

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 THIRD PERIODIC REPORT TO THE COURT

Pursuant to paragraph 59 of this Court's Remedial Order and Partial Judgment, Permanent Injunction, and Order Appointing Court Monitor dated December 8, 2011 (the "Remedial Order") (Docket # 765), Mark S. Cohen, in his capacity as Court Monitor (the "Monitor") in the above-captioned matter, respectfully submits the Monitor's third 90-day report concerning the status of the parties' compliance with the Remedial Order.

I. Overview

Paragraph 59 of the Remedial Order requires the Monitor to "provide periodic reports to the court and to the Parties concerning the status of the Parties' compliance with this Order and other orders of the court or the Court Monitor, including their progress, any barriers to compliance, and potential areas of noncompliance." Remedial Order ¶ 59. The Remedial Order further provides that "[t]he Court Monitor shall file a report with the court under this provision at least once every 90 days." *Id.* The Monitor submitted his Second Periodic Report to the Court (the "Second Report") on June 5, 2012. Accordingly, this Report sets forth an update regarding the parties' compliance with the terms of the Remedial Order, and provides the Monitor's continuing observations on the progress of the parties in fulfilling the goals of the Remedial Order.

The Monitor has continued to hold conference calls with the parties on a regular basis (typically every week and occasionally every two weeks), during which the Monitor has reviewed upcoming deadlines with the parties, discussed ongoing tasks required to be performed by the City pursuant to the Remedial Order, and addressed procedural and substantive issues that are raised by the parties. The Monitor continues to find these weekly calls to be productive in ensuring compliance with specific tasks and deadlines set forth in the Remedial Order.

The Monitor also continues to conduct weekly calls with the recruitment and EEO

consultants who have been retained by the City pursuant to the Remedial Order, during which the City's consultants have generally described (without divulging the content of specific communications or findings) the nature of the steps they have taken thus far in carrying out the independent investigation mandated by the Remedial Order, *e.g.*, visiting other cities' fire departments and meeting with FDNY senior staff. The Monitor believes that the consultant conference calls serve an important role in coordinating the efforts of the City's consultants and the Monitor's consultant, and contributes to a more efficient process of effectuating the Remedial Order.

The sections below summarize the steps taken by the parties and the Monitor since the Monitor's Second Report, including the work of the City's consultants and the Monitor's consultant, the continued development and administration of Exam 2000, the further revision of the City's Attrition Mitigation Plan, EEO tasks, and the document retention plan for the City. This Report also describes issues that have emerged as the parties have undertaken the performance of their assignments under the Remedial Order.

II. Monitor's Consultants

The Monitor has continued to work with the Monitor's consultants to evaluate and make recommendations regarding the FDNY's recruitment and attrition mitigation efforts, and its efforts to comply with applicable EEO laws, as required under the Remedial Order. The Monitor and his expert, Manitou, Inc., participate in ongoing weekly calls with the City's consultants regarding these efforts. The topics addressed in these calls include review of materials regarding recruitment and EEO best practices, reporting by the City's consultants on the scheduling of interviews with fire department and other public safety agencies in other jurisdictions to gather baseline information on their respective recruitment and EEO compliance efforts, and reporting

on the fact of the City's consultants' having conducted interviews and focus group meetings with various FDNY and City staff, including incumbent firefighters. The Monitor notes that the City has declined the Monitor's offer to schedule these information gathering meetings together with the Monitor and his consultant, except on limited occasions.

In addition to its regular discussions with the City's and the Monitor's experts, the Monitor has also participated directly in discussions with staff of other public service agencies regarding recruitment and EEO efforts. On June 18, 2012, the Monitor, Manitou, and the City's experts met with Inspector Martin Morales, commanding officer of the recruitment unit of the New York City Police Department, to discuss recruitment strategies. Broadly summarized, several key themes emerged in the meeting with Inspector Morales: (i) importance of commitment at the highest levels of the agency to diversity in hiring (both in personal supervision and in establishment of express priorities and goal mandates for staff); (ii) ability to measure effectiveness of solutions based on empirical data; (iii) ability to allocate budget and personnel resources where they have the most impact; and (iv) emphasis on recruitment of highly qualified diverse candidates, *e.g.*, on local and other college campuses and military bases.

The Monitor and/or Manitou are also scheduling visits to additional fire departments to gather additional information regarding comparable efforts to implement recruitment, attrition mitigation and compliance efforts in accordance with the requirements of the Remedial Order. Although the City's experts have in the majority of instances preferred to proceed separately, at least one of these visits, to Baltimore, Maryland, is currently expected to take place in coordination with the City's independent recruitment consultant.

