

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 THIRTEENTH PERIODIC REPORT TO THE COURT

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

EXECUTIVE SUMMARY

This report summarizes activities relevant to compliance by the City of New York (the "City") with the Modified Remedial Order from June 16, 2015, when the Twelfth Periodic Report (Dkt. # 1603) was filed, to September 16, 2015. This report also summarizes the Monitor's 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 purview. *See* Stipulation and Order dated June 5, 2015 (Dkt. # 1599); *see also* Memorandum & Order dated June 5, 2015 (Dkt. # 1598) at 10.

In several areas, the Parties have entered a key phase in the implementation of reforms and initiatives intended to give effect to the Modified Remedial Order and the Disparate Treatment Settlement. The FDNY plans to administer the next open competitive exam beginning in September 2017 and to open the application period in or around April 2017, meaning that the recruitment campaign for the exam will be launched in or around April 2016. Planning for that recruitment campaign, which is already underway, must be finalized in the near future. At the same time, the FDNY continues to process candidates who took Exam 2000 for the next Fire Academy class, and further reforms in the hiring and screening process should be implemented as promptly as possible. These include modifications to the medical exam component of the screening process (the "Medical Exam") and further reforms in the character

screening process. In addition, the FDNY's Chief Diversity and Inclusion Officer, who was appointed in October of last year, has had time to become fully familiar with the Department and the issues it confronts, and is now in a position to play a key role in implementing essential reforms. The FDNY has also filled open positions in its Equal Employment Opportunity ("EEO") office and expects the EEO leadership team to be fully in place in the near future, which should enable the City to move forward with essential reforms in the FDNY's EEO practices.

All of these areas have been the focus of substantial work by the Monitor and the Parties over the past several years. As discussed throughout this report, it is now critical for the Parties and the Monitor to finalize and execute additional reforms and initiatives in key areas.

Part I of this report discusses the status of the FDNY's effort to recruit a larger proportion of black and Hispanic applicants for the position of entry-level firefighter pursuant to the Modified Remedial Order. These efforts include the proposal for a new cadet program developed by a working group established pursuant to the Disparate Treatment Settlement; the planning and implementation of measures to limit attrition by supporting minority candidates through the hiring process; and the ongoing development of the data management resources needed to track candidates through the hiring process and evaluate the success of recruiting efforts.

Part II discusses steps being taken to ensure that the Medical Exam administered as part of the selection process for entry-level firefighters does not have an unlawful disparate impact on black and Hispanic candidates. Those steps include efforts to validate as job-related key components of the testing, along with measures intended to provide improved guidance and

support for candidates undergoing testing, and continuing efforts to gather data showing any impact of the testing on hiring.

Part III reports on the Monitor's ongoing review, assessment, and consultations regarding the FDNY's EEO function, including analysis of existing EEO policies and practices, training, the EEO investigations process, and EEO record keeping. This section reports on the Monitor's consultations with the City regarding proposed improvements in several areas of the EEO function. The Monitor also has continued monitoring the City's investigations of instances of alleged retaliation.

Part IV summarizes developments relating to the FDNY's process for reviewing the character and background of firefighter candidates, including efforts to detect and prevent any disparate impact resulting from that process, and recent consultations with the City concerning possible reforms in the process.

Part V summarizes the Monitor's recent activity relating to the process by which candidates who are disqualified during the screening process may appeal the FDNY's decision to the New York City Civil Service Commission.

Part VI discusses issues related to the next computer-based exam for prospective firefighter candidates.

Part VII reports on the demographics of the most recently graduated class from the Fire Academy.

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

I. Recruitment and Attrition Mitigation

A. Background and Recent Events

The need for the FDNY to review and reform its programs for recruiting black and Hispanic entry-level firefighter applicants was central to the Court's findings and to the Monitor's duties as established by the Modified Remedial Order. *See, e.g.*, Monitor's Recruitment Report to the Court (Dkt. # 1464) at 3-7 (summarizing the Court's findings of fact regarding recruitment and relevant provisions of the Modified Remedial Order) ("Monitor's Recruitment Report"); *id.* at 7-10, 49-56 (summarizing the Monitor's focus on recruitment and setting forth recommendations for future action). In addition, as part of the settlement of Plaintiffs-Intervenors' intentional discrimination claim (the implementation of which the Monitor is overseeing), the City agreed to use its best efforts to recruit black test-takers for the open-competitive exam in proportions closely approximating the representation of age-eligible blacks in the New York City labor market, plus three percent. *See* Disparate Treatment Settlement ¶ 1.

Accordingly, the Monitor and the Parties have undertaken an extensive and ongoing analysis and evaluation of the FDNY's recruitment activities and issued a series of reports and recommendations. *See, e.g.*, Monitor's Fifth Periodic Report (Dkt. # 1198); Monitor's Sixth Periodic Report (Dkt. # 1249); Monitor's Recruitment Report. The Monitor has also assessed the City's progress toward various goals and recommendations on an ongoing basis. *See, e.g.*, Monitor's Eleventh Periodic Report (Dkt. # 1575) at 2-10; Monitor's Twelfth Periodic Report at 2-10. In recent months, the Monitor has held additional single-purpose meetings to discuss recruitment issues with Assistant Commissioner Michele Maglione, who heads the FDNY's Office of Recruitment and Diversity ("ORD"); with Deputy Commissioner Pamela Lassiter, who

serves as the FDNY's Chief Diversity and Inclusion Officer ("CDIO"); and separately with the FDNY's Data Analytics Unit.

