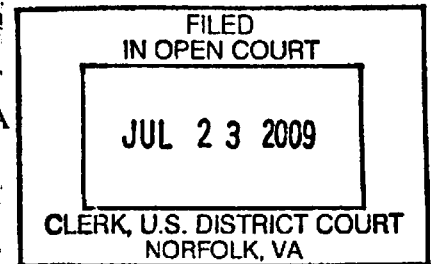


IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION



UNITED STATES OF AMERICA,

Plaintiff,

v.

CITY OF PORTSMOUTH, VIRGINIA,

Defendant.

Civil Action No.

2:09cv133

CONSENT DECREE

This action was brought by the United States against the City of Portsmouth, Virginia (the "City") to enforce the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, as amended ("Title VII"). This Court has jurisdiction of this action under 42 U.S.C. § 2000e-6 and 28 U.S.C. §§ 1343(a)(3) and 1345.

In its Complaint, the United States alleges that the City has pursued policies and practices that discriminate against and deprive or tend to deprive African Americans of employment opportunities because of their race, in violation of Section 703(a) of Title VII, 42 U.S.C. § 2000e-2(a). Specifically, the United States alleges that the City's use of the National Firefighter Selection Test ("NFST") as a pass/fail screening device in the selection process for the entry-level position of firefighter has had disparate impact upon African Americans. The United States further alleges that the City's use of the NFST has not been shown to be job related for the position in question and consistent with business necessity.

This action alleges disparate impact discrimination. The United States does not allege in its Complaint that the City of Portsmouth has intentionally discriminated against any person or

group of persons under Title VII.

The City denies that it has violated Title VII. Nevertheless, the United States and the City, desiring that this action be settled by an appropriate Consent Decree ("Decree") and without the burden of protracted litigation, agree to the jurisdiction of this Court over the parties and the subject matter of this action. The United States and the City further agree to the entry of this Decree as final and binding between themselves as to the issues raised in the United States' Complaint in this case. Subject to the Court's approval of this Decree, the parties waive hearings and findings of fact and conclusions of law on all issues, except as to the following, which the parties stipulate and which the Court finds:

- (a) Since at least 2004, the selection process used by the City in the screening and selection of applicants for hire into the position of entry-level firefighter in its Fire Department has included the administration of a written examination, the NFST.
- (b) The City requires that applicants score at least 70% on the NFST in order to proceed in the selection process. The NFST score is calculated by averaging together scores achieved by applicants on each of the NFST's component parts: reading comprehension, mathematics, and listening comprehension.
- (c) Between 2004 and 2008, the City administered the NFST four times to a total of approximately 403 white applicants and 198 African-American applicants. The City conducted one administration of the NFST in each of 2004, 2006, 2007 and 2008. There is no dispute that African-American applicants passed the NFST at a lower rate than white applicants and that the disparity in pass rates is statistically

significant. The pass rate for African-American applicants was approximately 42%, while the pass rate for white applicants was approximately 86%, a disparity in pass rates that is equivalent to approximately 10.8 units of standard deviation.

- (d) The lower pass rate of African-American applicants on the NFST ultimately resulted in an estimated shortfall of African-American applicants hired for the position of entry-level firefighter. The shortfall is an estimate of the additional number of African-American applicants that would have been hired had African-American applicants passed the NFST at the same rate as white applicants. The estimated shortfall of African-American applicants hired for the position of entry-level firefighter is approximately twelve (12).
- (e) The United States contends, and for purposes of this Consent Decree only and without admitting liability the City does not dispute, that the City's use of the NFST with a 70% pass/fail cut-off score is not job related for the position of entry-level firefighter and consistent with business necessity.

In resolution of this action, with the consent of the parties, IT IS THEREFORE ORDERED, ADJUDGED AND DECREED as follows:

I. DEFINITIONS AND PARTIES

1. The parties to this Consent Decree are the United States, by the United States Department of Justice, and the City of Portsmouth, Virginia (hereinafter, collectively "the parties," and individually a "party.")
2. "Backpay" refers to a monetary award that represents the value of some or all of the wages and benefits that a claimant would have received from the City if the claimant had been

hired by the City for an entry-level firefighter position on or about the claimant's presumptive hire date.

3. "Claimant" refers to any African-American applicant for the position of entry-level firefighter who is preliminarily eligible for individual relief and who timely submits a claim form, pursuant to Paragraphs 29 and 32.

4. "Date of entry" of the Decree refers to the date on which the Court orders entry of the Decree at or following the Fairness Hearing on the Consent Decree as set forth in Paragraph 24 of this Decree.

