

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

Plaintiff,

and

MILWAUKEE BROTHERHOOD  
OF FIREFIGHTERS,

Plaintiff-Intervenor,

Civil Action No. 74-C-480

CITY OF MILWAUKEE, et al.

Defendants.

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SUPPLEMENTAL ORDER

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I

INTRODUCTION AND BACKGROUND

1. The United States filed its Complaint in this action on October 17, 1974, alleging that defendants City of Milwaukee, *et al.* (“City of Milwaukee” or “City”), were engaged in a pattern or practice of discrimination against African-Americans and women on the basis of their race and gender, respectively, with respect to employment opportunities within the Milwaukee Fire Department (“MFD”) and the Milwaukee Police Department (“MPD”), in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, the provisions of the State and Local Fiscal Assistance Act of 1972 (Pub. L. 92-512, 86 Stat. 919), 31 U.S.C. § 1221 *et seq.*, the Omnibus Crime Control and Safe Streets Act of 1968, as amended, (Pub. L. 90-351, 82 Stat. 197) 42 U.S.C. § 3766(c)(3), the Fourteenth Amendment to the Constitution of the United States, and 42 U.S.C. §§ 1981, 1983.

2. On October 17, 1974, contemporaneous with the filing of the United States’ complaint, the Court (Reynolds, J.) approved and entered a Consent Decree (“Decree”) which resolved all MFD issues in the United States’ action, as well as two private actions.<sup>[1]</sup>

3. The Decree enjoined the City from engaging in any employment practices regarding the MFD that have the purpose or the effect of unlawfully discriminating against applicants or employees on the basis of their race, gender or national origin. Decree, ¶¶ 1 & 2. The Decree provided that if in the future any of the plaintiffs allege that an employment practice of the City is discriminatory in nature, such a claim “will be the subject of supplemental relief under paragraph 18;” and it provided that the Court retain jurisdiction of the actions for such supplemental or corrective relief as might be necessary or appropriate.<sup>[2]</sup> Decree, ¶¶ 2 & 18.

4. Since the entry of the Decree, the Court has entered various supplemental orders,<sup>[3]</sup> and also has terminated certain provisions of the Decree.<sup>[4]</sup>

5. In 1977, the City moved to vacate the Decree. The Court, however, denied the City’s motion, United States v. City of Milwaukee, 441 F. Supp. 1377 (E.D. Wis. 1977); and, with the exception of those provisions of the Decree that have been extinguished, the Decree remains in effect.

## II.

### EQUAL EMPLOYMENT OPPORTUNITY COMMISSION CHARGES OF DISCRIMINATION

6. On October 5, 2000, the U.S. Equal Employment Opportunity Commission (“EEOC”) referred to the Department of Justice charges of employment discrimination against the MFD, pursuant to 42 U.S.C., §2000e, *et seq.* The charges of discrimination included allegations that the selection processes for Firefighters, as well as for promotion within the MFD, unlawfully discriminate against African-Americans.<sup>[5]</sup> Following an investigation, the EEOC determined there was reasonable cause to believe that the following employment practices discriminated against African-Americans in violation of Title VII: the 1993 and 1995 written examinations for Firefighter; the recruitment process for Firefighters and Cadets; the appointment of Firefighters and the hiring of Cadets; the promotional process for Fire Lieutenant; and the 1996 promotional process for Battalion Chief. The EEOC’s referral of the charges to the Department of Justice followed the EEOC’s determination that conciliation of these charges with the City had failed.

## III.

### THE DEPARTMENT OF JUSTICE’S SUPPLEMENTAL INVESTIGATION

7. The Department of Justice commenced a supplemental investigation of these charges, as well as a related practice: the City’s 1999 written examination for Firefighter. The Department concluded its investigation regarding the City’s 1993, 1995 and 1999 written examinations for Firefighter; and the United States’ claims regarding those three written examinations are covered by this Supplemental Order.<sup>[6]</sup> However, the Department has not concluded its investigation of the EEOC charges regarding the City’s 1995 written examination for Fire Lieutenant or the City’s 1996 promotional process.<sup>IV.</sup>

### INTERVENING PARTY

8. The Milwaukee Brotherhood of Firefighters (“Brotherhood”), an organization that represents the interests of African-American Firefighters, has moved to intervene as a plaintiff in this action for purposes of this Supplemental Order. The United States and the City do not oppose the Brotherhood’s intervention for purposes of this Supplemental Order. The Brotherhood asserts the same claims as the United States regarding the City’s 1993, 1995, and 1999 written examinations for Firefighter. The

EEOC charges regarding the City's 1995 written examination for Fire Lieutenant and the City's 1996 promotional process for Battalion Chief, as well as any claims the Brotherhood may make with respect to that examination and/or that process, are not included in the complaint in intervention or covered by this Supplemental Order. The parties acknowledge that the omission of the same from the Brotherhood's complaint in intervention at this time does not foreclose the Brotherhood from asserting such claims in the future.

## V.

### THE CITY'S 1993, 1995 AND 1999 FIREFIGHTER SELECTION PROCESSES

#### A. The City's 1993 Firefighter Selection Process

9. The City's 1993 selection process for Firefighter included two components: a written multiple-choice examination and a physical ability test ("PAT"). Each component was scored individually and weighted evenly at 50/50. Preference points for veteran status and for possessing an Associate Degree in Fire Technology or a Bachelor of Science Degree in Fire Science were added to the component scores to arrive at an overall score. A candidate's overall score was used to create a rank-order eligible list of candidates to be processed for appointment. The City appointed candidates from this eligible list from 1993 to 1995.