As noted, with the next open competitive exam scheduled to begin in September 2017 and the application period scheduled to open in April 2017, the FDNY plans to launch its next recruitment campaign in or around April 2016. The FDNY must therefore finalize and begin to execute plans for that campaign in the very near future.

At the most recent recruitment meeting with ORD and Deputy Commissioner Lassiter, which took place on June 23, 2015, ORD advised that it was in the process of planning for the recruiting campaign and intends to finalize its strategic plan and timeline at an ORD Planning Retreat in late September 2015. ORD also noted during the June 23, 2015 meeting that it has continued to work with its outside marketing firm, Findly, to develop the advertising and social media components of the upcoming recruitment campaign. Additionally, ORD anticipates hiring a staff member who will focus in part on recruiting candidates from the military.

B. Status and Next Steps

The Monitor's Recruitment Report, which was filed in September 2014, concluded that "the FDNY has continued to make substantial progress" in the area of recruitment, but that "the FDNY's efforts to improve its practices and policies for recruiting black and Hispanic firefighter candidates are far from finished" and that "the urgency of those efforts will only increase . . . as the FDNY begins to prepare for the next recruitment campaign." Monitor's Recruitment Report at 53-54. There has been progress in many areas, however, several important recruitment initiatives remain incomplete. The most significant of these are discussed below.

1. Strategic Planning and Budget Information

As noted, ORD plans to hold a Planning Retreat with its staff and consultants in September 2015 to establish a concrete strategic plan for the upcoming recruitment campaign. In

advance of the retreat, the Monitor will be holding another single-purpose meeting with ORD and the Parties, which is currently scheduled for September 16, 2015.

The Monitor expects that, following the Planning Retreat, the City will be in a position to provide the Monitor with specific plans and schedules for the upcoming recruitment campaign and for implementing other measures. The Monitor has requested this information in the past. *See, e.g.*, Monitor's Recruitment Report at 49 (recommending that the City provide "specific budgets and timetables" for carrying out the recruitment objectives of the Modified Remedial Order); *id.* at 54-55 (requesting a "comprehensive calendar of upcoming recruitment . . . events"); *see also* Monitor's Sixth Periodic Report at 32-45; Monitor's Fifth Periodic Report at 13-35. The City has provided some of this information on an ongoing basis (*see, e.g.*, Monitor's Eleventh Periodic Report at 5-7), while stating that more comprehensive and concrete plans and schedules would be developed closer to the launch of the next recruitment campaign. The FDNY has now reached that stage, and the Monitor expects the City to provide it with plans and schedules on a real-time basis.

The Modified Remedial Order requires the City to establish "measureable short-term and long-term goals for the recruitment of black and Hispanic entry-level firefighter candidates." Modified Remedial Order ¶ 26(e). The Disparate Treatment Settlement also requires the City to use its best efforts to reach specific recruiting goals. *See* Disparate Treatment Settlement at 2. The City, the other Parties, and the Monitor are in active discussions regarding how best to establish interim goals and measure progress toward the FDNY's overall recruitment objectives. The Monitor expects that the results of this discussion will be reflected in the plans and schedules to be provided by the City in the coming weeks.

ORD has provided information regarding the recruitment budget at various points over the past year. As the next recruitment campaign draws near, the City should ensure that the budget remains adequate to meet ORD's projected needs and that ORD continues to provide relevant information to the Monitor on a real-time basis.

2. Data Collection and Analysis

As discussed in previous reports, “[c]ontinued success in attracting black and Hispanic applicants will be much more likely with a sustained data-driven effort to determine which tactics are most effective and how resources can be deployed most efficiently. Indeed, such an effort is necessary for the City to fulfill its responsibilit[ies] under the Modified Remedial Order.” Monitor’s Recruitment Report at 40. Accordingly, the Monitor has consistently urged the City to improve its ability to collect and use recruitment data. *See, e.g.*, Monitor’s Twelfth Periodic Report at 6; Monitor’s Eighth Periodic Report (Dkt. # 1412) at 8-10; Monitor’s Fifth Periodic Report at 9-13; Monitor’s Second Periodic Report (Dkt. # 892) at 16; Monitor’s First Periodic Report (Dkt. # 823) at 20. Among other things, the Monitor recommended that the FDNY create an end-to-end database that would allow ORD to track recruiting and hiring data from initial expressions of interest through the Academy. The City was also urged to analyze whatever data had been gathered during the Exam 2000 recruitment campaign in planning for the next campaign.

The City itself recommended in its Recruitment Report a series of improvements to the FDNY’s recruitment activities, including increasing the use of “[d]ata-driven decision making,” City of New York’s Recruitment Report Pursuant to Modified Remedial Order Paragraph 26 (Dkt. # 1166) (the “City’s Recruitment Report”) at 59, and has reiterated this commitment several times.

In 2013, the City enlisted the services of the FDNY's Data Analytics Unit to help improve the FDNY's ability to plan and execute effective recruitment activities, and the Monitor and the Parties met with members of the Data Analytics Unit on several occasions to discuss ongoing initiatives. *See* Monitor's Sixth Periodic Report at 32-34. However, progress in this area was delayed due to significant turnover within the Data Analytics Unit over the past year.

