

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

Plaintiff,

-and-

THE VULCAN SOCIETY, INC., *for itself and on
behalf of its members*, JAMEL NICHOLSON, and
RUSEBELL WILSON, *individually and on behalf of a
subclass of all other victims similarly situated seeking
classwide injunctive relief*,

ROGER GREGG, MARCUS HAYWOOD, and
KEVIN WALKER, *individually and on behalf of a
subclass of all other non-hire victims similarly
situated*; and

CANDIDO NUÑEZ and KEVIN SIMPKINS,
*individually and on behalf of a subclass of all other
delayed-hire victims similarly situated*,

Plaintiff-Intervenors,

-against-

THE CITY OF NEW YORK,

Defendant.
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07-cv-2067 (NGG) (RLM)

MONITOR'S TWENTY-FIFTH PERIODIC REPORT TO THE COURT

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I. Executive Summary

This report summarizes activities relating to compliance by the City of New York (the “City”) with the Modified Remedial Order during the period from July 17, 2018, when the Monitor’s Twenty-Fourth Periodic Report (Dkt. # 1861) was filed, to October 14, 2018. The report also summarizes activities relating to the implementation of the Parties’ settlement of Plaintiffs-Intervenors’ disparate treatment claims (the “Disparate Treatment Settlement”), which the Parties agreed would fall within the Monitor’s authority as defined in the Modified Remedial Order. *See* Stipulation and Order dated June 5, 2015 (Dkt. # 1599); *see also* Memorandum & Order dated June 5, 2015 (Dkt. # 1598) at 10.

This periodic report covers an important juncture for the City and the Monitorship. The Exam 2000 list has expired, the Exam 7001 recruitment campaign has ended, and processing of Exam 7001 candidates has begun. This time period represented an important window for the City to demonstrate the capacity to analyze the results of Exam 2000 and show that it had used the results of that analysis to help in developing plans for Exam 7001 that were informed by that analysis. This time period was also sensitive because it marked, by and large, the outside time frame in which the City could identify and address problems, complete outstanding initiatives, and evaluate suggestions from the Monitor and the other Parties and adopt any changes based on those suggestions before the next class of candidates is processed.

Going forward, this time period offers an important, continuing opportunity for the City to demonstrate the institutional ability to show that it is making ongoing use of data systems to which much of the work of the Monitorship has been devoted thus far, and to support its assertions that it is regularly studying, based on data, what the effect of existing or proposed practices have been or will likely be. In a number of instances, while the City maintains that it

has information and is consulting data before making choices – and indeed that it would be incorrect or unfair to suggest otherwise – it has also stated that it is not in a position to provide visibility to the Monitor or to the other Parties about how it is doing this or what the results show. Because effective monitoring requires the ability to gain timely insight into the City’s activities, the Monitor hopes to work with the City to identify and eliminate at least some of the barriers that are limiting the City’s ability to fully showcase its work and prevent the Monitor from fully reviewing City projects.

As always, this period also involved more general discussions with the City. Based on those discussions, some steps taken by the City appear to be clear improvements over past practice, such as the creation of a candidate portal to make it easier for candidates to view their progress through the different stages of the screening process. The City also appears to have invested significant work in strengthening its EEO case management database to make it a better tool for the EEO office, although further changes are needed, and the City must also demonstrate that it acts consistently to address issues that emerge from the data. City recruitment staff also appear to be engaging with the first group of candidates entering Exam 7001 processing and providing encouragement.

In terms of demonstrating completion of initiatives or analyses, however, the City’s progress has not been all that could have been hoped. With respect to the Exam 7001 recruitment campaign, the City had projected delivery of an after-action analysis of the recruitment campaign for August 2018, as reported in the last periodic report, the City has been unable to share the results with the Monitor or other Parties as of this writing. The City indicates that it is in the process of finalizing an expanded report. In addition, although the City has provided a report showing rates of attrition for different demographic groups in a number of

phases in the Exam 2000 hiring process, it has not been able to fully identify and implement takeaways based on patterns of attrition discerned in the Exam 2000 hiring process and a number of potential sources of adverse impact remain still not fully addressed, including with respect to character review or the Medical Exam.

With respect to the hiring process for Exam 2000, the Monitor is also awaiting an analysis and a discussion of the stages where candidates dropped out of the process – a necessary first step in alleviating any causes of such attrition that could be mitigated. The City states that it has the information and is making use of it internally, and that delays in providing the analysis are related to finalizing and organizing the information for outside review. But the net result is that in spite of repeated requests to review the analysis, months have passed without the information being made available to the Monitor, such that neither the results themselves nor details of how the City is using them could be taken into account before candidates began processing. In addition, although the City contends that it has made use of Exam 2000 data internally to guide its attrition mitigation efforts for Exam 7001, its delay in producing its analysis to the Monitor suggests that it may have begun processing Exam 7001 candidates without the full benefit of a systematic analysis of the data from Exam 2000.

During the period covered by this report, a number of long-awaited initiatives, such as surveying existing personnel and Exam 2000 test-takers and validating the stairmill, appear to have gotten actively underway. Though certainly it is positive that the City has begun this work, a number of projects started too late to permit or consider input from the Monitor and the other Parties and to ensure that the outcomes are applied to all Exam 7001 candidates. The Monitor does expect to report meaningful progress in these areas, however, by the next periodic report as well as the next scheduled status conference in this action (December 12).

Part II of the report begins by summarizing activities relating to FDNY recruitment, including the City's efforts (ongoing and planned) to minimize attrition among candidates on the new "eligible list" – the rank-ordered list of candidates based on scores from the most recent open competitive firefighter examination (Exam 7001). The list is expected to be formally established in February of 2019, and the first Academy class to include Exam 7001 candidates is expected to begin in May of 2019. The City has begun processing the initial group of candidates for the Candidate Physical Ability Test ("CPAT"), the first step in candidate screening.¹ The Monitor is awaiting a timeline for all the processing steps for the first Fire Academy class from the Exam 7001 list. As reported by the City at the September 13 status conference, this initial group comprises over 2,400 candidates, including at least 355 black candidates and 579 Hispanic candidates.

To assist candidates in the initial group to prepare for the CPAT, the FDNY is offering training sessions five days a week at its Randall's Island facility, for a total of six sessions per week. Data from the previous eligible list (for Exam 2000), show a strong correlation between attendance at training sessions and success on the CPAT for most candidates. Accordingly, the FDNY's Office of Recruitment and Retention ("ORR") is encouraging candidates to attend training using text, email and phone, and following up with candidates who attend and those who miss scheduled sessions. The FDNY also created an online candidate portal, which allows each candidate to track his or her progress through the hiring process, and also provides notifications, reminders, and informational materials. As discussed in Part II, the Monitor intends to work with the City to try to improve the portal, including potentially by allowing candidates to make or change appointments and personal profile information online.

¹ The CPAT is administered by the Department of Citywide Administrative Services ("DCAS").

The Monitor has emphasized that in addition to the provisions the City makes for candidates who have been called off the list or who are actively being processed, it must also develop and implement long term plans to encourage, inform, and support candidates at different stages of the list as they wait to be called – because the wait could be as long as four years for many such candidates. All candidates currently have access to the resources and materials available on the City’s “JoinFDNY” website. While the City has described some plans for further outreach, including Mobile Academies to which candidates projected for the next round of processing are invited, the Monitor believes that additional steps are needed that address candidates at every level of the list, and has consistently urged the City (including in the last periodic report) to develop and provide to the Monitor additional detailed communication plans and messages tailored to candidates who are likely to be called off the list at different times.

In addition to steps being taken by the City, the Vulcan Society has established a closed Facebook group for black candidates who have been called for the CPAT. The Vulcan Society intends to create additional closed Facebook groups for candidates who are likely to be called for processing in the coming months and years.

Part II also discusses the need for the City to make the best possible use of available data from all relevant sources to target its recruitment and attrition mitigation activities and craft its messaging.² As discussed in the last periodic report, the City must, and has committed to, complete a full retrospective analysis of its recruitment campaign and its effectiveness in recruiting black and Hispanic candidates.³ The analysis should identify methods that were most effective in attracting and retaining successful black and Hispanic firefighter candidates; and it

² Those sources include Exam 2000, the recruitment and processing of Exam 7001 candidates, and an upcoming survey of Exam 2000 candidates.

³ See Modified Remedial Order ¶¶ 15, 26(a), 32.

should consider the messages, channels, targeting, and resources employed in recruiting test-takers for Exam 7001. The City originally projected that the retrospective analysis of the recruitment campaign would be completed in August of this year. After requesting an extension, it now plans to share the assessment with the other Parties in late October.

The Monitor also directed the City to conduct a survey of Exam 2000 test-takers, to evaluate factors relevant to their perceptions of the hiring process and reasons for attrition, and to attempt to identify characteristics of candidates who succeeded in being hired. This information should be helpful for future campaigns.

Shifting to the hiring process, another category of data relates to examination of the stages where candidates from particular groups were disqualified or discontinued the screening process for Exam 2000. The City must timely complete its analysis of candidate attrition from the Exam 2000 eligible list.

In addition to the reports themselves, the Monitor has also asked the City to provide (by October 26) an account of the ways that data from the studies listed above has been used to date to inform and improve the City's attrition mitigation initiatives for Exam 7001. As noted earlier, the City maintains that it has been making active use of the data, but has simply not yet been able to enable the Monitor or other Parties to see the results or understand how they are being used. Once that has happened, the Monitor expects going forward to assess both the data and the uses to which it can be put in future. The Monitor has asked the City to report on those planned uses as part of its October 26 report.

Part II also discusses the Monitor's work to evaluate the City's compliance with the Disparate Treatment Settlement's requirement that New York City residents be given first priority for assignment to their home divisions "to the extent reasonable, practicable and

consistent with operational needs.” It also provides an update on initiatives associated with the Working Group established by the Disparate Treatment Settlement.

Over the past years, the Monitor has encouraged the City to develop data systems that would enable the City to identify and assess the impact of existing and proposed FDNY policies and practices on the FDNY workforce. Part III focuses on the data systems the City has worked on developing over the course of the Monitorship to support its recruitment activities and to track its compliance with applicable EEO laws and policies. Primarily, Part III discusses the City’s Consolidated Candidate Tracking System (“CCTS”), which is intended to provide users with access to data for every candidate for the entire hiring process. In the last periodic report, the Monitor noted that based on a demonstration of CCTS capabilities provided by the City on December 19, 2017, it appeared that the CCTS permits analyses of numerous categories of data, but the City had not yet demonstrated that it can readily support all the analyses that the City must conduct to track its EEO compliance. To facilitate analysis of the CCTS’s capabilities, at the December demonstration the Monitor asked the City for a data dictionary listing and explaining all the fields in the system. The City provided portions of the data dictionary on March 1 and June 15, and a purportedly complete data dictionary on August 24, 2018, which the Monitor and Parties will now be able to use in connection with information on the analyses that currently take place to make any further recommendations as to how the CCTS can be used as a tool to inform the City about its workforce and enhance compliance with governing law.

Part III also discusses the City’s continuing use of its recruitment database in managing communications with Exam 7001 candidates and the continuing use of the Candidate Tracking Spreadsheet for retrospective analyses of data for candidates who took Exams 2000 and 2500.

Part IV focuses on the FDNY's EEO function, including an update on staffing, and activities relating to messaging, compliance and accountability, and investigations.

On staffing, the City reports that it has filled all but one of the positions recently added to the EEO Office, including, significantly, the positions for attorney investigators, who play the primary role in investigating EEO complaints.

With respect to messaging, the City has taken some steps to more forcefully convey a commitment to diversity and inclusion. These include plans for a program of "voice announcement messages,"⁴⁴ the first of which is to be a video message from the Commissioner emphasizing the FDNY's commitment to diversity. But the Monitor believes the City must do considerably more to implement the Monitor's longstanding recommendation to involve uniformed leadership more extensively in the personal delivery of EEO messages, including through live presentations and appearances as well as acting on opportunities to reinforce the Department's values and conduct that will not be tolerated. The Monitor continues to believe that broad based personal participation by operational supervisors is critical for the FDNY to communicate those messages effectively.