10. The City's 1993 written examination for Firefighter, which was developed by the City, included 83 questions in the following content areas: reading comprehension; reasoning and problem solving; oral instruction; maps and diagrams; basic grammar; and public contact. The 1993 written examination was scored based on a 100-point scale, with 70 set as the passing point. Candidates who passed the written examination were invited to take the PAT. The PAT, also developed by the City, required candidates to perform various exercises within a set course in no more than 450 seconds (7.5 minutes). Raw scores based on seconds were converted to a 100-point scale, with 70 set as the passing point.

11. The City's 1993 written examination for Firefighter resulted in substantial disparate impact upon African-American candidates. The pass rate for African-American candidates on the examination was 3.9%, while the pass rate for white candidates was 30.7%, resulting in a highly statistically significant difference (10.5 SD). The average score for African-American candidates who passed the examination was 71.88, while the average score for white candidates who passed the examination was 75.91, resulting in a highly statistically significant difference (6.85 SD).

12. While 363 (or 16.7%) of all candidates who took the City's 1993 written examination for Firefighter were African-American, only two (or 1.5 %) of candidates appointed from the eligible list resulting from that examination were African-American. Had the City's 1993 selection process for Firefighter been race-neutral, it would be expected that at least 21 African-Americans would have been appointed, resulting in a shortfall of 19 African-American appointees. The written examination was the only practice or device in the City's 1993 selection process for Firefighter that resulted in significant disparate impact upon African-American candidates. Accordingly, the written examination was the cause of an overall appointment shortfall of 19 African-Americans for the City's 1993 selection process for Firefighter.

#### B. The City's 1995 Firefighter Selection Process

13. The City's 1995 selection process for Firefighter included three components weighted as follows: a written examination: 21%; the PAT: 44%; and an oral exercise (the "B-Pad"): 35%.

Preference points for veteran status and for possessing an Associate Degree in Fire Technology or a Bachelor of Science Degree in Fire Science were added to the component scores to arrive at an overall score. A candidate's overall score was used to create a rank-order eligible list of candidates to be processed for appointment. The City appointed candidates from this eligible list from 1995 to 1999.

14. The City revised its written examination for the 1995 selection process for Firefighter based on recommendations made to it by Personnel Decisions, Inc. ("PDI"), a Minneapolis, MN, consulting firm. The written examination was revised as follows: an "academy section" (a test of classroom learning) was added; the basic grammar section was removed; and PDI rewrote the reading comprehension section using actual text material used in recruit training. Thus, the City's 1995 written examination for Firefighter contained a total of 80 questions in three content areas: ability to follow oral instructions; classroom learning ability; and reading comprehension. The written examination was scored based on a 100-point scale, with 70 set as the passing point. Candidates who passed the written examination were invited to take the PAT. The PAT was left largely unchanged from that used by the City in its 1993 selection process. Raw scores based on seconds were converted to a 100-point scale, with 70 set as the passing point.

15. Candidates who passed the PAT were invited to take the "B-Pad" oral exercise, a new component added by the City to its selection process on the recommendation of PDI. The B-Pad, developed by Behavioral Personnel Assessment Devices, a California consulting firm, requires candidates to view and respond to problem scenarios shown to them on videotape. Raters evaluate videotapes made of the candidates responding to the scenarios. The B-Pad was scored based on a 100-point scale, with 70 set as the passing point.

16. The City's 1995 written examination for Firefighter resulted in substantial disparate impact upon African-American candidates. The pass rate for African-American candidates on the examination was 36.1%, while the pass rate for white candidates was 86.0%, resulting in a highly statistically significant difference (20.41 SD). The average score for African-American candidates who passed the examination was 76.97, while the average score for white candidates who passed was 83.83, resulting in a highly significant statistical difference (14.39 SD).

17. While 429 (or 22.5%) of all candidates who took the City's 1995 written examination for Firefighter were African-American, only 11 (or 9.2 %) of candidates appointed from the eligible list resulting from that examination were African-American. Had the City's 1995 selection process for Firefighter been race-neutral, it would be expected that at least 27 African-Americans would have been appointed, resulting in a shortfall of 16 African-American appointees. The written examination was the only practice or device in the City's 1995 selection process for Firefighter that resulted in significant disparate impact upon African-American candidates. Accordingly, the written examination was the cause of an overall appointment shortfall of 16 African-Americans for the City's 1995 selection process for Firefighter.

### C. The City's 1999 Firefighter Selection Process

18. The City's 1999 selection process for Firefighter included the same three components the City had used in 1995. However, the weights for the component scores were changed as follows: a written examination: 15%; the PAT: 46%; and the B-Pad: 39%. Preference points for veteran status and City residency, and for possessing an Associate Degree in Fire Technology or a Bachelor of Science Degree in Fire Science were added to the component scores to arrive at an overall score. A candidate's overall score was used to create a rank-order eligible list of candidates to be processed for appointment. The City has appointed candidates from this eligible list from 2000 to the present.

19. The written examination for Firefighter used by the City for its 1999 selection process was a substantial revision of the examination used by the City during 1995. Thus, 43 questions from the 1995 examination that had impact against minorities were eliminated and a reading comprehension passage was added. The City's 1999 written examination contained a total of 50 questions; and it was scored based on a 100-point scale, with 70 set as the passing point. Candidates who passed were invited to take the PAT.

20. The City maintained the same exercises and time limit for the PAT in 1999 as it had used in 1995. However, rather than using a candidate's course completion time (seconds) as the basis for the raw score, the City established a "ceiling score" based on the median time of the original incumbent group and a range of banded scores falling below this ceiling. The highest possible score was seven points, the lowest one point. The PAT scoring was changed to address the concern that the rising level of competition by the best performing candidates was adversely affecting the standing of candidates on the eligible list who were well within the range of acceptable proficiency but not at the top range. PAT point scores were converted to a 100 point scale, with 70 set as the passing point.