The Monitor expects the FDNY to renew and accelerate its efforts on data collection and analysis in the near future. The Monitor has now met twice with new members of the Data Analytics Unit, most recently on June 18, 2015, and has received additional updates from the City in emails and calls. The City has advised that the end-to-end database is at the "proposal" stage, and the City has indicated its understanding that it must move promptly from the proposal to the execution stage in order to create a database that will be useful for the upcoming recruitment campaign. The City has stated that it plans to prepare a scope of work and timeline for database work, which the Monitor will review and continue to track.

In addition, the partial analysis of Exam 2000 data undertaken by prior members of the Data Analytics Unit remains incomplete. The Monitor expects the City to complete that analysis and share the results with the Parties and the Monitor in time for the analysis to be used in planning the upcoming recruitment campaign.

Whether in the specific form of an end-to-end database or in some other format, collecting and analyzing data will require a sustained and focused devotion of resources by the City. Without immediate action, the City is unlikely to meet its stated goal of "maximiz[ing] the use of data" in the upcoming recruitment campaign (City's Recruitment Report at 59), or to fulfill its obligations to establish short-term and long-term recruitment goals or to use best efforts

to meet such goals. *See* Modified Remedial Order ¶¶ 26(e), 29; Disparate Treatment Settlement ¶ 1.

C. Attrition Mitigation Efforts

The Modified Remedial Order requires the City, in consultation with the Monitor and the Parties, to implement a plan to “mitigate and diminish rates of voluntary candidate attrition between different steps of the City’s process for the selection of entry-level firefighters.” Modified Remedial Order ¶ 31. Although such attrition mitigation efforts are targeted at candidates who have passed the written exam rather than prospective applicants, those efforts are overseen by ORD.

As discussed in prior reports, the City has initiated several important attrition mitigation programs, including the Firefighter Candidate Mentorship Program, the Communications and Social Media Program, and the Candidate Physical Ability Training Prep Program (the “CPAT Prep Program”). *See* Monitor’s Twelfth Periodic Report at 5. ORD also provides assistance to affinity groups within the FDNY to aid in their efforts to support candidates during the hiring process.

During the Monitor and the Parties’ June 23, 2015 meeting with ORD, the City advised that implementation of each of these initiatives will be discussed at the ORD Planning Retreat in September 2015. The Monitor expects that concrete plans will emerge from the ORD Planning Retreat, including a schedule with defined timeframes for the completion of projects for each initiative.

D. Settlement Working Group

As part of the agreement to settle the intentional discrimination claims brought by Plaintiffs-Intervenors, the City agreed to engage with the New York City Department of Education (“DOE”) and others to “create educational and other opportunities that will enhance

the ability of New York City students to pursue careers as New York City firefighters.”

Disparate Treatment Settlement ¶ 1(e). To pursue this goal, the City and the Parties in October 2014 formed a Working Group, which includes representatives from the DOE, the Department of Citywide Administrative Services (“DCAS”), and the City University of New York (“CUNY”). Pursuant to the Disparate Treatment Settlement, the Monitor has helped to coordinate the Working Group’s efforts.

Firefighter Cadet Proposal. The primary focus of the Working Group to date has been the development of a proposal for a Fire Cadet title. *See* Monitor’s Eleventh Periodic Report at 8-9; Monitor’s Twelfth Periodic Report at 7-9. These efforts culminated on August 19, 2015, when the City submitted the proposal for public review in advance of a public hearing, which was held on August 24, 2015. The proposal described the selection process, job duties, and instructional curriculum for the Fire Cadet title, each of which have been designed to further the Disparate Treatment Settlement’s goals. Specifically, the program was designed to attract, select, mentor, and retain a diverse cadre of cadets, who will ultimately progress to the firefighter position through the promotional examination process and successfully complete the rigorous screening, appointment and training process to become firefighters.

The period for public comments regarding the cadet proposal closed on August 28, 2015. The proposal was approved by the Office of the Mayor and was submitted to the New York State Civil Service Commission for final approval on August 28, 2015. The state Civil Service Commission is expected to review the program and reach a decision, perhaps before the end of this year.

Other Initiatives. The Working Group is also continuing to consider other measures to “to enhance the ability of New York City students to pursue careers as New York City

firefighters.” Disparate Treatment Settlement ¶ 1(e). In particular, the Working Group is discussing high school and college-based initiatives that would leverage recruitment and faculty resources to attract and mentor students through fire science curricula, including for example, working with CUNY-based General Educational Development (GED) programs in order to integrate fire service recruitment and mentoring efforts into their career services programs. The intent of such initiatives is in part to develop support networks that may attract interest among black and Hispanic students and to help those who wish to become firefighters navigate the application and screening process for entry-level firefighters. As the Court found, historically, white candidates have benefited from the support of “friends and family” networks that have helped them through the hiring process, and such support networks have been largely unavailable to minority candidates. *See, e.g.*, Findings of Fact (Dkt. # 741) at 13-14. The Monitor anticipates that the Working Group will continue to refine and implement additional proposals for other initiatives in addition to the creation of the Fire Cadet title.