Regarding issues of compliance and officer accountability, Part IV recounts recent developments and discussions concerning the FDNY's workplace professionalism reporting system; the implementation of the FDNY's new EEO metric for officer performance evaluations; and continuing work on a Department-wide EEO climate survey. With respect to reporting on workplace professionalism within the FDNY chain of command, the Monitor has continued to advise the FDNY of the conviction that the FDNY must provide officers with more detailed guidance on required topics for officers to report to their superiors, and that each of the required

⁴⁴ This program was formerly characterized (by the City and in previous periodic reports) as "voice alarm drills."

periodic meetings between officers and their superiors must be memorialized by a brief written report (as brief as a one-page checklist confirming that the conversation addressed specific issues and whether problems were noted). Such adjustments are essential to put officers on proper notice of the conditions and conduct that should trigger reports, to encourage proactive oversight and supervision, and to provide the FDNY with useful management information if it later turns out that a situation existed but was not reported. In response to the Monitor's recommendations, the City plans to provide the Monitor with a draft of revised, more detailed instructions for workplace professionalism reporting by the end of this week. The Monitor hopes that the new draft instructions will address some of its concerns.

Regarding the EEO performance metric that the City recently implemented as part of the performance review process, the City has confirmed that the EEO Office contributes information to officer evaluations in some instances when it becomes aware of officer conduct below the standards required by FDNY policy (including failures to report potential violations and negligent supervision of workplaces in which violations occur). But the Monitor has not yet obtained materials from the evaluations to confirm how the process works in practice (for example, how the EEO Office's input is reflected in final evaluations). The Monitor plans to work with the City to obtain relevant documents and information in the near term.

With respect to the climate survey to evaluate EEO climate within the FDNY, the City has advised both the Monitor and the Court that contracting issues may prevent it from moving forward with the vendor recommended by the Monitor; and the previously projected September time frame for administering the survey has passed. The City has also solicited feedback on a draft survey that it prepared and is receiving input from an expert retained by the Department of

Justice. The Monitor has reinforced the need to complete the survey as promptly as possible and is continuing to work with the Parties to resolve logistical impediments and review substance.

Part IV also describes the Monitor's review of the FDNY's EEO investigative function – including topics to be covered in the report on the EEO Office that that Court has directed the Monitor to provide. The Monitor circulated a draft of the report to the Parties for comment on September 25, and it received the Parties' comments on October 5. It plans to finalize the report soon, taking the Parties' comments into consideration.

On related issues concerning investigations, Part IV also discusses the City's response to the Monitor's July 16, 2018 recommendations regarding the FDNY's Statement of Principles, which governs the Department's handling of cases where complainants are removed from their workplaces pending investigations; and it also discusses planned updates and improvements in the Department's EEO case management database.

Finally, Part IV also discusses the Monitor's efforts to confirm whether and how the City conducts analyses of its hiring and employment decisions to identify disparate impact. Following an extended dialogue between the Monitor and the City, on October 5 the City produced a high-level description of the analyses that it conducts and/or plans to conduct to identify disparate impact, along with identification of the responsible City unit. The Monitor and the Parties are currently reviewing the list, and the Monitor plans to follow up to obtain further detail and provide any comments.

Part V reports on efforts to analyze and reduce disparate impact on black and Hispanic candidates in the Medical Exam.⁵

⁵ The Medical Exam is administered by the Bureau of Health Services ("BHS").

With regard to the City's long-running efforts to validate the stairmill component of the Medical Exam, in June of 2018 the City engaged PSI Services LLC ("PSI"), which a few months prior to being formally retained had begun to assist the City with validation of the written examination and the Functional Skills Test ("FST"), to conduct a validation study of its current stairmill test. Together with experts for the other Parties, and with the Monitor's input, PSI has been working actively over the past ninety days to develop an appropriate validation protocol.

Part VI reports on efforts by the Monitor and the Parties to determine whether and how the FDNY's character review process has a disparate impact on black and/or Hispanic candidates, and to develop reforms to reduce any such impact and ensure that screening criteria and procedures are job-related. On September 28, the Monitor circulated two related items to the Parties: (1) a statistical analysis of outcomes from the character review process; and (2) a response to the City's objections to the Monitor's recommendations for changes in the character review process. The Monitor plans to convene a meeting of the Parties within the next several weeks to discuss the statistical analysis and further consider the Monitor's proposed reforms.

Part VII discusses issues related to the analysis of Exam 7001 (the open competitive exam given in September and October 2017) and the survey to be administered to certain Exam 2000 candidates.

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

II. Recruitment and Attrition Mitigation

A. Candidate Processing

1. CPAT Testing and Preparation

As previously reported, candidate scores for the most recent open competitive firefighter examination (Exam 7001) were released in June.⁶ The City anticipates that the Exam 7001 eligible list will be established in February 2019 and that the first Fire Academy class to include candidates from the new list will commence in May 2019.

At the September 13 status conference, in communications with the Monitor and the other Parties, and at a September 25 special purpose meeting focused on the topic of mitigating attrition by Exam 7001 candidates, the City provided updates on the initial steps in candidate processing -- reporting that it has begun processing the initial group of candidates for the CPAT, the first step in candidate screening for candidates called off the eligible list. As reported at the status conference, this group, which consists of candidates with adjusted final average scores of 102 and above (including claimed credits as referenced in footnote six), numbers more than 2,400 candidates, including at least 355 black candidates and 579 Hispanic candidates.

DCAS, which administers the CPAT, offers two optional series of orientation sessions to familiarize candidates with the test – the first between September 26, 2018 and October 6, 2018 and the second between October 9, 2018 and October 13, 2018. (All the orientations sessions are the same, and candidates may take a session in either series, both, or neither.) Following the orientation sessions, candidates are invited to take two “practice” CPAT tests before taking the final test; and a candidate is deemed to have passed the CPAT with a satisfactory performance on

⁶ The published scores include bonus points based on New York City residence and other factors, which are subject to verification, and which may change to the extent that candidates assert new claims for credits to which they are entitled or are found to have asserted claims to which they are not entitled.

either of the two practice tests or on the final test. Practice sessions for the CPAT will be held from October 16 through December 6, and final testing will be conducted from December 7 through December 17.

The FDNY also offers CPAT information sessions and practical training sessions at its facilities on Randall's Island, which candidates may choose to attend on multiple occasions.

On October 11, the City reported the following figures to date for attendance at its CPAT training program:

Black candidates – 371 invited, 248 (67%) RSVP'd, 177 (48% of invited) attended

Hispanic candidates – 593 invited, 381 (64%) RSVP'd, 277 (47% of invited) attended

White candidates – 1,370 invited, 750 (55%) RSVP'd, 564 (41% of invited) attended

Total candidates – 2,466 invited, 1,459 (59%) RSVP'd, 1078 (44% of invited) attended

The City has also provided figures for attendance at CPAT information sessions – which provide a further indication of candidate engagement. As reported to the Monitor on October 1, 68% of black candidates, 63% of Hispanic candidates, and 54% of white candidates had attended either a CPAT information session or a training session.

Because the training and testing process is ongoing, these figures do not provide a complete picture of rates of attendance for the various groups. Candidates who have either failed to respond to invitations or who have not yet attended a training session still have time to do so.⁷ The City will continue to update the Monitor and the other Parties on a bi-weekly basis throughout the training and testing period.

⁷ The fact that response and attendance rates for black and Hispanic candidates match or exceed those for white candidates might be viewed as a favorable early indication of commitment among historically underrepresented groups. But it is not certain that that trend will continue.

2. Residency Credits and Pending Applications

The City and the other Parties have continued their efforts to ensure that all candidates who are eligible for residency credits claim them. As reported at the June 28 status conference, 3,799 of the 46,000 test-takers, including 1,166 black and 1,047 Hispanics test-takers, did not claim the residency credit despite having listed New York City addresses. Monitor's Twenty-Fourth Periodic Report at 10. While this apparent inconsistency may be appropriate in some cases (for example where a candidate had not established City residency in the relevant time frame), it is possible that some applicants who could have claimed the credit did not.

The City has continued outreach efforts to such candidates, and has also provided contact information to the United States and the Vulcan Society to enable them to reach out to potential residency credit claimants and remind those who are eligible that they should claim the credit. The United States and Plaintiffs-Intervenors have prioritized the highest scoring candidates, whose adjusted final scores (combining raw scores and bonus points) would qualify for the first round of intake if they receive the five bonus points the residency credit would provide. As of September 13, the United States reported that of 46 Hispanic candidates contacted, public data indicated that 11 had claimed the credit; the Vulcan Society reported that of 50 black candidates contacted, 25 had claimed the credit. The United States and Vulcan Society have also begun outreach to candidates who may qualify for subsequent rounds of intake. As of October 13, the United States reported that it had contacted a total of approximately 215 Hispanic candidates with then-current adjusted final scores of 92 or more, of which 32 have now received residency credit. The Vulcan Society reported that it had contacted a total of 50 black candidates with then-current adjusted final scores of 95 or more, of which 20 have now received residency credit.

Since the last periodic report, the Parties also concluded their efforts to reach out to candidates with pending applications (applications for which no fee had been paid and no fee

waiver obtained). The deadline for candidates to complete pending applications was August 6, and following the deadline the City has continued to investigate whether certain candidates would be eligible for fee waivers. To the extent that the Parties' efforts are likely to have a material impact on hiring, it appears they have been successful. Although many applications remained pending at the deadline, very few pending applications were outstanding from candidates likely to be called for processing based on their scores. As of the September 13 status conference, the City reported that only 2 black candidates, and no Hispanic candidates, with raw scores of 97 or higher had pending applications.

B. Attrition Mitigation

As the City moves forward with processing for candidates on the Exam 7001 list, which will be active for four years, it is essential for it to demonstrate that it has the strategies, capabilities, and methods needed for it to minimize attrition among black and Hispanic candidates, who may not have friends and family support networks to keep them engaged as a result of past FDNY demographics. As the Court found, candidates in these historically underrepresented groups often must navigate the long, complex, and arduous FDNY hiring process without the benefit of support and advice from friends and family connected to the Department. Most candidates will not be called off the list for years, and the City must take the necessary steps to maintain communications with candidates, sustain their interest in becoming firefighters, and provide them with the resources and information they need to be prepared for the various phases of candidate screening.

1. Training and Outreach to Groups Called for Processing

The most robust component of the City's current attrition mitigation efforts is the array of activities targeting candidates who have just been called off the Exam 7001 list for processing, as the City endeavors to ensure that candidates are notified and fully informed about CPAT testing,

and that they are fully prepared to pass the test. Candidates receive invitations to CPAT orientation, practice sessions, and final test dates by mail from DCAS; and, improving on prior practice, the Fire Department is now adding copies of all mailings sent to candidates to the candidate portal. The FDNY also follows up with reminders by text, email and phone; and it receives updates from DCAS regarding candidates who fail to appear for sessions and engages in follow-up communications with no-shows – encouraging candidates to reschedule where possible and gathering information about the reasons they failed to appear. Beginning with CPAT practice sessions that commence on October 16, FDNY will survey no-shows about the reasons they failed to appear, and reasons will be documented in the FDNY's ARCS database.

CPAT training is an especially important focus for the City's work on attrition mitigation. As the City reported at the September 25 meeting (and to the Monitor in writing on October 1), attendance at training sessions is strongly correlated with success on the CPAT. Based on Exam 2000 data, voluntary attrition rates for men are 60% with no training sessions, 31% with two, and 8% with three. For women, the rates are 88% with no training sessions, 60% with one, and 8% with four. Qualifying rates are also high for those candidates who attend multiple CPAT training sessions: for candidates who attended at least three sessions, qualifying rates were 83% for black candidates, 79% for Hispanic candidates, and 87% for white candidates.