The Monitor's consultants have requested, and received, data from the City relating to the success of City recruitment efforts by conducting an analysis of candidate outcomes from

expression-of-interest cards to test taking, with a view toward ultimately tracking the success of different City recruitment outreach efforts from initial contact through hiring. The Monitor's consultants are in the process of evaluating this data and conducting the required statistical analysis.

The Monitor and his consultant continue their investigation of best practices regarding recruitment strategy. As part of this baseline research into best practices, on August 1, 2012, the Monitor's staff and Manitou interviewed Dr. Djuana Stoakley, an advertiser with a specialization and expertise in military recruitment strategy. Dr. Stoakley shared insights from the military's success with diversity recruiting, including positive experience with focusing recruitment efforts on qualified, college-educated prospects, significant use of new media, showcasing success stories of diverse military leaders and heroes in recruitment advertising materials, tying advertising outreach campaigns to events such as Black History Month, and targeting messaging appropriately to the interests of different age brackets.

On July 2, 2012, Manitou and the Monitor met with members of the Vulcan Society and their counsel. On August 27, 2012, Manitou and the Monitor met with the head of the Hispanic Society affinity group.

As discussed further below, Manitou is also assisting the Monitor in the evaluation of CID and PRB policies and procedures mandated by the Remedial Order.

III. Firefighter Test Development and Administration

The Monitor notes that the City and the parties continue to work with Special Master Mary Jo White in the completion of processes for Exam 2000. As noted in the Monitor's Second Report, test development and administration falls within the purview of the Special Master (Remedial Order ¶ 7). Accordingly, the Monitor has continued to remain generally informed about the Special Master's work through party updates and communications with the Special Master. The Monitor continues to expect to receive, pursuant to paragraph 15 of the Remedial Order, advance notice and information from the City regarding any step in any process for the selection of entry level firefighters, except with regard to the steps specifically enumerated in paragraph 7 of the Remedial Order, over which the Special Master continues to have oversight.

The City has informed the Monitor that the City and its test development expert, PSI, Inc., have continued to work with the parties and their experts under the supervision of Special Master White to finalize the scoring methodology, compute and analyze the test results, and draft the final technical report for Exam 2000. The City has further notified the Monitor that the final technical report is to be submitted to the Special Master by September 18, 2012, and the City's motion for approval of Exam 2000 is to be filed with the Court by September 24, 2012.

The City sent letters to candidates who took promotional Exam 2500, but who appear not to have been eligible to take that exam because they were not permanently employed as FDNY EMTs or Paramedics as of the first dates the computer-based test was administered (March 15, 2012). The City has informed the Monitor that the notice advised such candidates to contact DCAS if they believe a mistake has occurred and they were eligible to take promotional Exam 2500. According to the City, although the Exam 2500 test results are not yet available, all other takers of Exam 2500 were mailed intake packets by the FDNY and are being invited to

informational sessions regarding the Candidate Physical Ability Test (CPAT), which will be arranged by the FDNY's ORD.

The FDNY has advised that Candidate Investigation Division intends to start conducting intake interviews with takers of Exam 2500 on or about October 5, 2012. If there is a need for the Personnel Review Board (PRB) to review candidates' qualifications, the City anticipates that the PRB would meet in late November or December. As the Court noted during the August 22, 2012 conference with the parties, "it's the Court's strong view that the process that's used by CID and PRB should be the same for everybody, meaning whatever test you took, there should be one process" August 22, 2012 Conference Transcript at 35:24-36:2.

IV. Firefighter Applicant Recruitment

A. Optional Survey

As noted in the Monitor's Second Report, the City's test consultant, PSI, transferred the survey response data to the City on May 18, 2012. The City has advised the Monitor that the data will be organized and analyzed in the coming months, pursuant to paragraph 25 of the Remedial Order.

B. City's Recruitment Consultant

The City has advised the Monitor that the City's independent recruitment consultant, Verna Myers, along with her colleague, Doug Reynolds of VMCG, have been conducting interviews of FDNY staff, as well as other City employees. Ms. Myers has also been conferring regularly with the City's independent EEO consultant, the Monitor, and the Monitor's consultant. Ms. Myers has similarly continued to participate regularly in the weekly consultant phone call led by the Monitor's consultant, Manitou, Inc.