II. Medical Exam Related Issues

The Modified Remedial Order requires the City to “with reasonable diligence, take all steps necessary to eliminate all policies and procedures that are not job related or required by business necessity and either have a disparate impact on black and Hispanic firefighter candidates or perpetuate the effects of said disparate impact.” Modified Remedial Order ¶ 19; *see also id.* ¶ 15 (forbidding the City to use “as part of any entry-level firefighter selection process, any examination that in any way results in a disparate impact upon black or Hispanic applicants” subject to limited exceptions). Pursuant to Paragraphs 15 and 19 of the Modified Remedial Order, over the past year the Monitor has conducted a review of, and engaged in ongoing dialogue with the Parties regarding, allegations that one or more portions of the City’s

Medical Exam have a disparate impact on black and/or Hispanic candidates. *See* Monitor's Twelfth Periodic Report at 13-18; Monitor's Eleventh Periodic Report at 13-16; Monitor's Tenth Periodic Report (Dkt. # 1533) at 13-16; Monitor's Ninth Periodic Report (Dkt. # 1462) at 3-6. As the Monitor has previously reported, the Plaintiffs-Intervenors raised concerns regarding the possible disparate impact of the Medical Exam on black candidates, and the United States raised the same concerns with respect to both black and Hispanic candidates. *See* Monitor's Eleventh Periodic Report at 13-14; Monitor's Tenth Periodic Report at 13; Monitor's Ninth Periodic Report at 4-5.

The Monitor has been engaged in its own intensive review of these issues. *See* Monitor's Twelfth Periodic Report at 13-14; Monitor's Eleventh Periodic Report at 14; Monitor's Tenth Periodic Report at 13-14; Monitor's Ninth Periodic Report at 5-6. As part of this review, the Monitor requested from the City and then analyzed relevant, available information to develop a series of measures likely to mitigate the causes of non-job related discrepancies in the results of the Medical Exam and make the process easier to navigate. *See* Monitor's Eleventh Periodic Report at 15. As previously described in detail, the City's record-keeping practices at the time made it difficult to determine what factors contributed to discrepancies between Medical Exam results for black and Hispanic candidates and those for white candidates. *See id.* After a series of meetings with the Parties and members of the FDNY's Bureau of Health Services ("BHS"), the Monitor and the Parties agreed to pursue a set of initiatives that were designed to address a range of factors that are likely to contribute to the racial imbalance in Medical Exam results. Among other things, these initiatives were intended to remove logistical and financial impediments to completing the Medical Exam, to ensure that all candidates have information that will help them prepare for aspects of the test that can be affected by fitness training and good

health practices, and to ensure that the discrepancies in results across different racial and ethnic groups are fully understood and any necessary reforms are identified and implemented. *See id.* The status of the implementation of each of those initiatives is discussed below in Subsection A.

The Monitor's in-depth evaluation of the Medical Exam has continued. These efforts are described in Subsection B.

A. Implementation of Agreed Initiatives Regarding the Medical Exam

As noted, the Monitor has worked with the Parties to develop, reach agreement upon, and monitor the City's initial implementation of measures intended to mitigate possible causes of any racial discrepancies in results and make the Medical Exam process easier to navigate for candidates. Early this year, the Monitor and the Parties agreed in principle that the City will:

- Conduct a validation study of the stairmill test portion of the Medical Exam;
- Provide candidates with more information about the Medical Exam;
- Pay for additional testing that may be necessary following a second failure on the stairmill test;
- Fund other diagnostic testing;
- Allow the Diversity Advocate to observe the stairmill exam;
- Track and record specific data regarding the Medical Exam; and
- Retest some candidates, in appropriate circumstances.

Monitor's Twelfth Periodic Report at 13-14; Monitor's Eleventh Periodic Report at 15.

Over the past 90 days, the Monitor has continued to work with the Parties on the FDNY's implementation of these initiatives. Some of the initiatives are already underway while other initiatives, such as the validation study for the stairmill exam, require further evaluation and discussion and are still in process. The following table provides the status of each initiative.

Status of Medical Exam Initiatives

Initiative	Status
Conduct a validation study of the stairmill exam	The Monitor, in consultation with its expert, held initial discussions with the City about the protocol for this study, and the City circulated a proposed validation protocol to demonstrate the business necessity and job relatedness of the stairmill portion of the Medical Exam. On August 6, 2015, the Department of Justice indicated that it would prefer a different validation methodology, and the Vulcan Society subsequently agreed. The Monitor and the Parties continue to discuss these issues and hope to come to resolution in the coming weeks. Depending on the protocol selected, validation may take a few months or longer to complete.
Provide candidates with more information	The Monitor and the Parties have developed a set of frequently asked questions (“FAQs”) for candidates regarding the Medical Exam, as well as a script for one or more videos to explain and demonstrate portions of the Medical Exam to entry-level firefighter candidates. ¹ The FDNY has also prepared a guidance document to summarize the stages and tests that make up the Medical Exam. The FAQs and the videos regarding the Medical Exam are in development and should be available to candidates on the FDNY website shortly. The guidance document will also be finalized shortly and will be posted on the FDNY website, as well as provided to each candidate in his or her FDNY hiring process introductory materials.
Pay for additional testing in connection with the stairmill / fund other diagnostic testing	The FDNY has begun providing certain follow-up blood testing to candidates at BHS free of charge when needed. The FDNY has

¹ The Monitor expects that the FAQs and the video(s) will work in tandem with the BHS guidance document being prepared pursuant to the Disparate Treatment Settlement to provide all candidates with enhanced information about the Medical Exam.