21. Candidates who passed the PAT were invited to take the B-Pad which was left unchanged from that used by the City in 1995. The B-Pad was scored based on a 100-point scale, with 70 set as the passing point.

22. The City's 1999 written examination for Firefighter resulted in substantial disparate impact upon African-American candidates. The pass rate for African-American candidates on the examination was 80.6%, while the pass rate for white candidates was 97.5%, resulting in a highly statistically significant difference (8.59SD). The average score for African-American candidates on the examination was 82.4, while the average score for white candidates on the examination was 89.5, resulting in a highly statistically significant difference (12.44SD).

23. While 252 (or 21.1%) of all candidates who took the City's 1999 written examination for Firefighter were African-American, only ten (or 11.8 %) of candidates to date appointed from the eligible list resulting from that examination have been African-American. Had the City's 1999 selection process for Firefighter been race-neutral, it would be expected that 18 African-Americans to date would have been appointed, resulting in a shortfall of eight African-American appointees. The City, however, intends to continue to utilize the eligible list resulting from that examination down to the rank of 250, or for up to twelve months from the date of the final approval and entry of this Supplemental Order, whichever event occurs first, in the selection of additional candidates for appointment to Firefighter positions. The City's continued use of the eligible list down to the rank of 250 will reduce the shortfall of African-American appointees from eight to five. The written examination is the only practice or device in the City's 1999 selection process for Firefighter that results in significant disparate impact upon African-Americans candidates. Accordingly, the written examination is the cause of an overall appointment shortfall of five African-Americans for the City's 1999 selection process for Firefighter.

D. The Parties' Positions regarding the City's 1993, 1995 and 1999 Written Examinations for Firefighter

24. The parties agree that the City's use of its 1993, 1995 and 1999 written examinations for Firefighter resulted in sufficient disparate impact upon African-American candidates as compared to white candidates to establish a *prima facie* case of discrimination under Title VII. The parties further agree that the City's use of its 1993, 1995 and 1999 written examinations for Firefighter resulted in appointment shortfalls for African-Americans of 16, 19 and five, respectively.

25. The United States and the Brotherhood contend that the City cannot demonstrate, as is its burden under Title VII, that the City's 1993, 1995 and 1999 written examinations for Firefighter, as well as the City's use of each of those examinations with a pass point of 70.0 and as a weighted component of a rank-order overall score, are "job-related for the position in question and consistent with business necessity."

26. Solely for the purpose of this Supplemental Order, and without admitting liability, the City does not assert that its 1993, 1995 and 1999 written examinations for Firefighter, or its use of each of those examinations with a pass point of 70.0 and as a weighted component of a rank-order overall score, is "job-related for the position in question and consistent with business necessity."

## VI.

### SETTLEMENT OF CLAIMS AND ORDER OF RELIEF

27. In resolution of all claims of the United States and the Brotherhood regarding the City's 1993, 1995 and 1999 written examinations for Firefighter, in resolution of all claims any person who accepts relief under this Supplemental Order has or may have under federal, state or local equal employment opportunity law regarding the City's failure to have appointed him/her as a Firefighter as a result of his/her score on the City's 1993, 1995 and/or 1999 written examinations for Firefighter, and in resolution of all claims of the United States and the Brotherhood regarding Cadet appointments, and Firefighter and Cadet recruitment, IT IS HEREBY ORDERED that the City provide that relief set forth in Parts VII and VIII, *infra*, of this Supplemental Order.

## VII.

### INJUNCTION AND PROSPECTIVE RELIEF

28. In light of the City's public safety responsibilities to its residents, the City's need to continue to appoint Firefighters and the delay and attendant costs in the appointment of Firefighters if the City were not allowed to continue to utilize the eligible list that resulted from the City's 1999 written examination for Firefighter, the City may continue to utilize that eligible list, but only down to the rank of 250, or for not more than a period of twelve months from the date of final entry of this Supplemental Order, whichever event occurs first. Thereafter, the City is enjoined from using that eligible list for any purpose, other than effectuating remedial relief for those persons identified in Subparagraph 32c, *infra*, of this Supplemental Order.

29. For future recruitments for the positions of Firefighter and Cadet, the City may, if it wishes, administer and use its 1999 written examination for Firefighter, or an alternate form thereof, if, and only if, the City uses the written examination and the PAT on a pass/fail basis (score based on a 100-point scale, with 70 set as the passing point) and ranks candidates who pass the written examination, the PAT and the B-Pad on the eligible list based solely on their B-Pad scores, with preference points added for veteran status, City residency and graduation from a Fire Technology course.

30. If the City wishes to utilize, in the selection of candidates for appointment to positions of Firefighter and Cadet, a selection device and/or process other than those allowed by Paragraph 29, *supra*, such device and/or process must comply with the requirements of Title VII. To that end, if the City wishes to utilize a selection device and/or process other than those allowed by Paragraph 29, *supra*, the City must, not less than 120 days prior to the City's intended use of such process and/or device, provide the United States and, in accordance with a confidentiality agreement, counsel for the Brotherhood with: a

description of such device and/or process and its intended use; the known or likely disparate impact, if any, of such device or process; and all evidence as to the job-relatedness and validity of such device or process. In the event that the United States does not agree with the City's intended use of such device or process, the parties agree that United States may submit that issue to the Court for resolution.

31. The City and the Brotherhood agree that the Brotherhood will actively participate in recruitment efforts designed to improve African-American representation in the position of Firefighter.