The City has also informed the Monitor that Ms. Myers and her colleagues at VMCG,

have worked extensively since the Monitor's Second Report. Specifically, over the past 90 days, as described to the Monitor, VMCG has: met with the leadership of the Vulcan Society and its counsel and interviewed several members of the Vulcan Society; met with the President of the FDNY Hispanic Society, attended one of its monthly meetings and interviewed members of the Hispanic Society; interviewed a number of FDNY battalion chiefs; and attended the joint consultants' and Monitor's meeting with the head of recruitment for the NYPD, ; toured the Fire Academy on Randall's Island and interviewed Chief Galvin, Chief of Uniformed Personnel; conferred with FDNY personnel regarding recruitment activities, program and budget, VCMG also reports that they are planning and facilitating a number of working sessions with FDNY leadership regarding diversity and inclusion efforts, communications and planning for a Leadership Conference.

V. Attrition Mitigation Plan and Reassessment of Entry-Level Firefighter Selection

Paragraph 31 of the Remedial Order directs that "[t]he City, in consultation with the Court Monitor and the Parties, shall draft and implement a written plan to mitigate and diminish rates of voluntary candidate attrition between different steps of the City's process for the selection of entry-level firefighters." Remedial Order ¶ 31. As noted in the Monitor's Second Report, the parties and the Monitor provided their initial comments regarding the City's draft attrition mitigation plan on February 27, 2012. The Vulcan Society provided additional comments on August 20, 2012.

On July 5, 2012, the Monitor requested an updated attrition mitigation plan. The City has stated its intention of submitting a revised attrition mitigation plan to the Monitor on September 7, 2012.

The City has also informed the Monitor of FDNY programming directed at firefighter applicants. The FDNY has invited applicants to attend the EMS Week Competition at MetroTech (May 2012), FDNY Appreciation Weekend on the USS Intrepid (July 2012), FDNY Appreciation Night at the Brooklyn Cyclones (July 2012), FDNY Day at Six Flags Great Adventure (August 2012), and FDNY Night at the Staten Island Yankees (August 2012).

Further, the City has informed the Monitor that the ORD continues to encourage applicants to follow it on Facebook (JoinFDNY) and Twitter (@JoinFDNY). The City has reported to the Monitor that, as of August 30, 2012, JoinFDNY has 10,214 followers and @JoinFDNY has 1,738. The ORD has also answered more than 13,700 questions through these social media platforms.

As the Monitor and the parties obtain additional empirical data regarding the success of the City's past outreach initiatives and initiatives from other cities and agencies, the Monitor expects that the attrition mitigation plan will continue to evolve.

VI. EEO Compliance Reform

A. EEO Compliance Issues

As described in the Monitor's Second Report, paragraph 47 of the Remedial Order provides that the independent EEO consultant shall submit a report concerning the City's EEO compliance activities with respect to the FDNY that, among other issues, "evaluates the effectiveness of equal employment opportunity law compliance activities," "identifies best practices used by other offices responsible for ensuring comparable municipal department's compliance with applicable equal employment opportunity laws and policies, and particularly, best practices used by EEO offices in other fire departments nationally," and "recommends a detailed compliance program to be carried out by the EEO Office including specific compliance

activities, and which references specific metrics and goals to be used to evaluate the EEO Office's performance in carrying out each activity." The EEO consultant's report is to be based upon a research plan to be developed by the consultant in cooperation with the City and the Monitor, "subject to the approval of the Court Monitor." Remedial Order ¶ 48.

The City has informed the Monitor that its independent EEO consultant, Professor Merrick T. Rossein, has continued his review of the FDNY office and its training programs and policies. In furtherance of this review, Professor Rossein has interviewed FDNY EEO staff and staff at the Department of Citywide Administrative Services (DCAS), Citywide EEO Office with respect to EEO compliance and training. The City has also reported to the Monitor that Professor Rossein observed FDNY EEO basic training, as well as EEO training for lieutenants and Battalion Chiefs. Professor Rossein has also conducted an EEO trainers' focus group and interviewed individual EEO trainers, and has conducted four focus groups of captains and battalion chiefs. The City has also informed the Monitor that Professor Rossein, along with the City's recruitment consultant, held a series of meetings with top FDNY leadership to explore diversity, inclusiveness, and EEO approaches.

Professor Rossein has continued to confer regularly with the City's independent recruitment consultant and the Monitor's staff and consultants, and also participated in the joint interview of the Commanding Officer of the NYPD Recruitment Office. The City has informed the Monitor that Professor Rossein and the recruitment consultant met with the FDNY Hispanic Society and the leadership of Plaintiff-Intervenor the Vulcan Society, Inc., and subsequently conducted individual interviews of Vulcan and Hispanic Society members. The City has further advised that Professor Rossein and his colleague have been conducting research on comparative fire departments, which has included field interviews at the Los Angeles, San Francisco,

Baltimore, and Washington, D.C. fire departments, as well as the Pentagon.