Initiative	Status
	also obtained funding to pay for other diagnostic testing to be conducted at an outside provider when necessary. The FDNY is working on identifying and partnering with providers, obtaining adequate staffing to administer the funding of outside tests, and resolving logistical issues with respect to implementing this testing.
Allow certain FDNY personnel to observe the stairmill exam	With the agreement of all Parties, the Diversity Advocate was designated to observe the stairmill portion of the Medical Exam and observes administrations of the stairmill exam periodically on a random basis.
Track and record specific data regarding the Medical Exam	The City is working on developing a new database to track certain information about the Medical Exam. The City provided to the Monitor and the other Parties information about the design of the database, including the specific categories of data to be collected; and the Monitor and the other Parties provided comments to the City. The City has informed the Monitor and the other Parties that the database is expected to be up and running by the end of this month, September 2015. In the meantime, the Monitor will continue to maintain the database discussed below in Subsection B.
Retest some candidates	The Parties are discussing the criteria to be used to determine which candidates will be eligible for retesting, and they are developing a list of candidates who will be eligible for retesting based on those criteria. In addition, the City circulated to the Monitor and the other Parties a draft letter to be sent to those candidates informing them of their eligibility for retesting. The other Parties have provided comments to the City, and the City is evaluating those comments and revising the letter.

The Monitor continues to work with the Parties toward full implementation of these initiatives.

B. Continuing Analysis

In addition to facilitating the implementation of agreed upon reforms, the Monitor has been continuing its evaluation of the Medical Exam. As discussed in previous Periodic Reports, the Monitor, with the assistance of the Monitor's experts, led by Dr. Denise Smith, has compiled and analyzed data related to the Medical Exam, reviewed detailed information regarding the FDNY's Medical Exam, met with representatives of BHS, and reviewed national standards and the practices of fire departments in other large metropolitan areas. *See* Monitor's Twelfth Periodic Report at 17; Monitor's Eleventh Periodic Report at 14; Monitor's Tenth Periodic Report at 14.

In some areas the Monitor's analysis was constrained by the limited availability of records. Specifically, because of the FDNY's previous record-keeping practices, for candidates who received Notices of Disqualification citing a "failure to cooperate" with lab tests (meaning that the candidate did not comply or that the candidate did not supply more follow-up tests, which could be costly and time consuming to obtain from outside medical providers), the Monitor could not distinguish between candidates who failed to provide lab test results and candidates who failed one or more tests for a medical reason after taking them. In addition, the FDNY's records, which did not differentiate among different reasons for Notices of Disqualification based on pulmonary testing, did not allow the Monitor to analyze in detail the Medical Exam results of candidates disqualified on that basis. To address this lack of data, the Monitor requested and obtained from the City medical files for the over one hundred candidates who fall into one or both of the above groups. The Monitor and its expert consultants reviewed

each of these files to determine in greater detail what caused the candidates to receive Notices of Disqualification.

In addition, the Monitor and the Parties have agreed that the Monitor will continue to compile and analyze available Medical Exam data until the FDNY's database, described in Subsection A above, is up and running. The Monitor requested from the City the documentation necessary for the Monitor to continue compiling data and tracking Medical Exam results. The Monitor expects to receive that documentation shortly.

The Monitor is continuing its data analysis and may use it to assist in identifying other initiatives aimed at reducing any racial discrepancies in results arising out of the Medical Exam. The Monitor expects to share the results of its analyses with the Parties on an ongoing basis.

III. EEO Compliance and Retaliation Investigations

A. EEO Compliance Activities

On August 6, 2015, Deputy Commissioner Lassiter met with the Monitor and the Parties to provide updates on the FDNY's current EEO compliance activities. Deputy Commissioner Lassiter also discussed some of the long-standing issues that have been noted in the course of the Monitorship. These include the need to create and promulgate an investigation manual; to create a database to track the progress of complaints, investigations, and other EEO compliance activities; and to improve communications with complainants regarding the status and resolution of investigations. *See* Monitor's Eleventh Periodic Report at 23. Deputy Commissioner Lassiter also commented on continuing efforts to expand diversity and inclusion training, including the implementation of regular EEO training for instructors at the Fire Academy.

Deputy Commissioner Lassiter noted that staffing limitations continue to impede progress on these issues. *See also* Monitor's Twelfth Periodic Report at 26. The Monitor

recognizes that temporary staffing deficiencies might reasonably be expected to slow the implementation of some initiatives. However, the Monitor has communicated, and the City has agreed, that the City is ultimately responsible for providing the resources necessary to comply with the Court's Order. The limited resources of the EEO Office – beyond temporary staffing shortages – have been identified as a critical issue for the FDNY's EEO compliance efforts. Indeed, they were extensively discussed during the litigation and identified by the Court as a significant problem. *See* Findings of Fact at 60. The EEO Office is making progress in its efforts to increase the staff of the EEO Office, including the recent hiring of a Deputy Director and the imminent hiring of a new Assistant Commissioner for EEO. In the interim, Deputy Commissioner Lassiter has continued to oversee the day-to-day compliance activities of the EEO Office. (The Assistant Commissioner, once hired, will report to Deputy Commissioner Lassiter.) To the extent that additional resources are needed, above and beyond the new personnel hiring currently underway, the Monitor expects the City to identify these resources and take steps to put them in place in the EEO Office as soon as practicable.