Accordingly, the FDNY has taken a variety of actions to maximize and facilitate attendance at training sessions – reaching out to candidates by text and email to invite them to information sessions, encouraging them to register for training, sending multiple reminders for training sessions, following up with no-shows, and facilitating rescheduling (which candidates

may do by phone).⁸ Communications include information on the importance of training and preparation, highlighting for candidates the correlation of training with historical pass rates.⁹

For candidates in specific demographic groups (including black, Hispanic, and women candidates), additional follow-up is provided by designated recruitment coordinators, who reach out to the candidates, address questions and concerns, and facilitate interactions with the FDNY and DCAS. The coordinators are active firefighters who engage in candidate outreach in addition to their regular duties, generally for one day per week. Plaintiffs-Intervenors have expressed concern that this arrangement does not allow coordinators to devote enough time to their work with candidates or maintain continuity in follow-up communications. In response, the City has expressed a preference to allow the coordinators to continue their work as active firefighters while assisting with candidate outreach. The Monitor will continue to receive reports on the activities and workload of the coordinators as part of its oversight regarding the City's attrition mitigation efforts. If the current arrangement does not permit coordinators to fulfill candidates' needs and requests, it may be necessary for the FDNY to dedicate more of their time to their attrition mitigation activities.

All candidates who have been called off the list are also offered mentors, who provide them with information and support as they go through the hiring process. The City reports that

⁸ As in its communications with CPAT no-shows, the FDNY asks candidates who register but fail to appear for CPAT training sessions why they did not attend. The Monitor had previously expressed a concern that running CPAT training in only one location may limit attendance, and the Monitor had suggested that the City consider offering training at additional sites. Thus far, candidate feedback has not indicated that the location is a substantial factor preventing candidates from attending training sessions. The Monitor will continue to receive updates from the City on factors driving no-shows.

⁹ The United States has raised some concerns about the timeliness with which candidates have been notified about CPAT training, and the Monitor plans to make further inquiries with the City to confirm that invitations are issued in as timely a fashion as possible.

all the candidates called off the eligible list for the first round of processing have enrolled in the mentorship program.

In addition to direct communications, candidates in processing are also given access to the online candidate portal, which will help them track and manage their progress through the steps of the hiring process. The features of the portal include notifications and reminders of appointment and upcoming events; copies of DCAS and ORR correspondence with the candidate; lists of required documents; a progress bar displaying the completed, pending, and upcoming steps in candidate screening; and informational resources such as policies and guidelines. Though undoubtedly candidate friendly, the portal lacks some clearly useful capabilities. For instance, the portal does not provide a single online mechanism for candidates to update personal information such as mailing addresses or phone or email contact information – in such a way that the change is communicated to both DCAS and to the relevant units of the FDNY (*e.g.*, the Candidate Investigation Division (“CID”) and ORR). Instead the portal provides candidates with a form they must print, fill out, and either mail or deliver in person to DCAS. According to the City, DCAS’s current information practices will not permit direct communication of such changes between the portal and DCAS’s database. The Monitor intends to initiate a dialogue with DCAS to explore ways of overcoming this impediment.

Another potentially useful feature that the portal lacks is the ability to schedule and reschedule appointments. Currently the system allows candidates to look up existing appointments but does not provide a mechanism for creating or changing them, which can only be done by calling and receiving a second assigned date (rather than selecting a mutually workable date). Here again, as explained by the City, the difficulty arises in part from the separate identities and roles of the various units involved, and the need to account for complex

scheduling criteria. The Monitor and the Parties have suggested that the City explore ways of using the portal as a central scheduling tool for candidates in processing.¹⁰ And the City is assessing the feasibility of such changes.

2. Attrition Mitigation Plans for Candidates Outside the Current Processing Group

In addition to its activities and initiatives directed to candidates in current processing, the City must also develop and implement plans to communicate more broadly with all candidates who may be called off the list at any point during its four-year term, to maintain their interest, and assist them in preparing for the various components of the screening process. The Monitor has requested that the City provide a detailed communication plan covering the life of the list, including when and how the FDNY will communicate with a candidates likely to be called off the list in each year of its life, and what messages it will deliver at what times. But the City is still developing content and has not provided details of its long term strategy for these candidates. While the City's plans for communications with candidates do include some communications with those who have not yet entered processing, the Monitor has suggested that the City take additional steps to encourage and provide resources for this group of candidates, who represent the overwhelming majority of candidates likely to be called, and who (because of the time that will elapse before they are called) are the most likely to drop out of the process or suffer from inadequate preparation when their time for processing arrives. This group also

¹⁰ On a related point, the Monitor has also suggested that the City examine whether the scheduling of intake appointments by CID can be made more candidate-friendly. Currently, each candidate is notified of an assigned intake date by CID, and if the candidate needs to reschedule, he or she receives a new date issued by CID, without the opportunity to communicate up front about potential scheduling conflicts. Such a process seems likely to result (at least in some cases) in an inefficient back-and-forth series of take-it-or-leave-it scheduling offers. And it would seem more efficient for the City to employ either an online scheduling tool offering available dates, or the same phone-based system it uses to reschedule appointments for the CPAT and CPAT training.

requires innovation, as merely repeating the same messages is likely to become less effective over a period of years.

The City's current plans include periodic contact with all candidates by text and email (tracked and managed by the FDNY's ARCS system); and the FDNY encourages candidates to follow the Department on social media and view content on the JoinFDNY website, which operates as a central, generally accessible source for relevant information and motivational content. The City has begun to develop content including day-in-the-life style videos focusing on black and Hispanic firefighters, and it also plans to develop content conveying the message that the job is "worth the wait" that many candidates will experience before being called off the eligible list. The Monitor has urged the City to expedite the development of additional content and initiatives in these areas.

Another outreach method used by the City is "Mobile Academies," at which candidates (typically up to a few dozen at an event) can experience some of the activities associated with firefighting and interact live with current members of the FDNY. The FDNY plans to focus invitations to its Mobile Academies on candidates in the next "band" of candidates expected to be called off the eligible list, and to proceed in a similar fashion as processing progresses – so that as each band is called for processing, the next band will receive invitations to the Mobile Academies. The City reports that Mobile Academies were held on September 29 and October 8 for candidates with adjusted final averages of 100 to 101, and that they have been attended by 556 candidates -- 389 on September 29, and 167 on October 8. While this initiative appears worthwhile and (at least thus far) effective in reaching a substantial number of candidates, as currently conceived it does not reach any of the thousands of candidates who occupy positions

lower on the eligible list, but who are nevertheless likely to be called for processing before it expires.

To ensure that the City's plans provide sufficiently for the full range of candidates likely to be called for processing off the Exam 7000 list, the Monitor has asked the City to develop and share with the Monitor, by November 2, specific plans for communications and initiatives directed to candidates who are likely to be called off the list in later phases of the hiring process for later Academy classes. Based on consultations with its experts, the Monitor believes it is essential for the FDNY to develop and disseminate messaging specific to such candidates throughout the time they wait to be called for processing. In addition, to the extent possible, the FDNY should endeavor to develop ways in which these candidates can remain actively engaged with the Department and their preparations for becoming firefighters.

Before the last periodic report, the Monitor proposed that the FDNY examine ways of expanding or leveraging the Fitness Awareness Program ("FAP") to reach more candidates. Monitor's Twenty-Fourth Periodic Report at 13. The FAP is currently available only to candidates undergoing processing. The Monitor has proposed that the City develop online content that candidates could use to assess their fitness and level of preparation and formulate training regimens to achieve fitness goals, in addition to the online link to a Physical Preparation Guide on JoinFDNY. At the June 28 status conference, the City reported that it was developing a video based on the FAP to inform candidates about the level of physical fitness required for the job and provide guidance on how to achieve and maintain it. But at the September 25 meeting, the City reported that the video had not yet been completed. This initiative is just one example of the type of steps the FDNY needs to take to engage with the full range of candidates likely to be called off the list.

To supplement the FDNY's efforts to remain connected with candidates, the Vulcan Society has established the first of several closed Facebook group for black candidates on the Exam 7001 list – with the City providing contact information and confirming the accuracy of materials to be posted in the group. Initially, the Vulcan Society has extended Facebook invitations to those candidates who have been called for processing, and it will create additional groups for candidates who are likely to be called for later classes. The Vulcan Society is also exploring other ways to communicate with these candidates, because it has learned that many are not Facebook users.

3. Use of Data About Attrition

As the City formulates and implements its attrition mitigation plans, and as candidate processing moves forward, it is important for the City to analyze available data to identify areas of concern (particular groups or steps in the process associated with high rates of attrition), focus its efforts, and measure their success against historical benchmarks. At this initial stage of processing for the Exam 7001 list, such analyses will be based on data from the Exam 2000 list, along with data on test-takers gathered in the course of the recent recruitment campaign. As Exam 7001 processing continues, the City will be able to evaluate its tactics and targeting, and adjust them for later-processed groups of candidates, based on results for groups processed earlier in the life of the list.

At the September 13 status conference, and in recent discussions among the Monitor and the Parties, including the September 25 attrition mitigation meeting, Plaintiffs-Intervenors raised concerns that the City may not have made sufficiently extensive use of Exam 2000 data to develop strategies and benchmarks for its Exam 7001 attrition mitigation efforts. In particular, the Vulcan Society, citing its own analyses of Exam 2000 data, asserted that even with CPAT training that mitigates attrition for other candidates, black women candidates appeared to suffer

attrition at the CPAT stage of the hiring process at a disproportionate rate (thereby increasing the rate of attrition among black candidates generally) – and it expressed concerns that the City may not have recognized that tendency or taken appropriate steps to address it.¹¹

In order to confirm that the City is making appropriate use of data in developing its plans, the Monitor has asked the City to provide an account of the relevant attrition mitigation analyses it has conducted and a description of the use it has made or intends to make of the results of such analyses. The City plans to provide the requested account, along with its detailed analysis of attrition among Exam 2000 candidates, by October 26.

As previously reported, on June 19, 2018, the City provided the Monitor and the other Parties with an updated report on candidate attrition for candidates on the recently expired eligible lists – entitled *Fire Department of New York City: Metrics to Assess Applicant Attrition From the Hiring Process For Exams 2000, 2500 and 0001*. The report shows the FDNY's calculation of the numbers and percentages of candidates who were eliminated or dropped out at various stages of the FDNY screening process. While this analysis appears to provide much of the essential data that the City would use to evaluate attrition among Exam 2000 candidates, the Monitor has asked the City to provide any additional analyses – such as analyses considering intersectional groups (*e.g.*, black women) or assessing the effect of particular interventions.

In response to Plaintiffs-Intervenors concerns regarding attrition rates among black women candidates, the City notes that black women candidates receive follow-up from both the African-American and the women's recruitment coordinator. The Monitor expects to conduct

¹¹ Specifically with respect to this concern, the City has raised questions about the Vulcan Society's analysis based on the City's own preliminary review, and the Monitor expects that the Parties will be able to investigate the issue more fully when the City has produced its analysis of candidate attrition.

further discussions with the City and with Plaintiffs-Intervenors to attempt to identify and address any particular barriers to success for this and other groups.

C. After-Action Analysis

In addition to its ongoing work on attrition mitigation and the hiring process, the City has also committed to conduct an “after-action” analysis to evaluate the recent Exam 7001 recruitment campaign. Monitor’s Twenty-Second Periodic Report (Dkt. # 1821) at 14. The analysis will assess the content and targeting of recruitment messages, along with the various channels and techniques employed to communicate those messages, cultivate applicants, and convert them into test-takers. *Id.* This data will also help the City to assess the success of particular targeting and techniques in attracting high-scoring black and Hispanic candidates. The analysis is intended to provide the City with the data and insights that will help it improve the content and targeting of future campaigns. The City had originally indicated that it planned to provide a report on its initial analysis in August. Monitor’s Twenty-Fourth Periodic Report at 16. But the City has pushed back that completion date. Most recently, the Monitor has asked the City to produce the report by October 26. In response the City indicated that it now plans to circulate its after action analysis “in late October.” The City states that in the meantime it has been conducting analyses that are visible internally to City personnel but not to the third parties. The Monitor has not been able to gain insight into the nature of such usage, and intends to gain further information about how to accomplish greater transparency to enable the monitoring process.

The Monitor has emphasized that the City’s analyses should include assessments of resources and budgeting. *Id.* In addition, once data becomes available from a planned survey of Exam 2000 candidates, the City’s analysis should also incorporate the data from that survey in evaluating the success of particular tactics in attracting and cultivating successful candidates.

The after-action analysis should also generate actionable, data-driven plans for future recruitment of successful black and Hispanic candidates to the FDNY.