B. Candidate Investigation Division and Personnel Review Board Training

Paragraph 42 of the Remedial Order provides that “each investigator and manager in CID, and each member of the Personnel Review Board (“PRB”) shall receive interactive training tailored to educate the recipients how to practically apply applicable equal opportunity laws and policies in the performance of their responsibilities in CID or on the PRB, respectively.” Remedial Order ¶ 42. In June 2012, Professor Rossein and his colleague, Natalie Holder-Winfield, held an interactive training session for CID staff who would be processing candidates for the FDNY’s EMS Division this summer. Prior to these training sessions, Professor Rossein submitted what were described as draft materials for the training, which were intended to be revised and refined subsequently, to the Monitor. The Monitor provided initial comments to this draft.

The City has informed the Monitor that Professor Rossein currently is working with the City to review and revise existing policies for FDNY’s CID and PRB, as well as the FDNY’s anti-retaliation policy. Professor Rossein has been working with the FDNY on the development of the PRB policies and procedures, and will be reviewing the FDNY’s draft of such policies during the week of September 4, 2012. The City has informed the Monitor that the PRB policies and procedures will be submitted to the Monitor no later than October 4, 2012. Further, the City has informed the Monitor that Professor Jenny Rivera assisted Professor Rossein in helping the City develop a policy concerning arrests and convictions for candidates.

The Monitor notes that he has not reviewed the final CID training materials to be employed by Professor Rossein or the City. The City has stated that the Monitor will receive all CID materials except the CID guidelines on September 7, 2012, and will receive the CID

guidelines on September 14, 2012.

C. Top-To-Bottom Assessment

The Remedial Order also tasks the independent EEO consultant with consulting with the City, the City's recruitment consultant, the Parties and the Monitor to "conduct a comprehensive top-to-bottom assessment of all steps in its process for the selection of entry-level firefighters that evaluates the strengths and weaknesses of the City's current selection process as a whole and of individual steps in that process." Remedial Order ¶ 32. As noted in the Monitor's Second Report, the Monitor, the Monitor's consultants, and the City's independent consultants developed a work-plan for the execution of the top-to-bottom assessment.

VII. Document Retention and Preservation

A. Document Retention and Preservation Order.

Paragraph 52 of the Remedial Order provides that "[t]he Court Monitor, in consultation with the Parties, shall prepare and file a Document Retention and Preservation Order, for approval by the court, directing the City of New York to retain, preserve, and maintain specified broad categories of documents that are relevant to evaluating the City's compliance with the Order, including documents currently in existence and any document which will be created in the future." Remedial Order ¶ 52. The Remedial Order further provides that the Monitor "may amend or supplement the Document Retention and Preservation Order at any time." *Id.*

As discussed in the Monitor's Second Report, the Monitor received confirmation from the City during the Monitor's first conference call with the parties on December 13, 2011, that the litigation hold from the underlying litigation in this matter is still in place. As likewise noted in the Monitor's Second Report, the Monitor circulated a draft Document Retention and Preservation Order to the parties in January 2012, and the parties timely submitted their

respective comments to the draft order on February 1, 2012. After numerous communications with the City regarding the City's logistical infrastructure for documents, the Monitor and the City further revised the Document Retention and Preservation Order and submitted a revised draft to the City. The Monitor appreciates the efforts by the City in cooperating throughout the process of revising the Document Retention and Preservation Order.

The Monitor submitted its proposed Document Retention and Preservation Order to the Court on August 30, 2012 (Docket # 959). Pursuant to the Court's August 31, 2012 Scheduling Order, any comments by the parties on the proposed Document Retention and Preservation Order are due by September 4, 2012.

B. Access to Information

The Remedial Order grants the Monitor with "access, on short notice, to individuals, information, documents, materials, programs, services, facilities and premises under the control of the City of New York that the Monitor requires to perform his or her duties under this Order." Remedial Order ¶ 66. The Monitor notes that the City has provided the Monitor with access to recruitment database information, policies and procedures, and has scheduled at the Monitor's request meetings with Assistant Commissioner Michele Maglione, Assistant Commissioner Margo Ferrandino, and Deputy Director Nafeesah Noonan.

With regard to CID and PRB procedures, the City has scheduled interviews of two recruitment supervisory staff. The Monitor also plans to interview CID and PRB investigators.