The FDNY retained the Kaleidoscope Group to customize and deliver diversity training. After conducting a series of focus groups with staff, Kaleidoscope has begun delivering training. Senior staff has already been trained; uniformed staff will begin being trained later this month.

Following the August 6 meeting, the Monitor communicated a list of proposed action items and target dates to the City. These items included a number of previously proposed and ongoing initiatives (including initiatives recommended by the City itself), along with new proposals developed by the Monitor based on its review of best practices and in consultation with its retained expert on EEO issues. The list of initiatives covers several areas, including the preparation of an investigation manual and other revisions to the policies and procedures for

investigating EEO-related complaints. Other key initiatives include the need for enhanced diversity and EEO training for firefighters and commanders, and measures to increase accountability for EEO issues among officers. The City is considering the Monitor's proposals, and the Monitor expects the City to work cooperatively with the other Parties and the Monitor to finalize a list of initiatives, and a timetable for their implementation.

On the specific topic of data management, the Monitor and its EEO consultant met with Deputy Commissioner Lassiter and a representative of the Law Department on August 22, 2015 to discuss an existing data management system developed and used by the U.S. military that might be adapted for use by the EEO Office to track and organize data relating to EEO complaints. The Monitor expects the City either to develop an effective data management system in the near future, either on its own or by adapting a database tool provided by an outside vendor.

B. Monitor's EEO Consultant

With the Court's approval and the City's consent, the Monitor recently engaged an EEO consultant to assist with reviewing the FDNY's EEO compliance activities and providing feedback and recommendations, including suggesting additional resources to support these activities. The Monitor's consultant currently serves with the U.S. Air Force as the Director of External Training, where he provides instruction on topics including diversity and inclusion, equal opportunity, sexual harassment, communication across differences, and conflict management. He previously served as the Equal Employment Opportunity Compliance Officer for New York State Police (where he was also an active lieutenant), and an Equal Opportunity Director with the Air National Guard.

C. EEO Retaliation Investigations

The City has continued to apprise the Monitor and the Parties of the status of ongoing EEO investigations of possible retaliation being conducted by the EEO Office, including certain investigations jointly conducted with the FDNY's Bureau of Investigations and Trials ("BITS"). As the Monitor and the Parties have reviewed some of the information provided by the City in connection with these investigations, including the details of certain conclusions reached by BITS and the EEO Office, the United States and the Plaintiffs-Intervenors have raised some concerns regarding the investigative process and the conclusions reached in specific investigations. The Parties have attempted to resolve these issues through direct discussions, with an eye toward implementing structural improvements in the investigative process that would allay such concerns in the future.

IV. Character Screening by the CID and PRB

The Monitor has continued to carry out its responsibilities under the Modified Remedial Order related to the character review process for entry-level firefighter candidates administered by the Candidate Investigation Division ("CID") and Personnel Review Board ("PRB"). Among other things, the Monitor has refined its analysis and evaluation of the performance of the PRB and CID, including the potential disparate impact of the character screening process on black and Hispanic candidates, and worked with the Parties to develop and consider a range of potential enhancements for the process.

A. Analysis of Potential Disparate Impact

The Monitor has been conducting a detailed statistical analysis of data regarding referrals to the CID and outcomes of the PRB process through the end of 2014. The results to date indicate that minority candidates are referred to the PRB at a higher rate than white candidates,

and that among candidates referred to the PRB, a higher percentage of minority candidates than white candidates are disqualified.

While the root causes of these discrepancies between groups are difficult to determine and appear to result in some instances from a combination of factors that cannot easily be disaggregated, the Monitor's review of statistical data has helped to identify a number of factors in the character review process that seem likely to disfavor minority candidates. At a June 25, 2015 meeting (discussed below), the Monitor and representatives of the City discussed steps that might be taken to eliminate or mitigate those factors consistent with effective review of job related aspects of candidates' characters and histories.

The Monitor has requested additional, fully updated data from the City, covering PRB referrals and outcomes up to the present. And it intends to assess the updated data in a further phase of the analysis. The additional data will permit a more thorough and reliable statistical analysis, which will also take account of additional outcomes following the implementation of revised PRB guidelines in November 2014. The final results will be incorporated in a report to be prepared in accordance with Paragraph 40 of the Modified Remedial Order.

B. Potential Enhancements in the Character Review Process

On June 25, 2015, the Monitor met with representatives of the City to discuss issues and potential further improvements in the character review process. At the meeting, the Monitor presented preliminary results of its ongoing statistical analysis of CID referrals to the PRB and PRB outcomes. The Monitor and the City also discussed a variety of potential reforms to the character review process that might help minimize any disparate impact on black and Hispanic candidates. The Monitor communicated a list of potential reforms to the City on August 19, 2015. The City provided its reactions to these potential modifications on September 9, 2015, and the Monitor is currently reviewing and analyzing the City's response. The goal is to confer

further with the City and the other Parties to finalize a list of reforms for the character review process and oversee their implementation as promptly as possible.²

C. Audit of PRB Documentation

The Monitor has asked the City to provide the Monitor with documentation created or collected by the FDNY under subsections of the PRB Guidelines addressing the Court's directive that the FDNY take steps to ensure the PRB process is not tainted by any outside influence, including by friends or family of any candidate reviewed.³ The documentation includes reporting of any incidents relating to prohibited contact or communication with PRB members as well as any conflicts of interest of PRB members with respect to particular candidates reviewed since the guidelines went into effect.