In a separate but related analysis, the Parties will also be reviewing whether the City fulfilled its obligation under the Disparate Treatment Settlement to “use its best efforts to recruit black test-takers for open-competitive firefighter entrance exams in proportions closely approximating the representation of age eligible blacks in the New York City labor market, plus an additional 3% to remedy a history of underrepresentation of blacks in the New York City firefighter ranks.”¹² This issue has been described more fully in previous periodic reports and correspondence with the Court.

D. Assignment Issue

As discussed in detail in the Monitor’s previous periodic report, Plaintiffs-Intervenors have raised issues regarding the City’s compliance with Paragraph 1(d) of the Disparate Treatment Settlement, which requires the City to give “New York City residents who graduate from the Fire Academy first priority for placement into a fire company within the Division in which they live, to the extent reasonable, practicable, and consistent with operational needs”; and the Monitor has undertaken an investigation of Plaintiffs-Intervenor’s concerns. Monitor’s Twenty-Fourth Periodic Report at 18. The Monitor posed its most recent set of follow-up questions to the City on August 8, 2018, and in its most recent request for answers to those

¹² The City and Plaintiffs-Intervenors disagree regarding the level of black representation among test-takers that should serve as the goal for the City’s “best efforts” under the Disparate Treatment Settlement. *See* Monitor’s Twenty-Third Periodic Report at 13. Before the active phase of test-taker recruitment began, the Parties agreed that the target figure for the City’s “best efforts” in recruiting black test-takers should be 28% of all test-takers for the open competitive examination.¹² But in October 2017 – during the examination period – the City advised the Monitor and the Parties that it believed (based on a further examination of demographic data) that the 28% figure was higher than required under the terms of the Disparate Treatment Settlement, and the City has since advised the Court of its position that the 28% was merely an “interim” goal. The Plaintiffs-Intervenors dispute the City’s position. The issue of compliance with the Disparate Treatment Settlement remains to be determined.

questions, it asked the City to respond by the end of this week. The Monitor hopes to resolve follow-up questions on this compliance issue, which has been pending for over a year, by the next periodic report.

Plaintiffs-Intervenors have also raised additional concerns relating to firefighter assignments, including assignments to engine and ladder companies, which Plaintiffs-Intervenors contend demonstrate potential unlawful discrimination or retaliation under the Modified Remedial Order, and are also relevant to the Order's focus on the importance of an effective EEO office within the FDNY. *See* Monitor's Twenty-Fourth Periodic Report at 18-19. The City objected to the Monitor's review of the issue on the basis that it encroached on the City's ability to resolve EEO claims in the first instance. After considering the Parties' positions, the Monitor remanded the issues to the EEO Office, with instructions to report to the Monitor on the outcome of the investigation within 120 days. That period will have expired by the next periodic report, and the Monitor will provide an update after the City provides an account of its investigation and findings.

E. Working Group

The Monitor has continued to oversee the City's work on initiatives undertaken by the Working Group Committee, which was created pursuant to the Disparate Treatment Settlement for the purpose of "creat[ing] educational and other opportunities that will enhance the ability of New York City students to pursue careers as New York City firefighters." Monitor's Twelfth Periodic Report (Dkt. # 1603) at 7-8 (citing Proposed Stipulation and Order (Dkt. # 1291-1) ¶ 1(e)). These initiatives include the implementation of the Fire Cadet title and the continued operation and expansion of the FDNY's Explorer Program. The City's timeline for the rollout of the Fire Cadet program, calling for the first Fire Cadet class to begin in 2021, has been described in detail in previous periodic reports. *See, e.g.,* Monitor's Twenty-Fourth Periodic at 19. Since

the last periodic report, the City has continued work on a web-based application and database that will allow applicants to complete and submit applications online, and track each individual from application through the hiring process.

The City is also continuing efforts to expand the FDNY Explorers Program, which provides training and mentoring at posts associated with City high schools in diverse neighborhoods.¹³ The City advised it selected 18 new post advisors in July 2018 for a total of 52, and it has no plans to add additional post advisors. The program currently has 183 Explorers, and plans to host additional open houses to reach its current capacity of 208.

III. Data Collection and Analysis

In the course of the Monitorship, the City has worked to develop and implement three principal data management systems relating to the FDNY's hiring process: (1) a recruitment database managing data from the Office of Recruitment and Retention's contacts with candidates, from the initial contact with a recruit through the examination, and now including post-exam communications; (2) an end-to-end database tracking candidates' progress through the entire recruitment and hiring processes (which will be the key database for tracking and analyzing candidates' progress through the hiring process for Exam 7001); and (3) a Candidate Tracking Spreadsheet ("CTS"), which is a compilation of available data from each step in the hiring process for candidates who took Exams 2000, 2500, and 0001¹⁴ – created as an interim data collection mechanism pending completion of the other information management systems.

¹³ The Explorers Program has been described in detail in previous periodic reports. *See, e.g.*, Monitor's Nineteenth Periodic Report (Dkt. # 1761) at 17-18.

¹⁴ The eligible list of Exam 2000, for open competitive candidates, expired June 26, 2017; the list for Exam 2500, for promotional candidates, expired on December 19, 2016; and the list for Exam 0001, for priority hire candidates, expired June 19, 2017.

A. Recruitment Database

As described in detail in previous reports, the City's recruitment database, developed by its consultant Vanguard Communications, manages data relating to potential candidates, gathered by the Office of Recruitment and Retention, from the candidates' first contact with the FDNY through the written examination. *See, e.g.*, Monitor's Fifteenth Periodic Report (Dkt. # 1669) at 7-8. The database, known as "ARCS," was used to gather data, provide reports, and manage communications with recruitment contacts before, during, and after the application period for the most recent open competitive exam – maintaining data on recruitment contacts and coordinating communications with applicants regarding exam preparation and logistics. Monitor's Twentieth Periodic Report (Dkt. # 1784) at 21-23; *see also* Monitor's Twenty-First Periodic Report at 20-21.

As it proceeds with further phases of candidate screening for the Exam 7001 eligible list, the FDNY has continued to use ARCS to track and manage its communications with test-takers – keeping track of the texts, emails and phone calls by which it communicates with candidates about the stages of the hiring process, directs them to available resources, and endeavors to maintain their interest in the FDNY. The ARCS system will also be a source of information the City can use to track, evaluate, and enhance its efforts to mitigate candidate attrition. As it maintains a record of the FDNY's communications with candidates, ARCS will enable the City to assess the effectiveness of its communications in maintaining candidates' interest in becoming firefighters and preparing them to navigate the hiring process successfully.

The ARCS system will also be one of the main sources of data for the City's retrospective analysis of its recruitment activities in the recent campaign, which will assess the effectiveness of the City's recruitment strategies with particular groups, in order to improve the reach and refine the targeting of future campaigns. As with other data systems, it now remains

for the City to demonstrate that it is regularly and effectively using ARCS data both for these purposes and, where not redundant of the end-to-end hiring database discussed below or other databases being queried for such analyses, to help ensure compliance with applicable equal opportunity laws.

B. End-to-End Hiring Database

As described in detail in previous reports, the City's end-to-end hiring database, known as the Consolidated Candidate Tracking System ("CCTS") provides access to data from several different department-specific FDNY databases, along with data from external sources, such as DCAS. Monitor's Nineteenth Periodic Report at 21-24; *see also* Monitor's Sixteenth Periodic Report (Dkt. # 1694) at 13-14; Monitor's Twentieth Periodic Report at 23-24; Monitor's Twenty-First Periodic Report (Dkt. # 1803) at 21-22. Data from internal department-level databases automatically populates fields in the CCTS but remains stored in the department-level databases. Data from DCAS, such as candidates' application status and examination results, is imported into the CCTS at specified intervals. As demonstrated by the City on December 19, 2017, the CCTS collates a wide range of data and enables users with appropriate access rights to conduct searches by "field" or similar top-level filters, including candidate status and results from different steps in the hiring process. The CCTS can also display a history of a selected candidate's progress through the screening process. Monitor's Twenty-Second Periodic Report at 19-22; Monitor's Twenty-Third Periodic Report at 18-19.

As the Monitor has previously noted, a fully functional CCTS is essential for the City to demonstrate compliance with the Modified Remedial Order. Monitor's Twenty-Fourth Periodic Report at 22. To comply with the Court's Order, the City must show, among other things, that the FDNY's hiring process has no unlawful disparate impact on black or Hispanic candidates; and it must demonstrate the ability to detect such disparate impact in periodic analyses if it

occurs in future. *See id.* For those purposes, the City must have a data system that retains relevant categories of data in a suitable, searchable form. *Id.*

Based on the City's initial demonstration, although the CCTS will apparently support analyses of numerous categories of data, the City has not yet demonstrated that it can readily enable all the analyses that the City will need to conduct. For example, as previously noted, queries on some categories of data can only be run if administrators set up the query on the "back-end" of the database. Monitor's Twenty-Third Periodic Report at 18-19. And this constraint limits the number of users who can quickly conduct analyses, and the flexibility with which searches can be conducted and reformulated. *Id.* At the December demonstration, the Monitor requested that the City provide a complete data dictionary for the CCTS, so that the Monitor could continue its assessment of the CCTS's capabilities and suggest improvements for how data could be searched, and so that the Monitor and the Parties could work with the City to create standing queries examining the impact of the hiring process on different groups.¹⁵ This was implicated by the City's use of a format when creating the database where queries are linked to pre-set fields, which must be programmed in the "back end." Thus, the Monitor followed up after the December 2017 meeting and reiterated the request for a full data dictionary showing all data fields, the available values for each field in the database, and which fields can be viewed in the current user interfaces. Unfortunately, the City was unable to provide the dictionary on its projected dates, and the Monitor granted numerous extension requests. *See, e.g.,* Monitor's Twenty-Third Periodic Report (Dkt. #1844) at 8 ("Once the City provides the requested information, the Monitor and the Parties will be in a position to work together to develop

¹⁵ The Monitor also plans to discuss the City's plans for enabling internally generated queries and updating queries to reflect changes in the process, database and/or legal requirements as needed over time.

appropriate ways of breaking down the CCTS data and using it to assess potential disparate impact in the various components of the FDNY's hiring process."); Monitor's Twenty-Fourth Periodic Report at 27 ("The need for this data is becoming increasingly pressing given the work that must be done to confirm and refine the FDNY's data management capabilities before processing begins in earnest for candidates on the Exam 7001 eligible list."). The City ultimately produced the data dictionary for the CTSS piecemeal, with partial dictionaries arriving on March 1, 2018, June 15, 2018, and August 24, 2018. The Monitor is reviewing the full data dictionary, which is now complete as of August 24, 2018.

As discussed below in Part IV.D.3, in addition to its request for more information concerning the capabilities of the CCTS, the Monitor also asked the City (in May of this year) to provide an account of the analyses it concurrently conducts and/or plans to conduct to identify areas where policies and practices have an adverse disparate impact on candidates or employees in particular demographic groups. The City provided a list of analyses on October 5, and the Monitor plans to follow up with further inquiries.

C. Candidate Tracking Spreadsheet and Attrition Metrics Report

The CTS is a compilation of data for candidates on the hiring lists produced by Exams 2000, and 2500, as well as Priority Hire candidates, which shows the results from each step in the hiring process for all those candidates. As previously recounted in detail, the last version of the CTS, produced March 2, 2018, remedied a number of gaps, inconsistencies, and ambiguities that limited the usefulness of prior versions. Monitor's Twenty-Fourth Periodic Report at 24-25; Monitor's Twentieth Periodic Report at 24-25; Monitor's Twenty-Third Periodic Report at 20. To the extent that some flaws in the data remained, they appear to be limited and isolated – and in some cases cannot be remedied, given that in some categories of data, for some subsets of candidates, information is simply unavailable or is in paper format that the City has chosen not to

transfer to electronic form (and which in some instances did not capture all fields collected electronically). Accordingly, as the Monitor previously noted, the most recent version of the CTS provides the most nearly complete and accurate account possible (at least from electronic sources) of the hiring process for candidates on the Exam 2000 and 2500 eligible lists.¹⁶

Monitor's Twenty-Fourth Periodic Report at 15.