## VIII.

### INDIVIDUAL RELIEF

#### A. Persons Eligible for Relief

32. The following persons ("claimants") are eligible for relief under this Supplemental Order:

a. All African-Americans who, during the City's 1993 general recruitment for Firefighter, applied for a Firefighter position in the MFD, met the minimum qualifications in effect at the time of application, took and attained a score of at least 60.0 on the City's 1993 written examination for Firefighter, were not disqualified by the City in a subsequent stage in the selection process (*e.g.*, failed the PAT, background investigation, medical examination or drug screen, etc.) and did not voluntarily remove themselves from consideration (*e.g.*, failed to appear at any stage in the selection process, declined offer of appointment, etc.), and were not appointed to the position of Firefighter during the life of the eligible list that resulted from that written examination (1993-1995) (these persons are listed on Appendix A);

b. All African-Americans who, during the City's 1995 general recruitment for Firefighter, applied for a Firefighter position in the MFD, met the minimum qualifications in effect at the time of application, took and attained a score of at least 60.0 on the City's 1995 written examination for Firefighter, were not disqualified by the City in a subsequent stage in the selection process (*e.g.*, failed the PAT, B-Pad, background investigation, medical examination or drug screen, etc.) and did not voluntarily remove themselves from consideration (*e.g.*, failed to appear at any stage in the selection process, declined offer of appointment, etc.), and were not appointed to the position of Firefighter during the life of the eligible list that resulted from that examination (1995-1999) (these persons are listed on Appendix B); and

c. All African-Americans who, during the City's 1999 general recruitment for Firefighter, applied for a Firefighter position in the MFD, met the minimum qualification in effect at the time of application, took and passed the City's 1999 written examination for Firefighter and obtained a position on the eligible list that resulted from that examination, were/are not disqualified by the City in a subsequent stage in the selection process (*e.g.*, fail background investigation, medical examination, drug screen, etc.) and did/do not voluntarily remove themselves from consideration (*e.g.*, fail to appear at any stage in the selection process, decline offer of appointment, etc.) and either have not been or, prior to the expiration of that eligible list pursuant to Paragraph 28, *supra*, are not appointed to the position of Firefighter from that eligible list.

#### B. Monetary Awards

33. The City shall provide the sum of \$1,800,000("Settlement Fund"), in three deposits as described below, to be used to satisfy all back pay claims to be paid under this Supplemental Order. 34. Only those claimants described in Subparagraphs 32a and 32b, *supra*, shall be eligible for awards of monetary

relief, including back pay, under this Supplemental Order.

35. Within 30 days from the date of final entry of this Supplemental Order, the City shall establish a liability reserve fund account entitled "Settlement Fund" and deposit \$600,000 of the Settlement Fund to be invested by the City Treasurer in the State of Wisconsin Local Government Investment Pool. Within thirteen months from the date of final entry of this Supplemental Order, the City shall make a second deposit of \$600,000 to the Settlement Fund account to be invested by the City Treasurer in the State of Wisconsin Local Government Investment Pool. Within 25 months from the date of final entry of this Supplemental Order, the City shall make a third and final deposit of \$600,000 to the Settlement Fund account to be invested by the City Treasurer in the State of Wisconsin Local Government Investment Pool. The principal and the interest earned on the Settlement Fund shall be distributed pursuant to the procedure for the disbursement of monetary awards under this Supplemental Order.

36. The distribution of the Settlement Fund, as well as all interest that accrues thereon after deposit, shall be made by the City at the direction and in the sole discretion of the United States, subject only to review by the Court. For purposes of distributions to claimants, interest shall be calculated as follows: the total amount of interest earned on the principal to be distributed while on deposit in the Local Government Investment Pool shall be divided by the total amount of principal to be distributed on deposit as to each of the three payments made by the City pursuant to Paragraph 61, *infra*, and the resulting factor shall be applied to increase distributions of principal then made to individual claimants.

37. All monetary awards under this Supplemental Order shall be paid directly by the City to the claimants. The monetary award of any claimant who dies after having been identified by the United States as qualifying for an award under Paragraph 58, *infra*, shall be paid as directed by the United States and approved by the Court. 38. The City shall pay all employer contributions to Medicare due on monetary awards to claimants who accept the relief provided by this Supplemental Order. Any such employer contributions to Medicare shall not be deducted from either the Settlement Fund or any claimant's monetary award. The City shall withhold, to the extent required by law, all appropriate Federal and State income taxes, employee contributions to Medicare, and any other required employee withholding or deduction from any monetary award made under this Supplemental Order, all of which shall be deducted by the City from such monetary award and all of which shall be paid from the Settlement Fund. 39. A claimant shall not be required to express an interest in priority appointment on his/her Interest in Relief form, in order to receive a monetary award under this Supplemental Order.

#### C. Priority Appointments to the Position of Firefighter

40. Those claimants described in Paragraph 32, *supra*, shall be eligible for priority appointment to the position of Firefighter in the MFD under the terms of this Supplemental Order. The number of claimants who shall be entitled to priority appointment by the City are as follows:

- a. Up to 19 claimants described in Subparagraph 32a, *supra* (1993 general recruitment class);
- b. Up to 16 claimants described in Subparagraph 32b, *supra* (1995 general recruitment class);
- c. Up to five claimants described in Subparagraph 32c, *supra* (1999 general recruitment class).

41. To be eligible for priority appointment to the position of Firefighter, those claimants described in Subparagraphs 32a, 32b and 32c, *supra*, must: (a.) meet the current lawful minimum qualifications for such appointment; (b.) comply with Paragraphs 55 and 61, *infra*; and (c.) pass his/her background investigation, medical examination and drug screen. For purposes of the background investigation, the



City may disqualify any claimant based upon such claimant's background as of the retroactive seniority date such claimant would be provided pursuant to Paragraph 48, *infra*, if appointed. The City may also disqualify the claimant based upon conduct occurring after the applicable retroactive seniority date only if incumbent Firefighters are, or would be, terminated from employment based upon the same or similar conduct. In addition, the City shall not disqualify a claimant based upon his/her physical condition or age unless incumbent Firefighters with such physical condition or age are unable to perform the essential functions of a Firefighter.