The City has provided the requested data, and the Monitor plans to conduct a review of the data received. The Monitor also intends to audit these documents periodically going forward.

V. Candidate Appeals to the Civil Service Commission

On July 13, 2015, the Monitor held a conference call with Commissioner Nancy Chaffetz of the New York City Civil Service Commission ("CSC") to gather information regarding the appeals process for candidates who have been disqualified from admission to the FDNY.

Plaintiffs had expressed concerns that a lengthy CSC appeals process might delay the hiring of meritorious candidates, including Priority Hires, and impede efforts to achieve the goals of the Modified Remedial Order. In addition, concerns had been raised that CSC appeals procedures

² The process being followed in connection with potential modifications to the character screening process is patterned after the process used in developing and beginning to implement modifications to the Medical Exam. In both areas, the Monitor has worked collaboratively with the parties to identify and develop specific initiatives, to the extent possible on a consensual basis.

³ The relevant subsections are B, C, D, F, and G of Section V of the PRB Guidelines (titled, respectively, Prohibition on Communications Outside of PRB Process, Reporting Unsolicited Communications Outside of PRB Process, Conflicts of Interest, Declaration Concerning Contacts, and Gifts).

might not afford candidates a proper opportunity to challenge all the grounds of disqualification argued by the FDNY on appeal. On the call the Monitor requested, and Commissioner Chaffetz provided, information in a number of areas relevant to these concerns.

Essential Steps in the Appeals Process. Candidates may appeal their disqualification within 30 days after receiving a Notice of Disqualification from the FDNY. The CSC notifies the FDNY of the appeal, and the FDNY has 60 days to respond by providing the CSC with documentation stating the reason for the disqualification as well as supporting “factual statements, affidavits and/or legal arguments.” According to Commissioner Chaffetz, the FDNY seeks extensions beyond the 60-day deadline when it determines they are needed, and the CSC typically grants such extensions. The CSC assigns a staff attorney to review the file and collect any missing information. The completed file is submitted to the members of the CSC for review.

As stated by Commissioner Chaffetz, the CSC’s standard of review applied to FDNY disqualification decisions is whether “the agency has a basis for its finding that is supported by the facts in the file.” In most instances, the CSC decides whether to affirm or rescind the disqualification based on the initial candidate submission and the FDNY’s response, but the CSC may order a hearing in its discretion if the case presents complex issues or unresolved factual questions. Hearing dates are often adjourned, typically at the request of the appellant. The CSC has 90 days from the date of the hearing or, if there is no hearing, from the date on which the appeal is ripe for consideration, to reach a decision.

Status of Appeals from Exam 2000 Candidates. Prior to the call, the City provided statistics on appeals, which were discussed further on the call. As of July 10, 2015, the CSC had considered and closed 164 appeals from candidates who appeared on the civil service list for Exam 2000 test-takers, which was established in June 2013. Fifty appeals from Exam 2000

candidates remain open. In 43 of the open cases, the CSC was still awaiting information from the FDNY or the candidate or the appeal was otherwise not yet ready for review, and 7 cases were in the “review” stage. Commissioner Chaffetz noted that the CSC had given priority to appeals from Exam 2000 candidates over the past year based on its understanding that concerns had been raised regarding the length of the appeals process.

Information for Candidates. Candidates who file appeals receive a form letter with basic information regarding the appeals process, including CSC contact information and the deadlines by which the FDNY must respond. The form states that, after the CSC receives the FDNY’s submission, the CSC will “review the record” and, in most instances, “issue a determination on the merits or schedule a hearing.” The form does not indicate whether or how a candidate may submit additional information or respond to arguments made by the FDNY.

Supplemental Submissions and Hearings. Most appeals are resolved on the initial written submission by the parties, which typically includes the candidate’s initial appeal and documentation, factual statements, and legal argument provided by the FDNY. However, if the CSC attorney reviewing the file finds gaps or discrepancies in the record provided by the FDNY, the CSC may issue an interim order instructing the FDNY to provide missing information or solicit additional information from the appellant. In addition, if appellants provide information that was not in the record, such as additional medical tests or information relevant to a prior arrest, the CSC will seek a response or clarification from the FDNY. If the CSC decides to order a hearing, it sends a separate notice to the appellant with the hearing date and other information.

Treatment of Grounds for Disqualification Stated for the First Time on Appeal. According to Commissioner Chaffetz, in the vast majority of instances, the appeal focuses solely on the grounds for the FDNY’s decision as stated in the Notice of Disqualification. In very rare

cases, the FDNY defends the disqualification on grounds other than those set forth in the Notice of Disqualification. In the two such instances that Commissioner Chaffetz recalled, the CSC instructed the FDNY to amend the Notice of Disqualification rather than rescinding the original disqualification, thereby avoiding a situation in which the appeal process begins again and the appellant must wait even longer for a resolution.