Although the CCTS is the operative system that the City employs to follow Exam 7001 candidates through the hiring process – and although, accordingly, no further data will be added to the CTS – the CTS remains the principal source of data from the Exam 2000 and 2500 lists. The Monitor and the Parties continue to employ it for retrospective analyses relevant to initiatives and reforms in areas such as candidate attrition and character review.

IV. EEO

A. Overview

The Monitor has continued to work with its experts, the City, and the other Parties regarding the FDNY's compliance with its EEO-related obligations under the Modified Remedial Order. The Monitor has continued to review the implementation of initiatives relating to EEO messaging and training, officer accountability and reporting requirements, and an FDNY workplace climate survey. It has also continued to examine the FDNY's handling of EEO complaints. In that area, the Monitor has substantially completed work on a report pursuant to the Court's November 17, 2017 Order, which directed the Monitor to provide a report on the

¹⁶ As noted in the Monitor's previous periodic reports, even if data for the Exam 2000 hiring list were complete and accurate, some changes in the hiring process are recent and have impacted only a small number of candidates – providing a small sample with insufficient statistical power to produce reliable conclusions; accordingly, it will likely be necessary to observe and analyze the effect of any reforms on the *next* group of open competitive candidates; and the Monitor understands the City intends to do so. *See* Monitor's Twenty-Second Periodic Report at 25; Monitor's Twenty-Third Periodic Report at 21.

FDNY's EEO Office, its staffing and procedures for conducting investigations, and the duration of those investigations. The Monitor circulated a draft of the report to the Parties for comment on September 25, and it received comments from the Parties on October 5.

The Monitor has continued to focus particularly on the role of the uniformed leadership of the FDNY in all aspects of EEO messaging and compliance. Based on advice from its experts and information gathered from meetings with FDNY personnel, the Monitor believes that for the FDNY to achieve the highest possible level of EEO compliance, officers must be personally involved in the delivery of EEO messaging and must engage in day-to-day oversight of EEO compliance and of the interactions among firefighters within their commands. In some instances the Commissioner has taken steps to personally communicate EEO messages – either in video messages to the Department or in meetings with officers. But the Monitor believes broad based efforts involving all levels of operation leadership is needed. Accordingly, the Monitor has urged the City to involve officers, including senior leadership, more consistently in the EEO messaging, and it has continued to follow up with the City on the development and implementation of accountability mechanisms, including the new EEO performance review metric and the Department's system of workplace professionalism reporting.

The Monitor and the Parties held a special purpose meeting on September 27, 2018 regarding the FDNY's EEO function, which included the FDNY's Assistant Commissioner for EEO. The discussion focused on the implementation of new initiatives, (including the administration of the EEO climate survey, the implementation of EEO performance reviews, and workplace professionalism reporting) and on continuing initiatives in areas such as EEO messaging and training.

B. EEO Staffing

Shortly before the last periodic report, on June 26, 2018, the City provided the Monitor and the other Parties with an updated summary of EEO staffing – including recently added positions. As previously reported, once it is fully staffed, the EEO Office will include 16 attorneys (including the Assistant Commissioner, two Deputy Directors, Investigative Attorneys and contract attorneys) and six non-attorney staff.

The current positions include

- The Assistant Commissioner
- Two Deputy Directors
- Eight Investigations Attorneys
- Four intake/second seat contract attorneys
- One training attorney
- Two disability rights coordinators

The City has continued to update the Monitor on the hiring process for the newly created positions. As most recently reported by the City, all the new positions except for one of the Deputy Director posts have been filled (although two attorney candidates are still being processed for hiring). Importantly, the added posts include attorney investigators, who have primary responsibility for conducting investigations. The additions to the investigative staff are expected to decrease caseloads and may help reduce the duration of EEO investigations. The Monitor will continue to assess the FDNY's handling of EEO cases to determine whether further additions are warranted.

C. Policies and Messaging

The Monitor has continued to work with the City on its implementation of messaging plans that the City first shared with the Monitor and the other Parties, in response to recommendations by the Monitor, on March 10, 2018. Monitor's Twenty-Third Periodic Report at 24. The City's plans included "voice alarm drills" at roll call (in which firefighters would be shown videos of senior leadership presenting EEO messages), the distribution of web-based and multi-media messaging, online refresher EEO training, and additional messaging through conventional channels such as posters and newsletters. *Id.*; Monitor's Twenty-Fourth Periodic Report at 28.

Based on materials provided to the Monitor thus far, although there has been some progress on the new messaging and training initiatives in the intervening months, much remains to be done. The first of the FDNY's voice alarm drill videos, which it now calls "voice announcement messages," was rolled out at the end of September, and the Department circulated the video to the Monitor and the other Parties on September 13. The video contains a message from the Commissioner about the importance of diversity in the Department. The concept of "voice alarm" messaging arose from separate meetings that the Monitor conducted with FDNY personnel and members of the Vulcan Society to discuss existing messaging mechanisms within the FDNY on topics other than EEO. As the Monitor understood the concept, "voice alarms" are typically mandatory trainings to reinforce or emphasize important FDNY information on a variety of topics, and are more typically conducted live, rather than by video as will be the case for the "voice announcement messages." As implemented, the "voice announcement messages" represent a worthwhile addition to the FDNY's messaging, but for such messaging to be effective, the City must follow up with additional communications on similar topics. The Monitor's experts have noted the importance of frequent, varied EEO communications in

ensuring that messaging has the desired impact on employees. The Monitor has recommended that the City develop additional videos conveying the Department's commitment to diversity, inclusion, and EEO compliance, and the City has confirmed that it plans to do so. The City has also circulated two new EEO posters to the Monitor and the other Parties, one on August 23 and the second on October 8, 2018. These are generally directed toward the concept of diversity for all roles within the FDNY, including civilian employees, and do not focus solely on firehouse personnel. The City also reports that it has developed a poster with a QR code that allows employees to link to the stories of employees featured in the poster.

While the launch of voice announcement messaging and the new posters are positive steps, the City has not yet made substantial progress in other aspects of its plans or in responding to the Monitor's recommendations. Most notably, as the Monitor has frequently emphasized, in order to convey its commitment to EEO compliance effectively, the FDNY must include live visits by senior management to firehouses in its program of EEO messaging. *See, e.g.*, Monitor's Twenty-Fourth Periodic Report at 28. Such visits could potentially be combined with firehouse visits that senior officers make in the ordinary course of operations. The Monitor has also repeatedly urged the City to include in its online training features (such as online quizzes) that will allow it to confirm that messages have been effectively delivered, and the City has previously indicated that it intends to verify attendance in connection with its online EEO messaging and training. *Id.*; Monitor's Twenty-Third Periodic Report at 24. But based on the City's reports at the September 27 meeting, it has not made substantial progress in either of those areas.

Addressing the issue of live messaging by Department leadership, the City noted that the Chief Diversity and Inclusion Officer delivers EEO messages in firehouse visits. But although

those visits may be worthwhile, the CDIO plainly cannot single-handedly conduct enough such visits to provide meaningful reinforcement for EEO messaging at the firehouse level. Moreover, the CDIO is not a uniformed officer, and the Monitor and its experts believe it is critical for uniformed leadership to personally communicate to firefighters that EEO compliance is a priority for the Department's operational command. The City reports that as of October 8, 2018, the CDIO is supported by a Fire Officer during visits. This approach is a positive development, but it does not address the need for more extensive participation by officers in delivering messages to the firefighters they supervise.

The City also noted that EEO counselors, some of whom are officers, can also communicate EEO messages in firehouse visits. But while the contribution of the counselors is likely to be helpful, this also is not a substitute for messaging delivered by uniformed officers to firefighters within their commands: with only 20 officer counselors to cover more than 200 firehouses, their ability to reach all the Department's workplaces with sufficient frequency is questionable; in addition, although the officers among the EEO counselors by definition hold leadership positions, the messages they deliver to firefighters outside their own commands are likely to carry less weight than the same messages would if delivered by operational commanders to those under their supervision.

The FDNY also has not apparently followed through on plans to develop online EEO refresher training incorporating mechanisms for verifying attendance and comprehension. At the September 27 meeting, the City reported that it had developed a new video on sexual harassment, but no new materials on EEO topics relating to race, ethnicity, or retaliation; and although it reported that participation in video training would be tracked in firehouse records with a "mark in the book," it does not appear to have instituted any online mechanism for

verifying attendance. The City indicated that it plans to update its system for the delivery of online training. The Monitor expects the City to comply with its recommendation that the City include such a verification tool in its updated system.

The Monitor and the Parties have also continued to consider ways to improve the FDNY's internal and external messaging relating to incidents of alleged harassment, discrimination, and hazing. The Monitor and its experts have noted the importance of such messaging as a way of communicating the Department's commitment to EEO compliance and, crucially, as a way of restoring and maintaining employees' confidence in the FDNY's ability and determination to investigate and discipline EEO violations. Monitor's Twenty-Fourth Periodic Report at 25. At the September 27 meeting, the Parties and the Monitor discussed ways the City could engage in more extensive communications around particular incidents without violating the confidentiality of investigations and without appearing to pre-judge their outcomes. As the Monitor has previously observed, and as the Court has noted, the FDNY may, in many instances, be able to issue statements reinforcing existing policy and values without taking a position on the facts of any particular case. Monitor's Twenty-Fourth Periodic Report at 29; September 13, 2018 Status Conference, Tr. at 39-41. In addition, at the September 27 meeting the Monitor and Plaintiffs-Intervenors renewed previous suggestions that the FDNY look for ways to publicize the outcomes of investigations and disciplinary actions, in order to assure members that complaints are taken seriously and investigations pursued vigorously. On previous occasions, the FDNY has published Department notices containing anonymous listings of disciplinary actions taken as a result of EEO complaints. The Monitor suggested that the FDNY examine ways of publicizing such actions more broadly (though still anonymously), and that it consider publicizing the activities of the EEO Office in aggregate – providing members with an

overview of Office's work and sending the message that it is active and responsive in handling complaints and promoting EEO compliance.

The Monitor and the Parties also discussed steps that the EEO Office could take to deliver targeted messaging, provide supplementary training, and/or increase oversight (in the form of inspections or other enhanced reporting requirements) in firehouses where EEO complaints arise. In this area also, the Monitor has suggested that the FDNY develop appropriate forms of interim action that will allow it to address potential problems without compromising the confidentiality of complaints and investigations.

Finally, since the last periodic report, the City has provided further updates on the rollout and expansion of its EEO counselor program, described in detail in previous reports. *See, e.g.*, Monitor's Twenty-Fourth Periodic Report at 29. The City reports that the posting of additional counselor positions (originally scheduled for July and August) was delayed while the EEO Office focused on hiring for Investigator and Deputy Director positions. The City now plans to post the counselor positions next week, with training expected in December or January.

D. Compliance and Accountability

1. Increased Accountability within the Chain of Command

a) *"Workplace Professionalism" Reporting*

Since the last periodic report, the Monitor has continued to engage with the City on changes the Monitor recommended in the FDNY's system for reporting certain information up the chain of command. The FDNY's "Professional Workplace Policy," and an associated reporting system, were established by a Department Order dated July 12, 2017, which requires officers to meet with their superiors to discuss conduct and issues affecting workplace professionalism – including but not limited to potential violations of EEO and anti-hazing policies. Monitor's Twenty-Second Periodic Report at 34; *see also* City Letter to Court dated

January 19, 2018 (Dkt. # 1828) (listing “anti-hazing, bullying, and other important initiatives implicating workplace professionalism” as intended topics of discussion).

The Monitor has recommended that the City give officers more detailed instructions and use a reporting form – as simple as a one-page checklist – to ensure that the reports reach essential issues and provide sufficient accountability. Monitor’s Twenty-Fourth Periodic Report at 30. The current system requires written reports only when issues are identified, and it does not call for reports at all levels of command; it also provides officers only with limited, general guidance describing the issues that may be reportable. Monitor’s Twenty-Fourth Periodic Report at 28. The City initially declined to implement the Monitor’s proposals, contending that its current system of reporting within the chain of command, combined with EEO mandatory reporting requirements, is sufficient to identify and record EEO related issues in the workplace and that it wanted to avoid confusion with mandatory EEO reporting. *Id.* at 29. But at the September 27 meeting, the City advised the Monitor that the FDNY was working on a set of more detailed instructions for chain of command reports, which may address at least some aspects of the Monitor’s recommendations. The City has committed to providing the Monitor with a draft of the instructions by the end of this week. The Monitor will also continue to work with the City to determine how it will implement the Monitor’s recommendation for written reports accompanying all the required conferences.

