UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

Plaintiff,

-against-

Docket No. 1:07-cv-02067

CITY OF NEW YORK,

Defendant,

UNIFORMED FIREFIGHTERS ASSOCIATION,

Intervenor.
----------X

PROPOSED INTERVENOR'S MEMORANDUM
OF LAW IN SUPPORT OF MOTION

OF COUNSEL:

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PROPOSED INTERVENOR'S MEMORANDUM OF LAW IN SUPPORT OF MOTION

PRELIMINARY STATEMENT

This Memorandum is submitted in support of a motion by the Uniformed Firefighters Association (hereinafter "UFA") seeking leave to intervene as a defendant in this proceeding. The motion should be granted because the UFA has demonstrated it qualifies for intervention as of right under F.R.C.P. Rule 24(a)(2). In the alternative, the UFA is entitled to permissive intervention under Rule 24(b)(2).

RELEVANT STATUTE

Intervention is governed by Rule 24 of the Federal Rules of Civil Procedure. Subdivisions (a) and (b) provide:

> **(a) Intervention of Right.** Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.
>
> **(b) Permissive Intervention.** Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirements, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

THE NATURE OF THE ACTION

The Complaint asserts that the CITY OF NEW YORK (hereinafter "CITY"), in its capacity as an employer, administered two Civil Service written examinations to candidates seeking positions as New York City firefighters. One examination was designated as Examination No. 7029 and was given in February of 1999. An Eligibility List derived from that examination was allegedly utilized for hiring by the Fire Department (hereinafter "FDNY") from February 2001 to December 2004.

The other examination was designated as Examination No. 2043 and was given in December 2002. It generated an Eligibility List that has been used since May 2004 and is currently considered an active list. According to the Complaint, the CITY intends to use the list until May 2008.

In relevant part, plaintiff claims that both examinations have resulted in a disparate impact upon black and Hispanic candidates for the job of firefighter. Focusing on the written portion of the examinations, the Complaint cites statistics allegedly illustrating that blacks and Hispanics score poorly in comparison to white candidates. This allegedly results in a disproportionately low number of black and Hispanic candidates being hired when a rank order hiring list is established from the examinations.

The Complaint further asserts that the written exams are not job-related, nor consistent with business necessity and are, therefore, discriminatory.

The Complaint challenges the testing and rank order hiring by the CITY for the FDNY. It seeks to "make whole" the blacks and Hispanics who were victims of the alleged discrimination. The Complaint also challenges the concept of rank order hiring from the lists generated by the questioned examinations.

Presumably, plaintiff seeks a simple "pass/fail" written examination system coupled with a physical examination that serves to differentiate between candidates. We further assume that plaintiff seeks a preferential hiring scheme as a remedy for those black and Hispanic candidates who were not hired from the list generated by the challenged examinations.

THE UFA MAY INTERVENE AS OF RIGHT

The standards in this Circuit for determining whether a party may intervene as of right under Rule 24(a)(2) were set forth in Brennan v. N.Y. City Bd. of Educ., 260 F.3d 123, 128-29 (2nd Cir., 2001). The Court stated that:

> To intervene as of right, a movant must (1) timely file an application, (2) show an interest in the action, (3) demonstrate that the interest may be impaired by the disposition of the action, and (4) show that the interest is not protected adequately by the parties to the action. {[*New York News, Inc. v.] Kheel*, 972, F.2d 482, 485 (2nd Cir., 1992).}

This application meets all these criteria.

(i) The Application is Timely.

There can be little dispute that the UFA's motion to intervene is timely. The Complaint in this action was not filed until May 21, 2007 and the CITY answered on or about June 18, 2007. It appears that the initial discovery conference will not take place until July 24, 2007. Timeliness under Rule 24 is a flexible concept [Blake v. Pallan, 554 F.2d 947, 951-52 (9th Cir., 1977)]. Among the factors to be considered when determining timeliness are:

> (a) the length of time the applicant knew or should have known of his interest before making the motion; (b) prejudice to existing parties resulting from the applicant's delay; (c) prejudice to applicant if the motion is denied; and (d) presence of unusual circumstances militating for or

> against a finding of timeliness (citing cases) [*United States v. State of New York*, 820, F.2d 554, 557 (2nd Cir., 1987)].