Potential Enhancements. Based on its discussions with Commissioner Chaffetz and the information gathered on the call, the Monitor has formulated a list of potential measures to make the process more efficient and to ensure that candidates fully understand the process and are able to address all of the grounds for disqualification asserted by the FDNY. The Monitor has submitted a list of potential improvements to the City (as part of the ongoing discussion regarding the character review process, *see* Part IV), and will seek to build consensus among the Parties on enhancements to recommend to the CSC.

VI. Next Examination

A. Current Status

As noted, the administration of the next open competitive examination for entry-level firefighters is currently scheduled to begin in September 2017, with the application period scheduled to open in April 2017. The City and its testing consultant, PSI Services LLC (“PSI”), in coordination with the Monitor and the other Parties, continue to work on the development of the next written exam, which will be patterned after Exam 2000. *See, e.g.*, Monitor’s Twelfth Periodic Report at 10; Monitor’s Eleventh Periodic Report at 10. The City and PSI have created a detailed project plan, incorporating input from the Monitor and the other Parties, for the development of the next examination. Pursuant to the project plan, over the past 90 days, the Monitor and its testing expert, Dr. Shane Pittman, reviewed the scripts, items, and guides that

will be used for the next computer-based examination and provided the Monitor's comments to the City, PSI, and the other Parties. Dr. Pittman has also continued to have discussions with PSI to provide oversight and assistance in the test development process.

B. Next Steps

As one of the steps in the project plan, PSI has recently finalized the video production and narration of the examination. The Monitor is reviewing and will provide comments on the video, and the Monitor and Dr. Pittman will also continue to be consulted as the City and PSI make progress in these efforts.

The Monitor and the Parties have also reached a consensus on the level and scope of the involvement of the United States and the Plaintiffs-Intervenors in the test development process. The Monitor understands that the United States has retained its own testing consultant, and that the Parties have reached an agreement to involve the United States and the Plaintiffs-Intervenors at discrete steps in the examination development process. Significantly, the resolution of this issue has not disrupted the examination development project plan created by the City and PSI, and the examination development process remains on schedule. Moreover, going forward, the Monitor expects that the additional involvement of the United States and the Plaintiffs-Intervenors will not alter the project plan for the development of the examination, but rather will ensure that the City and PSI can consider any concerns raised about the new versions of Exam 2000 during their development.

VII. Data Regarding Recent and Upcoming Hiring

The Monitor's Twelfth Periodic Report provides a detailed summary and analysis of demographic and other information regarding candidates who have either (1) graduated from the FDNY Fire Academy in recent classes of probationary firefighters or (2) taken Exam 2000 and

remain eligible for consideration on the active civil service list (and are likely to be called for further screening). *See* Monitor's Twelfth Periodic Report at 21-24.

June 2015 Class. Since the Monitor filed its Twelfth Periodic Report to the Court, another class of 320 probationary firefighters entered the Fire Academy on June 29, 2015. The June 2015 class began with 56 black probationary firefighters and 67 Hispanic probationary firefighters, including 6 Priority Hire candidates, 5 promotional candidates, and 303 open competitive candidates, as well as an additional 6 candidates who recycled from prior classes. The June 2015 class is composed of 39 percent black and Hispanic probationary firefighters.

Resignations and Terminations. While the Academy is in session, the City regularly provides the Monitor and the other Parties with data regarding probationary firefighters who were terminated or resigned from the Academy, including the reasons for the termination or resignation. There have been a total of 8 resignations and no terminations in the June 2015 class so far, including 2 white probationary firefighters, 1 black probationary firefighter, and 5 Hispanic probationary firefighters. One of these probationary firefighters was a Priority Hire. The goal of receiving this information is to help the Monitor and the Parties ensure that all probationary firefighters are being given a meaningful opportunity to succeed at the Fire Academy.

December 2015 Class. The FDNY has begun processing candidates to be appointed to the next class, which is scheduled to begin at the Fire Academy in December of 2015. The Monitor and the Parties are evaluating that selection process on an ongoing basis as part of the overall review of the hiring process as set forth in the Modified Remedial Order.

VIII. Additional Issues

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

- Record-keeping and communications with Priority Hires regarding retroactive seniority benefits, their status as probationary firefighters, and other issues;
- The status of the FDNY's efforts to expedite the processing of candidate appeals;
- Issues arising from investigations of specific alleged EEO violations, including alleged instances of retaliation as defined in Paragraph 17 of the Modified Remedial Order;
- Terminations and resignations of Priority Hire entry-level firefighters at the Fire Academy, including the reasons for such terminations and the status of affected candidates at the time of termination;
- Other discussions regarding individual candidates who are entitled to relief under the Court's Orders, including their interactions with the Fire Department, documents they have received, and their rights and remedies;
- The development of new forms for Notices of Disqualification and related communications from the FDNY;
- Information provided to candidates without certificates of good conduct or General Educational Development degrees (GEDs) about how they can restore themselves to the eligible list upon obtaining this required documentation;
- FDNY's efforts (discussed at an August 6, 2015 meeting with representatives of the Parties) to ensure that the training and instruction programs at the Fire Academy are conducted in accordance with the Department's diversity and inclusion priorities.

Dated: September 16, 2015
New York, New York

/s/

Mark S. Cohen