Based on consultations with its experts, the Monitor believes that its proposed reforms, calling on all officers to affirmatively evaluate and certify the state of the workplace climate under their commands, would help ensure that all officers take the necessary steps to remain informed and aware of conduct and conditions affecting the EEO environment. Such requirements will also encourage consistent, proactive oversight of EEO issues in a way that the

EEO mandatory reporting requirement (which applies only if an officer becomes aware of a potential violation) may not. In addition, specific instructions are likely to help ensure that officers operate under no misapprehension (and cannot claim to operate under any misapprehension) about the nature of the issues they are required to report. As the Court noted at the September 13 status conference, an obligation to check off issues on a formal report to which they must sign their names is likely to prompt officers to report issues they might otherwise dismiss too readily as insufficiently important. September 13, 2018 Status Conference, Tr. at 27-28.

The Monitor has also continued to pursue its request that the City produce any written reports generated by the current reporting process to date that refer to EEO and hazing issues, and its request to meet with relevant personnel to gather information on the practical operation of the reporting process. The City has previously opposed those requests, which were first made several months ago, and stated that the Monitor did not need the review because the City does not plan to rely on its workplace professionalism reporting as a component of its compliance with the Modified Remedial Order. *See* Monitor's Twenty-Fourth Periodic Report at 32. But as the Monitor has previously noted, whether or not the City relies on the reporting system to demonstrate compliance with the Modified Remedial Order, the system as designed should, and presumably will, generate reports relevant to EEO issues, which are indisputably within the Monitor's purview. *Id.* The City has now indicated that it will comply with its obligation to produce materials relating to complaints or issues concerning EEO, and it advises the Monitor that it has undertaken a review to identify such materials (if any) in the workplace professionalism reports.

b) Performance Evaluations

Since the last periodic report, the Monitor and the Parties have continued to discuss the FDNY's implementation of an EEO metric in officer performance reviews. The metric was first introduced for Lieutenants' reviews in February, and it is now also a component of performance reviews for Captains. Monitor's Twenty-Fourth Periodic Report at 32; Monitor's Twenty-Third Periodic Report at 29. In a September 18 email responding to a series of questions from the United States, and in the September 27 meeting, the City has provided additional details on the role of the EEO Office in the evaluation process. As reported by the City, the EEO Office contributes written reports to EEO evaluators when an officer's conduct has been brought to its attention and has fallen below the expectations set forth in FDNY EEO Policy. At the September 27 meeting, the City indicated that, in addition to actual EEO violations, such conduct would include failures to report violations or potential violations, failures to cooperate with the EEO Office, or negligent oversight and supervision of firefighters within an officer's command. The City also confirmed that in assembling information to contribute to performance reviews, the EEO Office utilizes the EEO database (discussed below) to identify connections between officers and EEO complaints and violations.

Following up on the City's responses to the United States and the information obtained at the September 27 meeting, the Monitor will now follow through on plans to obtain and review materials from the performance reviews to further confirm that the reviews are effectively accounting for EEO issues and that the EEO Office is involved in the process.

2. Climate Survey

The Monitor has continued to work with the City on plans for a workplace climate survey – which the Monitor, the City, and the other Parties have all acknowledged is an essential tool in evaluating the FDNY's EEO climate and identifying concerns that need to be addressed. *See,*

e.g., City of New York’s EEO Report (Dkt. # 1167) at 61 (July 2013) (stating that “[t]he FDNY will administer a command climate survey at every firehouse at regular intervals. [The c]limate survey will identify whether there are EEO, diversity, and inclusiveness issues or concerns that should be addressed.”). In the fall of 2016, after raising the issue during meetings with senior City personnel, the Monitor sent the City a draft form of survey prepared by the Monitor’s expert to help expedite the process, and asked the City to provide an update on its plans. In September 2017, after further urging by the Monitor, the City advised that it wanted to conduct only a “pilot” survey that would be limited in scope and would be administered only to recent hires. The Monitor continued to urge the FDNY to conduct an assessment of the full FDNY work force climate. *See* Monitor’s Twenty-First Periodic Report at 10; Monitor’s Twenty-Second Periodic Report at 12.

In the Monitor’s April 2018 Periodic Report, the Monitor reported that the City had agreed to conduct a full survey, and was proceeding to engage one of two vendors recommended by the Monitor. *See* Monitor’s Twenty-Third Periodic Report at 33. The City projected that the survey would be completed in September 2018. *Id.*

As of the last periodic report, the City had circulated a draft survey, and the Monitor had scheduled a meeting with all Parties for July 19 to discuss the draft and comments by the Monitor, the United States, and Plaintiffs-Intervenors. The City had agreed to work with the Monitor’s recommended vendor in February of this year, and it had projected that the survey would be administered in September. But for several reasons, the work remains to be completed.

An impediment to progress on the survey is the City’s inability to finalize an agreement with the vendor to develop the survey, administer it, and analyze its results. At the September 13 status conference, the City reported that contracting issues have prevented it from engaging the

vendor thus far. At the September 27 meeting, the City advised the Monitor and the other Parties that it was exploring whether a City agency outside the FDNY (such as DCAS or the Mayor's office) could administer and analyze the survey, which would reduce the vendor's involvement. But it remains to be determined whether the City has the necessary topic-specific expertise in house. In addition, any plan for a City agency (even one external to the FDNY) to run the survey and host the data it produces may raise concerns about the anonymity and confidentiality of responses. The Monitor has asked the City to report on its inquiries by October 18.

Another cause of delay has been that thus far, the City has preferred to create its own form of survey. The fact that the survey will not have been previously administered means that there is no ready point of reference or reliability for the individual questions (in some instances individually, or in other instances in the surrounding question context), or for the test instrument as a whole (*e.g.*, to ensure internal consistency among answers, proper weighting, *etc.*). It also will likely increase the need for customized programming to process responses.

As the City reported at the September 13 status conference, the Parties and the Monitor have continued to work on the substance of the survey during the delay caused by the City's contracting issues. The Department of Justice has retained a survey expert, whom the City indicated it viewed as providing helpful input, and the Monitor's experts also have provided feedback on the City's efforts. The Monitor encourages the City to continue to work on these substantive issues at the same time as it endeavors to overcome the practical obstacles delaying the survey.

3. Disparate Impact Analyses

One of the core responsibilities of the FDNY's EEO Office is the analysis of hiring practices and other employment actions to identify instances of potentially unlawful disparate impact. Accordingly, before the last periodic report, the Monitor asked the City to provide an

account of the data analyses it conducts or plans to conduct regularly to identify patterns that may indicate potential discrimination, both in the hiring process and in other employment actions affecting the terms and conditions of employment for firefighters.

The City provided an initial response to the Monitor's request in a September 7, 2018 letter to the Monitor and the other Parties, offering a general description of its intentions to conduct disparate impact analyses of the hiring process and FDNY employment decisions. But the City's response did not provide the detailed account the Monitor had requested. The Monitor renewed the request, calling for a list of the analyses the City currently conducts and plans to conduct – including the steps in the hiring process and decisions affecting terms of employment (e.g., promotions and assignments) that the City analyzes or plans to analyze; how often the analyses will be conducted; and who will be responsible for them. On October 5, the City provided a summary account of its analyses at a high level. The Monitor and the other Parties are currently reviewing the City's most recent disclosure and developing follow-up inquiries.

E. Investigations

1. The Monitor's Report on FDNY EEO Investigations

The Monitor has completed a draft of its report, pursuant to the Court's November 17, 2017 Order, regarding the EEO Office, its staffing, its investigative procedures, and its performance in the completion of EEO investigations – with a particular focus on the duration of investigations as measured against presumptive 90-day time limit for investigations set forth in the City's EEO guidelines and the FDNY's own EEO Policy.¹⁷ FDNY EEO investigations

¹⁷ In relevant part, the Court's Order stated as follows:

The court monitor is respectfully DIRECTED to provide the court with a report on the New York City Fire Department's Equal Employment Opportunity ("EEO") Office. This report should address, in particular, (1) how the EEO Office investigates and resolves complaints; (2) how the staffing of the office has changed over time; and (3) the speed with which the office investigates and resolves complaints.

frequently take more than 90 days, or even 180 days, to complete. Monitor's Twenty-Fourth Periodic Report at 35. And the protracted investigations can impose hardships on both complainants and respondents, especially where they are removed from regular duties pending investigations, and deter potential complainants from coming forward with reports of violations.

The Monitor circulated the draft report to the Parties for comment on September 25, and the Parties responded with their comments on October 5. The Monitor is currently considering the Parties' observations and suggestions and plans to file a final report shortly. In addition to the topics specified in the Court's November 17, 2017 Order, the report will include a discussion of data produced by the City, in response to the Court's direction at the March 13, 2018 status conference, showing the rate at which complainants and respondents in EEO investigations have been reassigned to desk duty, and the duration of those assignments.

2. Compliance with the Statement of Principles on Complainant Assignments

In March 2018, the City and the Vulcan Society exchanged correspondence over a dispute regarding the City's compliance with its Statement of Principles governing the detailing or reassignment of complainants in EEO investigations.¹⁸ See Monitor's Twenty-Third Periodic

¹⁸ The Statement of Principles was developed as part of the process overseen by the Monitor to implement a new FDNY EEO Policy and a new FDNY EEO Investigative Manual. It was circulated as Supp. No. 24 to Dept. Order No. 31 on April 6, 2017. See http://www.nyc.gov/html/fdny/insider/resources/do/2017/031_sup_24_2017.pdf.

It reads in relevant part:

There may be instances where a member who has made an EEO complaint requests and is granted a transfer or detail, or where operational needs of the Department dictate that the member must be detailed or transferred to another work location. In such cases, while the Department retains the ultimate authority to determine whether and where a member should be detailed or transferred, if operational needs permit, the Department will consult with the member to be detailed or transferred and consider their concerns and preferences along with the proposed work location's history of EEO and workplace violence complaints.

Report at 22. The Statement of Principles provides that “while the Department retains the ultimate authority to determine whether and where a member should be detailed or transferred, if operational needs permit, the Department will consult with the member to be detailed or transferred and consider their concerns and preferences along with the proposed work location's history of EEO and workplace violence complaints.”

On July 16, 2018 the Monitor recommended that the City implement a set of procedures to record that, as the Policy states, it had “consult[ed] with the member to be detailed or transferred” and “consider[ed]” his or her “concerns and preferences along with the proposed work location’s history of EEO and workplace violence complaints.” Further, since the Policy applies only where “operational needs permit,” the Monitor recommended that – if the FDNY determined that this qualification applied to a particular situation – the it should record that this was the case, and what the operational needs were. The City responded that it accepts the recommendation to elicit complainants’ views before offering placements (where operationally feasible), but objects to the other recommendations for reasons including the City’ view that it has superior information about placements as compared to complainants, and that record keeping about operational needs would either create a burden of proof or – according to the City – require the City to accommodate the complainant regardless of any operational needs. In this area as with other areas of the Monitorship, the Monitor urges the City to keep records of personnel decisions, both to facilitate review of compliance and to create an objective record of developments over time that will enable informed decision making. The Monitor intends to work with the City to attempt to understand the basis for its objection to keeping records related to the Statement of Principles.

3. EEO Database

Following up on the FDNY's April 12, 2018 demonstration of its EEO case management database, the Monitor recommended that the City add a number of features to its EEO case management database and improve the ways in which it is used to manage investigations. *See* Monitor's Twenty-Fourth Periodic Report at 36-37. The database records the steps taken in each EEO matter, the nature of complaints, and identifying information for relevant personnel; and it enables supervisors to track the progress and duration of investigations, and to identify patterns of violations and allegations. *See id.* The database also includes an activity log where investigators manually record events in an investigation (for example, correspondence with complainants, witness interviews, and the preparation of investigative findings). Among other suggestions, the Monitor has recommended that the FDNY integrate each case's activity log more closely with the mandatory investigative plan and use the log as an active planning tool with a presumptive timeline for each case incorporating deadlines based on the EEO Policy and applicable law. *See id.* The Monitor also recommended that the City minimize the use of text entries, to enable identification of recurring information via the use of data fields and to eliminate the need to perform an individualized search of EEO files or text to see if patterns of conduct appear.