Here, the UFA has requested intervention less than 30 days after issue was joined in the main action. Thus, the UFA has not waited an unreasonable amount of time to apply and the application will not delay any party from a prompt adjudication of the issues in this case. Conversely, if the application is denied, the UFA, as the exclusive bargaining agent for all firefighters, would be prevented from directly opposing any dilution of the traditional hiring standard; to wit, rank order hiring from an eligible list based upon testing of both intellectual and physical skills. Nor are there any unusual circumstances militating against a finding of timeliness.

(ii) and (iii) The UFA has an Interest in the Action Which may be Impaired by the Disposition of the Case.

With regard to the second and third prongs of the test governing intervention as of right, the UFA clearly has a cognizable interest in this action. As noted in Bridgeport Guardians v. Delmont, 227 F.R.D. 32 (D. CT, 2005), the interest: "must be direct, substantial and legally protectable. An interest that is remote from the subject matter of the proceeding, or that is contingent upon the occurrence of a sequence of events before it becomes colorable, will not satisfy the rule" (227 F.R.D. at 34).

As noted in the affidavit of UFA President Stephen J. Cassidy submitted herewith, the UFA, as representative of New York City firefighters, is primarily interested in the safety of its members. Thus, if the quality of candidates chosen for employment as firefighters is threatened or reduced, the UFA contends that the safety of fellow firefighters may be compromised.

Just in Bridgeport Guardians v. Delmont, supra. (at 35), where the intervening labor union sought to protect the seniority rights of its members, the UFA here has a "direct, substantial and legally protectable interest" in the outcome of this case. Similarly, that interest could be impaired by the disposition of this action.

(iv) The UFA's Interest May Not be Adequately Protected by the CITY.

With regard to the final prong of the test governing intervention as of right, namely, that the interests of the intervenor may not be adequately represented by the parties, we urge that the CITY, as an employer, does not necessarily have the same interests as its employees. The CITY is interested in public safety and managerial efficiency and not primarily how the safety of firefighters may be affected by the diminishment of hiring standards.

Thus, all criteria for intervention as of right have been met by the UFA and this application under Rule 24(a)(2) should be granted.

PERMISSIVE INTERVENTION

Under Rule 24(b) governing permissive intervention, a litigant may intervene in the discretion of the Court when its "claim or defense and the main action have a question of law or fact in common."

Here, the UFA disputes that the written portion of the FDNY entrance exams are not job-related and should be made purely "pass/fail." Thus, its defenses certainly are "common" to those of the CITY in the main action.

If the UFA intervenes, no party will be delayed from its day in Court nor prejudiced by the intervention [see, Patterson v. Newspaper & Mail Deliverers' Union, etc., 138 B.R. 149 (SDNY 1992) - Union local was permitted to intervene to represent its members in a challenge to the jurisdiction of a Court appointed administrator in a labor dispute].

Moreover, since it appears that the Vulcan Society, the FDNY fraternal organization representing black firefighters will intervene as a plaintiff, it would be fair and equitable to permit the UFA, representing its members, to present, where appropriate, a contrary view.

CONCLUSION

The UNIFORMED FIREFIGHTERS ASSOCIATION should be granted permission to intervene as a defendant in this action.

DATED: New York, New York
July 11, 2007

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(F-068518/017131/MNB)

STATE OF NEW YORK)
)SS:
COUNTY OF NEW YORK)

LINDA A. WEISINGER, being duly sworn, deposes and says:

I am not a party to this action and am over 18 years of age. I have a business address at 120 Broadway, New York, New York 10271.

On the 11th day of July, 2007, deponent served the within **MEMORANDUM OF LAW** by transmitting the papers via the internet at the e-mail addresses listed on the attached Service List, which e-mail addresses were designated by the attorneys for such purpose. I also deposited a true copy of said papers, enclosed in a postpaid, properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service addressed to the attorneys at the addresses also set forth on said attached Service List.

LINDA A. WEISINGER

Sworn to before me this
11th day of July, 2007.

Notary Public

BARBARA STERLING
Notary Public, State of New York
No. 24-4962776
Qualified in Kings County
Commission Expires 02-26-10

SERVICE LIST RE: U.S.A. vs. CITY OF NEW YORK

(AS OF JULY 2007)

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