Pursuant to paragraph 67 of the Remedial Order, the City was also required to "designate persons responsible for handling inquiries by the Court Monitor, including without limitation persons responsible for the areas of document retention, CID, ORD, and PRB, which persons' duties shall include taking calls from the Court Monitor and promptly responding to the Court

Monitor's communications." Remedial Order ¶ 67. As noted in the Monitor's Second Report, the City appointed José Maldonado as FDNY Associate Commissioner for Compliance on March 20, 2012.

As previously discussed, the Monitor trusts that the City will adhere to the provisions of the Remedial Order affording the Monitor with proper and timely access to information. The Monitor's access to information is not only necessary to evaluate the City's compliance with the requirements of the Remedial Order, but is vital to achieving the overarching goals set forth in the Remedial Order.

VIII. Party Dispute Regarding Fax Machine Communications

As the Court is aware, the parties have spent a significant amount of time discussing concerns regarding specific communications distributed within firehouses by use of FDNY fax machines. The Monitor has prepared a recommendation to the Court regarding this issue and received the parties' comments on the Monitor's draft recommendation. The Monitor's recommendation will be filed with the Court shortly.

IX. Continuing Themes and Next Steps

Over the course of the past 90 days, certain issues have continued to emerge as potentially significant in connection with the Remedial Order. The Monitor will be discussing these issues further with the parties.

A. Candidate Investigation Division and Personnel Review Board Training

The most immediate next step in the candidate selection process involves the training of the FDNY's CID and PRB. The Monitor recognizes that the commencement of the candidate selection process is time-sensitive and will work with the parties to efficiently achieve the aims of the Remedial Order. The Monitor also remains cognizant that the training of the CID and

PRB is a significant step in carrying out the Remedial Order. The Monitor has been working extensively with its consultant, Manitou, Inc., to review similar trainings from other jurisdictions in order to evaluate the training that is to be proposed by the City and to ensure that issues identified in the Court's Findings of Fact and through the Monitor's investigation to date are addressed.

B. Senior Leadership Communication Regarding Diversity

The Monitor continues to examine the potential need for increased positive communication by senior leadership in the FDNY about efforts to increase diversity in the FDNY. As noted in the Remedial Order and the Monitor's Second Report, the City and its residents benefit from a broader range of talent seeking to qualify for a firefighting career. *See* Findings of Fact at 24-32. Communication by the FDNY and City, particularly at the senior level, can play an important role in accomplishing this goal. The Monitor also continues to review whether and how improving communication within the FDNY on diversity-related issues can help achieve the goals of the Remedial Order. The Monitor maintains his intention, in consultation with the City and its consultants, to explore ways that the City can involve firefighters in diversity efforts and improve the FDNY's policies and procedures to ensure that all firefighters understand the FDNY's commitment to diversity and are able to work in a fair and inclusive workplace.

The Monitor believes that the statements by FDNY Commissioner Cassano in the June 28, 2012 Supplement No. 35 to Department Order No. 45, which reflect a commitment by the Commissioner to increasing diversity within the FDNY, were very positive. At the same time, the Monitor remains concerned that the FDNY's positive message regarding diversity may not be heard above the other messages being offered. There should be no question about the

FDNY's obligations to comply with the Remedial Order or its commitment to diversity within its ranks, and the Monitor believes that communication of the FDNY's position on diversity to the public and within the FDNY can be improved.

C. Need for Empirical Data in Connection with Outreach

The Monitor continues to emphasize the need for empirical data in approaching the programs and objectives of the Remedial Order. Manitou has likewise expressed the desire to collect data at every step in the remedial process to the City's consultants, who also are gathering data from the City. The Monitor continues to believe that this empirical data will help the City and the Court to assess the efficacy of remedial measures over the life of the Remedial Order. Accordingly, the Monitor is requesting data from the City as needed and is working with the City to ensure that more data is generated going forward.

D. Near Term Schedule

Now that the development and administration of Exam 2000 are complete, the Remedial Order will begin to enter the next phase of the firefighter applicant process, beginning with the review of the training provided to the FDNY's CID and PRB, and ultimately the selection of candidates. The Monitor plans on being involved in each step in the candidate selection process, as required under the Remedial Order.

The Monitor is continuing to work with its own consultants to assess the City's recruiting and hiring of entry level firefighters as set forth in the Remedial Order, reviewing the experience of the New York Police Department and other examples of hiring practices that have achieved success in the area of diversity, and researching best practices from other jurisdictions. Significant ongoing work remains with regard to these projects. The Monitor also expects to work with the parties and the City's consultants regarding EEO and recruiting functions and