5. "Days" refers to calendar days unless business days are clearly specified in the context of a specific provision of this Decree. If any deadline referenced in this Decree should fall on a weekend or holiday, the deadline shall be moved to the next business day.

6. "Entry-level firefighter" refers to the entry-level position in the City's Fire Department even though an individual hired into that position may be called a "recruit" (or other title) until the individual has completed academy training.

7. "Individual relief" refers to a monetary award in the form of backpay and/or an offer of priority hire, with retroactive hire date as defined herein, that a claimant may be offered pursuant to the terms of this Decree.

8. "Presumptive hire date" for any claimant refers to the median date of hire of applicants to whom the City administered the NFST on the date the claimant failed the NFST. The median dates of hire for the administrations of the NFST at issue are: (1) for the examination administered on May 8, 2004, the median date of hire is September 1, 2005; (2) for the examination administered on April 1, 2006, the median date of hire is June 30, 2007; (3) for the

examination administered on June 23, 2007, the median date of hire is December 26, 2007; and for the examination administered on April 26, 2008, the median date of hire is December 22, 2008.

9. “Retroactive hire date” refers to the seniority date to be used by the City for any claimant who is actually hired by the City as a priority hire pursuant to the terms of this Decree and successfully completes his/her probationary period. A claimant’s retroactive hire date shall not be used for purposes of any applicable probationary periods or any time in grade requirements associated with eligibility for promotions, but shall be used for all other purposes, including without limitation: amount of salary or other pay, pension benefits (to the extent that back contributions to the Virginia Retirement System (“VRS”) are allowed by state law and policy and regulation), future accrual of leave, including both vacation and sick leave, layoffs/reductions in work force, and eligibility for retirement.

10. “Selection device” refers to any examination, test, requirement, or criterion used to evaluate an applicant’s qualifications for hire as an entry-level firefighter (e.g., application, written examination, oral interview, physical agility/performance test, polygraph, medical examination, psychological examination, background investigation, etc.).

II. PURPOSES OF THIS DECREE

11. The purposes of this Decree are to ensure that:

- (a) the City does not violate Title VII by using policies or practices that have a disparate impact upon African-American applicants for entry-level firefighter positions on the basis of race and are not job related for that position and consistent with business necessity, or otherwise do not meet the requirements of

Title VII;

- (b) the City provides, as appropriate, monetary relief and/or priority hiring with retroactive hire dates to qualified individuals who were denied employment with the City due to the employment practice challenged by the United States in this case.

III. GENERAL INJUNCTIVE RELIEF

12. The City, its officials, agents, employees, and successors, and all persons acting on its behalf or in active concert or participation with it, are enjoined from using any selection device, including a written examination for the entry-level firefighter position, that has a disparate impact upon African-American applicants on the basis of race and is not job related for that position and consistent with business necessity, or otherwise does not meet the requirements of Title VII. Further, during the term of this Consent Decree, the City shall not administer any written examination for use in the selection of entry-level firefighters without the prior agreement of the United States or, absent such agreement, prior approval of the Court.

13. The City is specifically enjoined from using the NFST in any manner that results in a disparate impact upon African-American applicants. Notwithstanding the foregoing, the City may use the eligibility lists associated with its 2008 administration of the NFST as an interim hiring measure to fill essential entry-level firefighter vacancies either for a period of up to one (1) year from the date of execution of this Consent Decree by the parties, or until an alternative selection device is approved and adopted in accordance with the terms of this Consent Decree, whichever occurs first, as long as the City does not at any time use those eligibility lists in any manner that causes an additional shortfall of African-American hires. At least thirty (30) days

prior to making any offer(s) of employment based on the 2008 NFST eligibility lists, the City shall give the United States written notice of: (a) the number of entry-level firefighter vacancies that exist in the Fire Department; (b) the length of time the positions have been vacant; (c) the number of vacancies the City intends to fill; and (d) the identities of the individuals on the 2008 NFST eligibility lists to whom the City proposes to make offers of employment.

14. No later than ninety (90) days after the date of entry of this Decree, the City shall submit to the United States a proposal to use a selection device in place of the NFST (an "alternative selection device") for selecting entry-level firefighters. The alternative selection device shall either have no disparate impact on the basis of race or shall have been demonstrated to be job related for the entry-level firefighter position and consistent with business necessity in accordance with Title VII. In selecting or developing its alternative selection device, the City shall make reasonable efforts to explore the availability of selection devices which have been shown to reduce or eliminate disparate impact upon African Americans in the selection of firefighters.