At the September 27 meeting, the City reported that it was in the process of implementing a number of the suggestions offered by the Monitor and the other Parties, including suggestions relating to the use of the case management database as a scheduling tool. The City projects that version 2.0 of the database, incorporating those changes, will be launched in December of 2018. The City has also indicated the some changes, such as additional data fields showing reasons for administrative closures, have already been implemented.

4. Review of Investigations

Since the last periodic report, the Monitor has received intake documents for selected EEO complaints. The Monitor also received one draft memorandum on October 11, 2018, detailing investigators' findings and conclusions, on which the Monitor will shortly provide feedback.¹⁹

As previously reported, in a June 6, 2017 set of recommendations, the Monitor identified a number of deficiencies in the FDNY's EEO investigative practices, based on an historical review of complete investigative files. Twenty-Second Periodic Report at 32-33. At different times during the Monitorship, the City has also provided the Monitor with draft closing memoranda, in some cases together with investigators' notes from interviews with witnesses and, in some instances, documentary evidence (the City has not represented that it provides the complete file or record of investigative steps for every case). As previously noted, the Monitor's comments and suggestions on draft memoranda are intended to ensure that the EEO Office adhere consistently to investigative best practices and to provide guidance on investigative methods; the Monitor does not dictate results in particular cases or require the City to obtain Monitor approval before issuing findings. *See* Monitor's Twenty-Third Periodic Report at 31. In some instances, the City has conducted additional investigation based on comments made by the Monitor.

In response to requests from the Monitor and the other Parties, the City has also circulated a comprehensive list of EEO matters showing intake dates, case numbers, dispositions,

¹⁹ While the Monitor and City have discussed selected EEO investigations in greater depth at the other Parties' request, with the City providing ongoing updates as investigations proceeded, the Monitor has not had such discussions during the period covered in this Report.

dates of dispositions, numbers of witness interviews, and the date of the first interview in each matter. This information provides a high-level perspective on the average length of cases.

The Monitor is also preparing to interview a selection of complainants regarding their experiences with the EEO Office. Monitor's Twenty-Fourth Periodic Report at 37. The Monitor has identified an initial list of complainants that it wishes to interview, and the City has provided contact information for those complainants.

V. Medical Exam-Related Issues

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

A. Validation of the Stairmill Test

The Monitor, in consultation with its experts, Manitou, Inc., has continued to work with the City to address longstanding concerns, expressed by Plaintiffs-Intervenors and the United States, that the stairmill portion of the Medical Exam has a disparate impact on black and Hispanic candidates. Both the Monitor's analyses of NOFDs produced by the City and the City's BHS Attrition Metrics Report indicate that this concern is supported by the data. *See* Monitor's Twenty-Second Periodic Report at 42.

In February 2017, the City reported its intention to engage PSI, which assisted the City in developing the written examination, to assist the City in validating the existing stairmill exam, or otherwise identifying a validated screen. *See* Monitor's Nineteenth Periodic Report at 6. In

March 2018, PSI circulated a high-level proposal to the other Parties, as well as the Monitor. *See* Monitor's Twenty-Fourth Periodic Report at 45. In May 2018, at the request of the Department of Justice, the City agreed to permit experts for the United States and Plaintiffs-Intervenors to participate in stairmill validation discussions between PSI, BHS, and the Monitor's expert, Dr. Denise Smith.²⁰ PSI has also retained an exercise physiologist to assist with the validation, who became increasingly active after March 2018. The expert discussions have focused on identifying the purpose of the stairmill test (*i.e.*, what characteristic(s) specifically it should be designed to test for, and what may be extraneous to this specific test); developing a protocol to determine the necessary levels or amounts of the desired characteristic(s); and verifying that the stairmill test effectively measures whether the candidate possesses the necessary characteristic(s).

Based on assurances from the City, the Monitor reported in numerous periodic reports that the City would complete the validation study by April 30, 2018. *See* Monitor's Twentieth Periodic Report at 34; Monitor's Twenty-First Periodic Report at 36; Monitor's Twenty-Second Periodic Report at 9, 45. The Monitor then reported that the City could no longer meet that deadline but would complete the study well before Exam 7001 candidates begin medical testing at BHS. Monitor's Twenty-Third Periodic Report at 37-38. The Monitor expressed that the prospect of a second examination list being processed without a validated stairmill protocol was not acceptable and that the City must make every possible effort to complete the validation as soon as possible. *See* Monitor's Twenty-Fourth Periodic Report at 43

²⁰ As noted in earlier periodic reports, Plaintiffs-Intervenors and the United States reserved their right to raise objections to the validation study. *See, e.g.*, Monitor's Twentieth Periodic Report at 33.) In the interest of avoiding disputes and delay after validation, the City agreed to allow the other Parties to be heard before PSI conducts the validation study.

Unfortunately, the interval between March 2018 – when the City first circulated a high-level proposal to the other Parties – and September 2018 was simply not enough time to permit meaningful discussion of what is, by its nature, a technical endeavor with many decision points. The City has more recently stated that, due to equipment purchase and personnel needs, it is possible that stairmill testing will begin before the validation is complete; but it has offered that if the stairmill protocol that is validated differs materially from the stairmill protocol currently in use, the City will permit candidates who are disqualified by the current stairmill protocol to retake the stairmill test, using the validated protocol.²¹ Although this is not a desirable eventuality, the Monitor will work with the City and other Parties to ensure that the validated protocol, if different from the current protocol, is put in place as expeditiously as possible, and that no candidate is disqualified by a stairmill protocol that has not been validated.

B. City’s Proposed 120-Day Limit on Medical Testing

For Exam 7501 promotional candidates, the City implemented a requirement that all medical testing be completed in 120 days, disqualifying any candidate who exceeded that time limit. In early 2017, the City asked for the Monitor’s approval to apply such a limit to Exam 7001 candidates. The Monitor asked the City to provide data and an adverse impact analysis showing what the impact of such a limit would have been had it been applied to Exam 2000 open competitive candidates.

On May 18, 2018, the City sent the Monitor and other Parties an email setting out the City’s rationale for setting a time limit, which was its belief that the limit would benefit minorities by permitting the City to “process candidates farther down the list more rapidly.” The

²¹ The specific criteria under which candidates will have the opportunity to retest remain to be determined.

City cited data from Exam 7501 as supportive of the proposed change, although the City noted that there were differences between the two groups.

The Plaintiffs-Intervenors and the United States submitted letters with lists of concerns and questions on June 4 and 7, 2018, respectively. These concerns included the following:

- the City based its proposal on the experience of Exam 7501 promotional candidates, rather than on Exam 2000 open competitive candidates, despite the likely significant differences between the EMT and open competitive populations;
- the City excluded from its charts candidates who (a) had taken more than a year in processing, (b) were reconsidered for either the Medical Exam or the PRB; and/or (c) appealed. By excluding these groups, the other Parties noted that the City excluded the very candidates who were likely to have taken the most time in the medical process and would thus have been those most harmed by the proposed 120-day rule and noted as well that the exclusions disproportionately excluded black and Hispanic candidates; and
- the City used the categories “white” and “non-white,” instead of breaking out the data for black and Hispanic candidates.

The letters from the other Parties also questioned the City’s explanation of the asserted benefit the 120-day deadline would provide to minority candidates (that more people on the list would be reached as a result of the 120-day deadline) as it appeared that this result would be achieved only if the deadline rendered disqualified some people who were actually medically qualified. As reported by the Monitor on July 17, the City stated that it would alter the proposal so that the 120-day deadline would be used “to spur candidates to move quickly but would not be used as a basis for disqualifying candidates.” Monitor’s Twenty-Fourth Periodic Report at 44.

On August 24, the City circulated an email with additional detail for its proposal. The August 24 email stated that candidates would receive frequent notices and reminders about the deadline and the existing BHS process should they wish to appeal, which the City posited would minimize any adverse impact of the cutoff. According to the August 24 email, candidates would still be disqualified at the 120-day mark, even if they had not been found medically disqualified.

On September 10, the Monitor – having considered the May 18 proposal, as modified by the August 24 email – circulated a memo denying the City’s request to impose the limit. Because the City had not supplied an adverse impact analysis for Exam 2000 as the Monitor had requested, which was highly relevant to the Monitor’s decision whether or not to approve the proposed change, the Monitor asked its expert, Manitou, to help the Monitor conduct such an analysis using data from the CTS and the Electronic Medical Record database.²² The Monitor’s analysis, described in detail in the September 10 memo, showed the following: the 120-day limit, had it been enforced during Exam 2000 medical processing, would have had a significant adverse impact against black and Hispanic candidates; the majority of black and Hispanic Exam 2000 candidates (65.31% and 66.0%, respectively) who spent more than 120 days in BHS processing did eventually pass the Medical Exam; and the medical disqualification appeals process may benefit white candidates more than black and Hispanic candidates. The Monitor therefore found that an unacceptably high number and disparate percentage of high-scoring, medically-qualified black and Hispanic firefighter candidates – approximately two-thirds of whom are actually medically qualified – would likely be disqualified from the hiring process and denied the opportunity to become firefighters if the City’s proposed 120-day limit were implemented, and that this would unnecessarily undermine attrition mitigation efforts.

On September 25, the City responded to the Monitor’s decision with an email stating that, while it agreed that application of the limit as described only in the May 18 email would result in adverse impact if hypothetically applied for Exam 2000, the Monitor had not adequately

²² As explained to the City, the Monitor also hoped that the Monitor’s version of the analysis would provide guidance for the conduct of appropriate data-driven analyses of the likely impact of any changes the City might consider in the future. The City’s May 18 email simply cited data points – *e.g.*, 93% of white and 85% of non-white candidates completed the Medical Exam within 120 days – without conducting the statistical analyses by race/ethnicity that would show whether those percentages were indicative of adverse impact.

considered whether the notice and reminders outlined in its August 24 email would mitigate such impact. The Monitor responded on October 10, 2018, stating that the same analysis applied and that the Monitor cannot approve a change to the hiring process for open competitive candidates that is not supported by data and a careful analysis of projected impact.

C. Mask Fit Test

Before the Monitor's last periodic report, Plaintiffs-Intervenors had raised concerns regarding the City's decision, reflected in a May 24, 2018 Department Order, to withdraw an accommodation previously extended to specific members who stated that, for religious or medical reasons, they could not comply with the requirement that members not have facial hair that comes between the face and the sealing surface of a respirator mask. Monitor's Twenty-Fourth Periodic Report at 44. The Department's decision could mean that some candidates who may have been able to take and pass the Mask Fit Test (a component of Medical Exam) may now be unable to do so.

Plaintiffs-Intervenors contended that the FDNY's decision constitutes a change in the hiring process for firefighter candidates (and therefore must be approved by the Monitor), and they object that the withdrawal of the accommodation will have a disparate impact on black firefighters and firefighter candidates. *See id.* The City explained its decision as based on a review of relevant OSHA regulations and consultations with the manufacturer of its respirator systems, and on its conclusion that the accommodation presents unacceptable safety risks. *Id.*

Since Plaintiffs-Intervenors raised the issue, individual plaintiffs have brought two lawsuits in this District challenging the City's decision to withdraw the accommodations, including one such suit before this Court. *Hamilton v. City of New York*, 1:18-cv-04657-NGG-JO (E.D.N.Y.). The Monitor has advised the Parties that it plans to await further progress in the litigation before addressing the issue and is awaiting comments from the Parties on that plan.

D. Psychological Exam

On September 24, 2018, the City informed the Monitor and the Parties that it had revised the protocol for the psychological exam for Exam 7501 promotional candidates and asked for the Monitor's approval to use the revised protocol when it processes Exam 7001 open competitive candidates. The City's revised protocol would consist of two changes: (1) the current questionnaire, the Minnesota Multiphasic Personality Inventory ("MMPI"), would be replaced with a shorter, self-administered questionnaire the City refers to as the "SAMH," which it says is "based on six questionnaires that are accepted in the field as screening instruments for certain psychological conditions"; and (2) the questionnaire would be administered on the same day as the Medical Exam, whereas the current protocol requires candidates to return to BHS on a different day.