42. Within 30 days from the date the City receives from the United States the "Interest in Relief" forms and list of claimants requesting priority appointment pursuant to Paragraph 56, *infra*, the City shall administer the 1999 written examination for Firefighter to each eligible Subparagraphs 32a and 32b claimant who indicated an interest in priority appointment on his/her "Interest in Relief" form and appears for the written examination. The written examination shall be the 1999 written examination for Firefighter and shall be scored on a 100-point scale, with 70 set as the passing point. The City shall administer the PAT to Subparagraphs 32a and 32b claimants who pass the written examination and the City shall administer the B-Pad to those claimants who pass the PAT. In its discretion, the City may administer the B-Pad prior to the PAT and the PAT to those who pass the B-Pad. The City shall rank Subparagraphs 32a and 32b claimants who pass the written examination, the PAT and the B-Pad, based solely on their B-Pad scores, with preference points added for veteran status, City residency and graduation from a Fire Technology course. The City shall establish two separate Priority Appointment Lists, designated A and B as follows: a. "Priority Appointment List A" shall consist of the rank-ordered results of the Subparagraph 32a claimants' B-Pad scores with any preference points added, as specified in this Paragraph 42. In the event of a tie among Subparagraph 32a claimants, rank-order shall be determined randomly by computer.

b. "Priority Appointment List B" shall consist of the rank-ordered results of the Subparagraph 32b claimants' B-Pad scores with any preference points added, as specified in this Paragraph 42. In the event of a tie among Subparagraph 32b claimants, rank-order shall be determined randomly by computer.

These selection procedures and the submission of Priority Appointment Lists A and B shall be completed by the City within 90 days from the date the City receives the "Interest in Relief" forms and list of claimants requesting priority appointment from the United States pursuant to Paragraph 56, *infra*.

43. At the same time that the City establishes Priority Appointment Lists A and B pursuant to Paragraph 42, *supra*, the City shall establish Priority Appointment List C by re-ranking -- based upon B-Pad scores, with preference points added for veteran status, City residency and graduation from a Fire Technology course -- each Subparagraph 32c claimant who indicated an interest in priority appointment on his/her "Interest in Relief" form and who has not been appointed from the eligible list that resulted from the 1999 written examination. In the event of a tie among Subparagraph 32c claimants, rank-order shall be determined randomly by computer.

44. A claimant who is placed on a Priority Appointment List shall be entitled to an offer of appointment as a Firefighter by the City, as set forth herein. As between claimants on Priority Appointment Lists A and B, the City shall first make offers to claimants on Priority Appointment List A, based on their rank-order placement until List A is exhausted or the numerical limitations in Subparagraph 40a, *supra*, have been met, whichever comes first; and then the City shall make offers to claimants on Priority Appointment List B, based on their rank-order placement until List B is exhausted or the numerical limitations in Subparagraph 40b, *supra*, have been met, whichever comes first. In addition, the City shall make offers for the first Firefighter recruit class commenced by the City >as part of the next general recruitment for Firefighter, to claimants on Priority Appointment List C who were not appointed prior to the expiration of the eligible list pursuant to Paragraph 28, *supra*, based on their rank-order placement,

until List C is exhausted or the numerical limitations in Subparagraph 40c, *supra*, have been met, whichever comes first.

45. The City shall appoint not less than twelve claimants from Priority Appointment Lists A and/or B for the first Firefighter recruit class commenced by the City after the date of final entry of this Supplemental Order, or in the event the total number of claimants on the Priority Appointment Lists A and/or B or those claimants accepting offers is less than twelve, the City shall appoint all claimants on Priority Appointment Lists A and B. Thereafter, the City is required to fill not less than one-third of each subsequent Firefighter recruit class with claimants from Priority Appointment Lists A and/or B; and, in addition, the City shall appoint five claimants from Priority Appointment List C to the first Firefighter recruit class commenced by the City as part of the next general recruitment for Firefighter and the establishment of a new eligible list.

46. The City's notification of an offer of appointment pursuant to Paragraph 44, *supra* shall be made in writing and accomplished by certified mail (return receipt requested) to a claimant. A claimant who receives a written offer of priority appointment from the City shall have seven working days from the date of receipt to notify the City that he/she accepts such offer. Such notification by a claimant shall be in writing and shall either be accomplished by first class mail postmarked on or before the seventh working day from the date of his receipt of the City's written offer or delivered in person at the offices of the Fire and Police Commission on or before the seventh working day from the date of his/her receipt of the City's written offer. If a claimant timely provides the City with such notification, the City shall provide him/her with a priority appointment. However, if a claimant fails to timely accept the City's offer, the City's obligation to provide him/her with a priority appointment under this Supplemental Order ceases, except for reasonable cause as determined by the United States.

47. Nothing in this Supplemental Order precludes claimants from applying for appointment, or being appointed, as Firefighters under the City's general recruitment and appointment process for Firefighter. Any claimant who is an incumbent Firefighter or becomes one as a result of being appointed through the City's 1999 general recruitment and appointment process, shall be entitled to the retroactive seniority and pension benefits applicable to such claimant pursuant to Paragraphs 48 through 50, *infra*. As to such claimants, his/her retroactive seniority and pension benefits in no event shall be different from the retroactive seniority and pension benefits to which such claimant would have been entitled if he /she had been appointed from the Priority Appointment List. In addition, any claimant who receives retroactive seniority and pension benefits under this Supplemental Order will be deemed to have been appointed from the Priority Appointment List which would otherwise apply to him/her for purposes of fulfilling the City's obligation to make the requisite number of priority appointments with respect to that particular List pursuant to Paragraph 40, *supra*.

