority candidates, 29 (or nearly 75%) related to character disqualifications; by comparison, 23 of 68 appeals by non-priority hire candidates (34%) were based on character disqualifications. Ten (25%) of the priority hire appeals related to medical

disqualifications, as compared to 38 (or 57%) for non-priority hire appeals.<sup>3</sup> A majority of the appeals by priority hire candidates had been pending for at least six months as of September 18, 2014, and some had been pending for more than a year.

The Monitor sought additional information from the City regarding the appeals process and possible explanations for the delays. The Monitor also spoke directly with representatives of DCAS. The City explained that a majority of the pending appeals by both priority hire and non-priority hire candidates had been pending for more than six months as of September 18, 2014, and many had been pending for more than a year. The City reported that the delay was largely attributable to the fact that CSC had not yet received reply submissions from DCAS or the FDNY. The City also noted that even after the responsive submissions are filed, the CSC can take up to six additional months to make a determination.

After additional discussions with the Parties, the Monitor asked counsel for the City to confer with DCAS and the FDNY to develop a plan to process all submissions relating to appeals by priority hire candidates within three months. In doing so, the Monitor stressed that priority hire candidates had already waited years for the chance to become FDNY firefighters, and the Modified Remedial Order placed special importance on the fair and timely screening of those candidates.

The City submitted, and the Monitor approved, plans to add temporary staff, shift resources, and take other steps to meet the deadline set by the Monitor; the other Parties also received copies of the City's plans. Since then, the City has reported on progress toward this goal on a weekly basis. The Monitor will continue to review these reports and discuss the status of the appeals with the Parties.

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<sup>3</sup> The remaining appeals from non-priority hire candidates related to other grounds for disqualifications, such as age.

In early November 2014, the United States and the Plaintiffs-Intervenors raised a related issue regarding priority hire candidates who had appealed their disqualifications but later received amended NODs. In these instances, candidates were initially disqualified for one reason, filed an appeal, and received notice of a new basis for disqualification while the appeal was still pending before the CSC. The United States and Plaintiffs-Intervenors were concerned that candidates who filed new appeals based on the amended NODs would need to restart the appeals process and face additional delays. The City advised that candidates should not file new appeals; instead, candidates could make supplementary submissions responding to revised NODs as part the existing appeals.

The Parties and the Monitor continue to discuss these issues, including the concern that candidates receive no official notice regarding the process for responding to revised NODs. The Parties and the Monitor also intend to identify a longer-term solution to the slow pace of certain appeals. The Monitor will report on additional developments as appropriate.

### **VIII. 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.

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 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 will facilitate an initial call among the Parties to discuss these issues on January 6, 2015.

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:

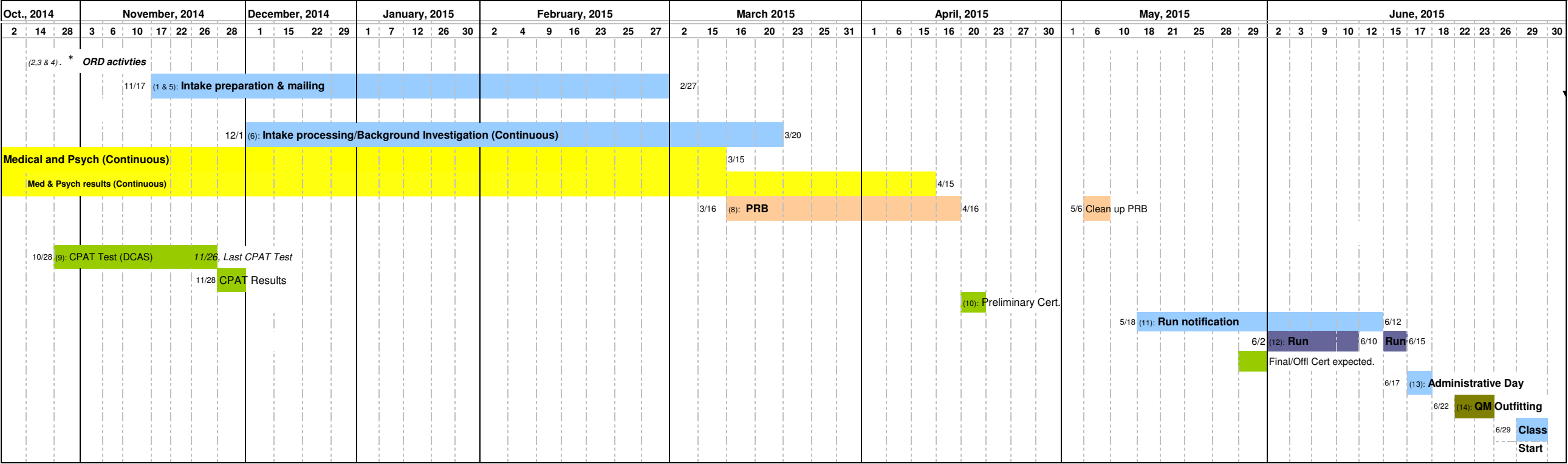
- Communications with priority hires regarding retroactive seniority benefits, their status as probationary firefighters, and other issues;
- Revisions to the list of documents that candidates are required to provide to CID, and a review of the intake documents CID provides to candidates;
- The City's calendar regarding processing candidates for the July 2015 academy class;
- 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: December 15, 2014  
New York, New York

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/s/  
Mark S. Cohen

# Exhibit A

Draft Firefighter Hiring Timeline - (June, 2015 Class)  
From Intake to Hire (November 7, 2014)



- 1

CID preparation for intake mailing
- 2

ORD CPAT Info Session Info package mailing
- 3

\*

ORD CPAT Info Session
- 4

FDNY CPAT Training
- 5

Mentor Training/Assignment
- 6

Intake
- 7

Medical/Psych evaluation
- 8

Personnel Review Board (PRB)
- 9

CPAT Testing
- 10

Preliminary Cert. Received
- 11

13 minute Run notification
- 12

13 minute Run
- 13

Administrative Day
- 14

Quartermaster outfitting
- Began August and September, 2014

FDNY Candidate Investigation Division activity

DCAS activity

FDNY ORD activity

FDNY Bureau of Training activity

PRB

FDNY Bureau of Health Services activity

FDNY Support Services activity