On October 12, the United States circulated a number of questions and comments about the City's proposed use of the SAMH, noting, among other things, that the current protocol is a validated test that does not appear to cause disparate impact among FDNY candidates, whereas the SAMH has not been validated and appears to be a new test created by the City. The City has responded to some of the United States's questions, and the Monitor is reviewing the Parties' submissions. The Monitor hopes to resolve any issues promptly, but the revised protocol raises complex issues that may take time to address.

VI. Character Screening by the CID and PRB

Since the last periodic report, the Parties and the Monitor, with the assistance of its expert consultants, Manitou, Inc., have continued to analyze the character review portion of the FDNY's hiring process and examine further potential reforms intended to minimize the potential for this component of the process to have an adverse disparate impact on black and Hispanic

candidates. As discussed in detail in previous periodic reports, analyses performed earlier in the Monitorship, before a series of changes in standards and procedures, indicated higher rates of referral to the PRB for minority candidates than for white candidates, and higher rates of disqualification among minority candidates referred to the PRB than for white candidates who had been referred. *See, e.g.*, Monitor's Thirteenth Periodic Report at 20-21. In addition, as discussed below, although definitive conclusions cannot be reached until a larger statistical sample of candidates has gone through the process under the most recently revised rules, an updated analysis by the Monitor indicates that the process, even as revised, may still have an adverse disparate impact on black and Hispanic candidates.

The Monitor has finalized a detailed response to the City's concerns and objections regarding proposed reforms that the Monitor had previously recommended – along with a statistical analysis of the effect of the character review process on relevant demographic groups. Both the response and the statistical analysis were circulated to the Parties on September 28, 2018.

A. Enhancements in the Character Review Process

As previously reported in detail, beginning in 2012, and in consultation with the Monitor and the other Parties, the City issued a series of guidelines for the CID and PRB; the most recent modifications to the guidelines were issued in the summer of 2016. Monitor's Sixteenth Periodic Report at 29-31; Monitor's Seventeenth Periodic Report at 29-30.²³

At a meeting on July 27, 2017, the Monitor provided the City with a detailed set of recommendations for new reforms, developed in consultation with the Monitor's expert, Alison Wilkey. Monitor's Twenty-First Periodic Report at 10. The City responded to the Monitor's

²³ As noted in prior periodic reports, the revisions were agreed upon by the Parties with the understanding that they may be subject to additional changes based on further analysis. Monitor's Seventeenth Periodic Report at 30.

recommendations in writing on October 13, 2017, and the Monitor shared its recommendations and the City's responses with the United States and Plaintiffs-Intervenors on October 27, 2017. Monitor's Twenty-Third Periodic Report at 39.

The Monitor's recommendations, described in detail in the Monitor's previous periodic reports, include revised procedures intended to relieve unnecessary burdens on candidates relating to the compilation and disclosure of criminal histories; revised standards for referral to the PRB intended to eliminate referral triggers that are not job-related; and changes in PRB decision making and record keeping intended to promote consistency and facilitate analysis of PRB outcomes. Monitor's Twenty-Second Periodic Report at 45-48.

The City expressed several concerns regarding the Monitor's recommendations, contending (among other things) that some of its current procedures are required by generally applicable rules for City employment, and that the criteria governing referral to the PRB, and potential disqualification, are job-related. In response to the City's comments and objections, the Monitor and its experts conducted further research and analysis – including further study of policy issues and best practices, and a statistical analysis of the character review process. The Monitor responded to the City on September 10, 2018 – providing (1) its response to the City's various legal, logistical, and policy objections and (2) the results of the Monitor's statistical analyses. Both components of the Monitor's response were also shared with the other Parties, on September 28, 2018.²⁴ The Monitor's response to the City incorporated a discussion of legal

²⁴ As recounted in detail in previous periodic reports, the Monitor's response, in particular the statistical component, was delayed while the City worked to resolve gaps, ambiguities, and anomalies in the data produced by the character review process. *See e.g.*, Monitor's Twenty-Third Periodic Report at 43.

considerations and substantive and procedural best practices in the use of criminal histories in employment decisions and other areas. The Parties are reviewing the Monitor's response.

B. Monitor's Statistical Analysis of the Character Review Process

The Monitor's statistical analysis considered results from the character review process for all Exam 2000 open competitive candidates, based on the CTS. Consistent with the plans outlined in previous reports, the Monitor's findings encompass PRB referrals and outcomes (including disqualifications, appointments, and appointments with stipulations or extended probation), and they also address the time consumed by the character review process and any potential effect of PRB referral on candidate attrition. *See* Monitor's Twenty-Third Periodic Report at 39-41.

The Monitor's analysis of PRB referrals and outcomes indicates that the process, even as revised by the reforms already implemented under the Modified Remedial Order, may still have an adverse disparate impact on black and Hispanic candidates -- although a definitive determination of its impact on candidates from different demographic groups cannot be made until a larger statistical sample of candidates has gone through the process under the current rules and standards, which were implemented in mid-2016, toward the end of the hiring process for the Exam 2000 eligible list.

Since the most recent reforms in 2016, among candidates who completed the character review process (either because the CID determined that their cases did not require PRB review or because they received a final decision from the PRB), rates of disqualification for black candidates and for Hispanic candidates have continued to be higher than the rate for white candidates. The sample of candidates who have gone through the process since the most recent round of changes is not large enough for these apparent disparities to be deemed statistically significant. Nevertheless, if the same disparities persist as more candidates go through character

screening, the results will ultimately reflect an adverse disparate impact -- particularly on black candidates.²⁵

In addition, notably, an analysis of all candidates on the Exam 2000 open competitive hiring list who received a final decision from the character review process, including candidates who were disqualified under now obsolete criteria and then reconsidered under the current standards, shows a statistically significant disparity between rates of disqualification for black candidates and white candidates. While this analysis, incorporating the effects of reconsideration, does not necessarily reflect the outcomes that would have occurred had the current standards and procedures been in place throughout the life of the list, it suggests that the reforms implemented to date may not have eliminated the tendency of the process to have an adverse disparate impact, at least on black candidates.²⁶

C. Next Steps

The Monitor plans to convene a meeting of the Parties to discuss the results of its analyses and further potential reforms. The United States has indicated that it plans to circulate its own expert's analysis of PRB related data before the meeting. Given the risk that the character review process may have an adverse disparate impact on black and/or Hispanic candidates, the Monitor encourages the City to adopt substantive and procedural measures likely to reduce or eliminate that impact.

²⁵ Based on the Monitor's power analysis, using the current trends of disparity in disqualifications, the observed disparity between white (2%) and black (5%) candidates will be statistically significant ($p = .047$) if 95 more white candidates and 85 more black candidates receive decisions (of any kind) from the character review process.

²⁶ When the results of reconsideration are included, the ultimate outcomes for all the Exam 2000 candidates who passed through character review represent an approximation of the results that would be obtained by applying the new rules to the whole group. However, it must be noted that the expanded analysis does not necessarily produce the same results that would have been obtained if the new rules had been in place all along -- starting when the first candidates were called off the Exam 2000 eligible list: all candidates eligible for reconsideration did not take advantage of it; and in some cases, candidates' criminal histories and/or employment histories may have changed between initial disqualification and reconsideration.

VII. Firefighter Exam

Pursuant to Paragraph 7 of the Modified Remedial Order, the Monitor is charged with overseeing the current computer-based test (“CBT”) for the position of entry-level firefighter. Consistent with the provisions of the Modified Remedial Order, the City and its testing consultant PSI have continued to work in coordination with the Monitor and the other Parties on analyzing and reporting on the examination process. The Monitor continues to be assisted by its testing expert, Dr. Shane Pittman of The Pittman McLenagan Group, L.C.

A. Open Competitive Exam

The Exam 7001 scores were released on June 13, 2018. The City currently expects to establish the Exam 7001 list in February 2019 and anticipates that the first class drawn from the list will enter the Academy in May 2019.

1. Current Milestone

The current step in the exam analysis and reporting process (Step 204, “Technical Report”) requires PSI to complete a report documenting all the steps taken in the development, administration, scoring, and analysis of Exam 7001. PSI circulated a draft of the report on July 23. The other Parties submitted comments on August 7, and the Monitor submitted comments on August 10.

The July 23 draft report provides a full description of PSI’s work, including its confirmatory job analysis, development of new exam forms, equivalency testing, exam administration, scoring, and analyses of results. The report includes adverse impact analyses that were performed and circulated by PSI in March 2018 and formed the basis for the Parties’ and Monitor’s understanding of the impact of Exam 7001’s existing method of use before the scores were released in June. The Monitor described these adverse impact analyses in detail in its

previous reports. *See* Monitor's Twenty-Fourth Periodic Report at 49-51; Monitor's Twenty-Third Periodic Report at 43-44.

The Monitor has requested that an appendix be added to the draft Technical Report so that assumptions and data updated since March 2018 can be included.²⁷ For example, PSI will use attrition data from the Exam 2000 list to update the assumed attrition rate used in adverse impact analyses; calculations will be made assuming that candidates will be called off the Exam 7001 list for four years of Academy classes, rather than the three years projected in the March analyses (when the forecast was that the open competitive list would be established while promotional candidates were still being processed); and PSI will use the most recent list data, including scores that may have changed as a result of added or subtracted residency credits or other adjustments. The body of the Technical Report will not see substantial changes and will be useful for direct comparisons to the technical report prepared for Exam 2000. The appendix will be useful as a more up-to-date projection of likely Exam 7001 outcomes and for comparisons that may be performed with respect to future exams.

The Technical Report was originally anticipated to be completed by September 5, 2018, but the Monitor's requests will necessitate a longer drafting period. The delay will not affect any other process or deadline.

2. Optional Survey to Be Administered to Former Exam 2000 Candidates

In May 2017, the Monitor directed that the City hire a third party to administer a recruitment-focused survey by May 2018 to all individuals who (a) were hired by the FDNY from the Exam 2000 list or (b) were called off the list for further processing but voluntarily

²⁷ PSI's March report was based on scores and demographic information provided by DCAS as of February 21, 2018.

dropped out at some point. (The Monitor asked that Exam 2000 candidates disqualified by the City not be asked to participate in the survey.) This data is intended to provide information about reasons why candidates dropped out, as well as identify characteristics in common, if any, for those who succeeded.

In April 2018, a month before the date set by the Monitor to administer the survey, the City circulated a draft form of survey for the first time, which omitted a number of categories of questions that the Monitor had expected would be covered. The parties and Monitor provided comments, and the City responded with a revised version on May 25, 2018. After further comments (the last of which were provided to the City on July 17), the City provided another revision on August 8, and on August 10, 2018 the Monitor advised the City that there were no further comments.

The survey launched on October 3 and 4, 2018, and is anonymous and confidential. The City states that its vendor, ideas42, has the demographic data associated with survey recipients but has removed identifying information so the vendor cannot identify individual survey recipients. Once the survey is completed, ideas42 will give the City both aggregated data and individual-level data, but the latter will still be stripped of identifying information. Neither the City nor the vendor will be able to tie responses back to individual persons.

After the survey is completed, the Monitor and Parties will work together to determine how the data can be used to inform a recruitment plan that specifically targets those minority applicants most likely to succeed.

VIII. Additional Issues

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

- Discussions regarding individual candidates who are or claim to be entitled to relief under the Court's Orders, including their interactions with the FDNY, documents they have received, and their rights and remedies;
- Addressing questions and disagreements among the Parties regarding the status of specific candidates and other issues that are not addressed elsewhere in this report and that fall within the Modified Remedial Order or Disparate Treatment Settlement;
- Frequent calls, meetings, and correspondence with the Parties regarding the full range of issues related to implementation of and compliance with the Modified Remedial Order; and
- Performing the remaining duties of the Special Master appointed by the Court in its Order filed May 22, 2012 (Dkt. # 883). The Court assigned these duties to the Monitor in an order dated August 17, 2016.

Dated: October 15, 2018

New York, New York

/s/

Mark S. Cohen