#### D. Retroactive Seniority

48. Any claimant who accepts priority appointment under this Supplemental Order and who achieves permanent status in that position, as well as any claimant who is an incumbent City Firefighter or becomes one as a result of being appointed through the City's 1999 general recruitment and appointment process, shall be entitled to retroactive seniority credit in that position as of the following retroactive seniority date.

a. June 5, 1994, for a claimant described in Subparagraph 32a, *supra* (the City's 1993 general recruitment Firefighter class);

b. June 1, 1997, for a claimant described in Subparagraph 32b, *supra* (the City's 1995 general

recruitment Firefighter class); and

c. The commencement date of the last recruit class from which eligibles on the City's 1999 eligible list for Firefighter have been appointed, for a claimant described in Subparagraph 32c, *supra*(the City's 1999 general recruitment Firefighter class).

49. As used in this Supplemental Order, the term "retroactive seniority" shall mean the crediting of seniority for all purposes for which seniority is used in the MFD, except that retroactive seniority credit shall not affect consideration or eligibility for either promotion or time-in-grade requirements for purposes of completing any probationary period or eligibility for promotion. Claimants who receive retroactive seniority shall receive salary and vacation at the same level as the salary and vacation they would currently be receiving if they had been appointed on their Retroactive Seniority Dates; however, claimants shall not be entitled to any retroactive accruals of vacation or sick leave benefits, including sick leave incentive benefits. Additionally, retroactive seniority shall not be used for purposes of meeting any qualifying period pertaining to duty disability or duty death benefits.

#### E. Pension Benefits

50. The City shall provide each claimant who receives a Retroactive Seniority Date pursuant to Paragraph 48, *supra*, with complete pension benefits as though such claimant had been appointed on the retroactive seniority date. The City shall pay all required employer and employer-paid employee contributions to the Employee Retirement System sufficient to fund the pension benefits. Any such contributions to the Employee Retirement System shall not be deducted from the Settlement Fund or any claimant's monetary award. Those claimants who receive retroactive seniority prior to January 1, 2000, shall be required to make all the required employee contributions to the Fire and Police Survivorship Fund in the amount of \$52.20 per year and such contributions shall be deducted from their monetary awards. Those claimants who receive retroactive seniority shall be eligible to participate in the Global Pension Settlement only if their retroactive seniority date is prior to January 1, 2000, and if they further execute the required consent form for the Employee Retirement System. If necessary, the City will apply to the Milwaukee County Circuit Court to permit those claimants who receive a retroactive seniority date prior to January 1, 2000, under this Supplemental Order to execute consent forms required under the Global Pension Settlement.

#### F. Fairness Hearing on Supplemental Order

51. Upon provisional approval, this Court will set a date for a fairness hearing to consider giving its final approval to this Supplemental Order and hear any objections filed by individuals affected by this Supplemental Order. The fairness hearing will be held within 30 days after provisional approval of this Supplemental Order.

52. Within seven working days from the date of the Court's provisional approval of this Supplemental Order, the City shall provide written notice to all individuals listed in Appendices A and B, all individuals remaining on the City's 1999 eligible list for Firefighter, all African-Americans who took but failed the written examination for Firefighter during the City's 1993, 1995 or 1999 general recruitment, all incumbent Firefighters and the Milwaukee Professional Fire Fighters' Association, Local #215, IAFF, AFL-CIO. The notice shall provide a description of the proposed settlement embodied in this Supplemental Order, specify the date, time and place for a fairness hearing, and describe the procedure for filing objections with the Court. Notice for purposes of this Paragraph 52 shall be by regular first class mail to the individual's last known address listed in the City's records. An example of such notice is attached hereto as Appendix C.

#### G. Notice to Claimants of the Settlement of this Action

53. Within seven working days from the date of final entry of this Supplemental Order, and upon agreement of the parties regarding the most current available information, the City shall by certified mail (return receipt requested), to the last known address of those claimants identified in Paragraph 32, *supra*, send the following: a. a "Notice of Settlement" of this action (as set forth as Appendix D); and b. an "Interest in Relief" form (as set forth as Appendix E).

54. The City shall bear the cost of all mailing and publication notices the City is required to make under this Supplemental Order.

#### H. Claimants to Submit "Interest in Relief" Forms

55. Any claimant who fails to forward an "Interest in Relief" form to the United States within 14 days from the date of the last mailing by the City of the Notice of Settlement of this action described in Paragraph 53, *supra*, shall be deemed to have waived any right to be considered for an award of remedial relief under this Supplemental Order except for reasonable cause shown as determined by the United States.

56. The United States shall provide the City with all "Interest in Relief" forms, as well as a list of claimants requesting priority appointment, within five working days from the last date for submission of such forms by the claimants.

#### I. Fairness Hearing on Individual Relief

57. Within five days from the date the City has established Priority Appointment Lists A, B and C, the City shall provide the United States and the Brotherhood with copies of such Lists and, for any claimant who applied for a priority appointment but who does not appear on a Priority Appointment List, a statement describing the reasons why the claimant is not on such List. The Parties shall seek to resolve any dispute concerning the Priority Appointment Lists.

58. Within ten days from the date the City has provided the United States with Priority Appointment Lists A, B and C, the United States shall notify each Subparagraph 32a, 32b and 32c claimant who forwarded an "Interest in Relief" form under this Supplemental Order, as to: the specific relief, if any, that the United States has proposed on behalf of each such claimant; whether the City disputes this claim; the opportunity to file, under Paragraph 59, *infra*, an objection with respect to that relief; and the date, time and place of a hearing by the Court to consider the objection. The United States shall at the same time provide the same notice to the City and to counsel for the Brotherhood.

59. Any objections by claimants to the claims for relief under this Supplemental Order must be filed in writing with the Court and served upon counsel for the United States, the Brotherhood and the City at least 20 days before the commencement of the hearing described in Paragraph 60, *infra*. The United States, the Brotherhood, and the City, or any of them, may timely file with the Court any written reply to any such objection they, or any of them, deem appropriate.

60. This Court will conduct a hearing for the purpose of resolving any dispute among the parties over the Priority Appointment Lists, as well as to resolve any objections filed by claimants under Paragraph 59, *supra*, regarding the individual relief to be awarded under this Supplemental Order. J. Notice of Determination, Acceptance of Relief and Payment of Monetary Award

61. Within ten days from the date of the Court's determination of all claims for remedial relief under this Supplemental Order following the hearing referenced in Paragraph 60, *supra*, the City shall send by certified mail (return receipt requested) a "Notice of Determination" form (as set forth in Appendix F) to each claimant entitled to relief. The Notice of Determination form shall be accompanied by a self-addressed stamped envelope and an "Acceptance of Relief and Release" form (as set forth in Appendix G) which the claimant shall use to notify the City as to whether he/she desires to accept the relief offered. The claimant shall have 15 days from his/her receipt of the Notice of Determination form and accompanying Acceptance of Relief and Release form in which to properly execute and return his/her Acceptance of Relief and Release form in order to receive any relief under this Supplemental Order. If the claimant notifies the City that he/she does not accept the relief, or does not return a properly executed Acceptance of Relief and Release form within the 15 day period, the City shall be released from any and all obligations to him/her under this Supplemental Order except for reasonable cause. If the claimant notifies the City within the 15 day period that he/she accepts the relief, the City shall within 45 days of the last timely returned Acceptance of Relief and Release form, pay that claimant no less than 1/3 of the claimant's total monetary award (including interest accrued) that is due the claimant, and thereafter pay the claimant no less than 1/3 of the claimant's total monetary award (including interest accrued) in each of two annual installments.

#### K. Appointment of Claimants

62. No less than ten days prior to the City's confirmation of appointment of Priority Appointment List A, B and/or C claimants as candidates to a Firefighter recruit class pursuant to this Supplemental Order, the City shall provide the United States and the Brotherhood with a list of claimants whom the City intends to appoint, and identify those claimants whom it has disqualified, stating the reasons for such disqualification. The parties shall seek to resolve any dispute concerning the disqualification of a Priority Appointment List claimant. If the parties are unable to agree, the United States and/or the Brotherhood may move the Court for a resolution; however, the City shall not be enjoined from enrolling and commencing the remainder of the recruit class as planned. The burdens of proof for the resolution of any priority appointment claim for individual relief under this Supplemental Order which is disputed by the City shall be those set forth by the Supreme Court for Stage II proceedings after a finding of liability in International Brotherhood of Teamsters v. United States, 431 U. S. 324 (1977). If a priority appointment claim is successfully disputed by the City, the monetary relief that had been allocated by the United States for such claimant may be reallocated by the United States in its sole discretion for distribution among non-disputed and successful claimants; however, no claimant shall be denied monetary relief on the basis of being disqualified for priority appointment, so long as such claimant met the qualifications for appointment which were in effect at the time he or she initially applied. L. Final Accounting 63. Within 45 days from the date of making the last of the third monetary award payments provided in Paragraph 61, *supra*, or the last priority appointment provided in Paragraph 45, *supra*, whichever is later, the City shall file with the Court and serve upon the United States and the Brotherhood a written report setting forth who accepted relief (both monetary and non-monetary), a description of the nature and amount of relief, and what relief went undistributed and the reasons therefor. Back pay relief which remains undistributed due to the City's inability to locate claimants shall be held by the City for the claimants until all reasonable efforts by the parties have been taken to locate the claimants, at which time such monies shall revert to the City upon consent of the United States and the Brotherhood and the City and order of this Court.

### IX. RECORDS AND REPORTS

64. The City shall retain for the duration of this Supplemental Order all records (including computer tapes) -- to the extent that such are maintained in the ordinary course of business -- relating to the

recruitment, selection, appointment, promotion, training, assignment, discipline, demotion and termination of persons covered by this Supplemental Order, including all applications identified by race, all medical and background investigation files, training evaluations, and all evaluations of candidates and employees. The United States shall have the right to inspect and copy any and all such documents upon reasonable notice to the City without further order of this Court. In addition, the City shall make available such additional information or records which it maintains in the ordinary course of business relating to the subject matter of this Supplemental Order as the United States requests in writing, provided such requests are not unduly burdensome.

65. The City shall provide to the United States and the Brotherhood, within 20 days from the date of final entry of this Supplemental Order, a report setting forth the number and race, national origin and gender of persons by rank within the MFD as of the date of final entry of this Supplemental Order.

66. For the duration of this Supplemental Order, the City shall provide periodic reports to the United States and the Brotherhood as described in this Paragraph 66. This first reporting period shall end six months after the first report referenced in Paragraph 65, *supra*, is due. Reporting periods shall continue to end every six months thereafter for the duration of the Supplemental Order. Within 60 days from the close of each reporting period, the City shall provide to the United States, in a uniform reporting form to be agreed upon by the parties, the following information:

- a. the number, race, national origin, and gender of all persons applying for Firefighter and Cadet positions;
- b. the number, race, national origin, and gender of all persons appointed as Firefighters and hired in Cadet positions in the MFD during the reporting period;
- c. without disclosing the identity of any individual candidate to the Brotherhood, the reasons for non-selection for every candidate who was not appointed or hired, divided into the following reporting categories: (1) did not meet the minimum qualifications; and (2) disqualified for any other reason, citing specific reason for disqualification;
- d. the number, race, national origin and gender of all persons who were terminated or who resigned from Firefighter positions by rank during the reporting period, including cadets; and
- e. the total number, race, national origin and gender of all sworn employees in the MFD as of the close of the reporting period.

## X.

### ADDITIONAL PROVISIONS

67. If the parties are unable to agree on a specific matter falling within the general provisions of this Supplemental Order that contemplates mutual agreement, any party may move the Court for a resolution.

68. In the event this Supplemental Order or its implementation is challenged, including any action claiming entitlement to damages against the City arising out of the implementation of this Supplemental Order, the City, the United States and the Brotherhood shall fully defend the lawfulness of this Supplemental Order. If any such collateral challenge arises in State court, the City shall promptly seek to remove such action to this Court. The United States and the City shall bear their own costs and

attorneys' fees in this action.

XI.

RETENTION OF JURISDICTION

70. This Court shall retain jurisdiction of the matters covered by this Supplemental Order for such action as may be necessary or appropriate to effectuate the purposes of this Supplemental Order. At the end of three years from the date of final entry of this Supplemental Order or upon the implementation of all of the remedial relief to claimants, whichever event is later, the City shall file with the Court and serve upon the United States and the Brotherhood a written certification that all remedial relief to claimants has been implemented. At the end of 90 days from the City's filing and service of such certification, this Supplemental Order and the 1974 Consent Decree entered in United States v. City of Milwaukee, et al., No. 74-C-480, shall be dissolved, and the complaint in said action, as it relates to the MFD, shall be dismissed, unless prior to such dissolution and dismissal taking effect, the United States shows good cause as to why such dissolution and dismissal should not take effect.

PROVISIONALLY APPROVED subject to the fairness hearing this \_\_\_\_\_ day of \_\_\_\_\_, 2001.

\_\_\_\_\_  
UNITED STATES DISTRICT JUDGE

APPROVED and ORDERED this \_\_\_\_ day of \_\_\_\_\_, 2001.

\_\_\_\_\_  
UNITED STATES DISTRICT JUDGE

AGREED AND CONSENTED TO:

on behalf of plaintiff  
United States of America

RALPH F. BOYD, JR.  
Assistant Attorney General  
Civil Rights Division

\_\_\_\_\_  
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On behalf of defendants City of Milwaukee, et al.

City of Milwaukee, et al.

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On behalf of plaintiff-intervenor  
Milwaukee Brotherhood of Firefighters:

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\_\_\_\_\_  
[\[1\]](#) Private plaintiffs Loren J. Washington, et al., (Loren J. Washington et al. v. Richard Block, et al., Civil Action No. 74-C-318), and the National Association for the Advancement of Colored People, Milwaukee Branch, et al. (NAACP, et al. v. Richard Block, et al., Civil Action No. 74-C-368), had filed complaints on July 29, 1974 and September 3, 1974, respectively. The complaints alleged that the City defendants were engaged in discrimination against African-Americans and Hispanics on the basis of their race and national origin, respectively, with respect to employment opportunities within the MFD in violation of 42 U.S.C. §§ 1981 and 1983 and the Fourteenth Amendment to the United States Constitution.



As noted above, while the United States' complaint alleged a pattern or practice of employment discrimination within both the MFD and the MPD, the Decree resolved only the MFD issues. The procedural history of the MPD litigation is extensive and ongoing. See, League of Martin v. City of Milwaukee, 588 F. Supp. 1004, 1007-11 (E.D. Wis. 1984); United States v. City of Milwaukee, 1997 WL 1911226 (E.D. Wis. 1997).

<sup>[2]</sup> The Decree also contains provisions that address various other issues, including appointment goals, qualifications for Firefighters, recruitment policies and record keeping and reporting.

<sup>[3]</sup> For example, on October 15, 1976, the Court entered an Order establishing a "goal of making 5% of the Firefighter appointments to females." The most recent supplemental Order, entered on December 27, 1989, authorized the intervention of numerous female paramedics for the limited purpose of enforcing a settlement agreement between the intervenors and the City regarding the intervenors' inclusion in the Firefighter pension fund.

<sup>[4]</sup> Pursuant to the parties' agreement, on April 6, 1983, the Court entered an Order discontinuing the interim appointment goal contained in paragraph 4 of the Consent Decree, because the City had met its long-range goal of attaining 14% African-American, Hispanic and American Indian representation in the MFD. Also, on June 20, 1994, a Supplemental Order terminating the appointment goal for female Firefighters took effect. These extinguished provisions are not at issue here.

<sup>[5]</sup> The EEOC's investigations were prompted by two separate charges of discrimination, the first (EEOC Charge No. 260-97-0100) filed by the Milwaukee Brotherhood of Firefighters, an organization that represents the interests of African-American Firefighters; and the second (EEOC Charge No. 260-97-0139) filed by an individual African-American Firefighter (Isaac Hatton).

<sup>[6]</sup> In accordance with Paragraph 16 of the Decree, the Department of Justice notified the City of the Department's determination that the City's 1993, 1995 and 1999 written examination for Firefighter violated Title VII.

The Department of Justice has concluded its investigation on the EEOC's charge of discrimination in the City's recruitment of African-American Firefighters and Cadets and determined not to pursue this claim. The Department of Justice also has concluded its investigation of the EEOC's charge of discrimination in the City's appointment of African-American Cadets and determined not to pursue this claim.