15. The City's proposal submitted pursuant to the preceding Paragraph shall include all information available to the City about the development and/or validation of the proposed alternative selection device, including but not limited to: a description of the alternative selection device and the manner in which the City intends to use it; the known or likely disparate impact, if any, of the intended use of the alternative selection device; all evidence of job relatedness or validity of the alternative selection device, including all job analyses, test plans, expert reports, and validation studies, as well as data underlying such analyses, plans, reports or studies; and any basis for a conclusion that the proposed use of the alternative selection device is

job related for the position and consistent with business necessity. The City's submission shall also identify any other selection devices, as well as any other manners of using the alternative selection device the City proposes, considered by the City. Within ninety (90) days of receipt of a proposal for an alternative selection device from the City, the United States shall notify the City in writing whether it has any objections to the City's proposed use of the alternative selection device. If the United States does not notify the City that the United States has an objection pursuant to this Paragraph, the City may administer the alternative selection device.

16. If after the administration of the City's alternative selection device, the United States determines that the City's use of the alternative selection device does not comply with Title VII and with this Decree, the United States shall notify the City in writing that the United States objects to the City's use of the alternative selection device.

17. If an objection to the City's use of an alternative selection device is made by the United States pursuant to either Paragraph 15 or 16 of this Decree, the parties shall meet within thirty (30) days to discuss the United States' objection. If the parties fail to reach agreement on how to resolve the issues raised by the United States' objection within thirty (30) days, either party to this Decree may move the Court for resolution no sooner than fourteen (14) days after providing the other party with written notice of such intent. If an objection to the City's use of an alternative selection device for the entry-level firefighter position is made by the United States pursuant to either Paragraph 15 or 16, no person shall be certified for appointment as an entry-level firefighter from any affected eligibility list except by written agreement of the parties or order of the Court.

18. The City shall designate an individual who shall be responsible for enforcing the

provisions of this Decree. This individual's responsibilities shall include, but not be limited to, ensuring that the City fully implements and complies with all Paragraphs of this Decree and receiving complaints of discrimination on the basis of race in the screening, selection and hiring of entry-level firefighters in the Portsmouth Fire Department.

IV. FAIRNESS HEARING ON THE CONSENT DECREE

19. Upon execution of this Decree, the parties shall file a joint motion for the provisional approval and entry of the Decree by the Court and shall request a Fairness Hearing on the Consent Decree to allow the Court to determine whether its terms are fair, reasonable, equitable and otherwise consistent with federal law. The Court shall provide the parties with at least ninety (90) days notice of the date and time set for this Fairness Hearing.

20. The purpose of the Fairness Hearing on the Consent Decree and the related notification provisions of this Decree is to provide to all individuals who may be affected by the terms of the Decree notice and an opportunity to present objections prior to final entry of the Decree, in accordance with Section 703(n) of Title VII, 42 U.S.C. § 2000e-2(n).

21. No later than seventy-five (75) days prior to the Fairness Hearing on the Consent Decree, the City shall provide a Notice of Settlement and Fairness Hearing, Instructions for Filing an Objection Prior to the Fairness Hearing, and an Objection to the Entry of the Consent Decree form, in the formats set forth in Appendix A, as follows:

- (a) via certified U.S. mail (return receipt requested) to the last known address of each African-American applicant who took the NFST as part of the City's firefighter selection process during or after 2004 and who was considered by the City to have failed the NFST because he or she received a score of less than 70% (each

such individual is listed in Appendix B to this Decree), along with a cover letter in the format set forth in Appendix C to this Decree; and

- (b) to each firefighter in the Portsmouth Fire Department, via the same method of delivery as the employee's paycheck is regularly distributed, as an attachment or enclosure to the employee's paycheck, along with a cover letter in the form set forth in Appendix D to this Decree.
- (c) via certified U.S. mail to the Portsmouth, VA Professional Firefighters Association (Local 539 of the International Association of Firefighters), and any other union or association recognized as being authorized to represent firefighters in the Portsmouth Fire Department.

At or before the time notices are provided pursuant to subparagraphs (a) and (c) of this Paragraph, the City shall provide to the United States a list stating the last known address of each individual or entity to whom such notice is being sent. At or before the time notices are provided to sworn employees pursuant to subparagraph (b) of this Paragraph, the City shall provide to the United States a list of the sworn employees to whom notice is being provided and the manner in which notice is being provided to each such employee.

22. Persons who wish to object to the terms of the Consent Decree may file objections, in accordance with the requirements and format set forth in Appendix A, as follows:

- (a) Objections shall state the objector's name, address and telephone number; set forth a description of the objector's basis for objecting; include copies of any documentation supporting the objections; state the name and address of the objector's counsel, if any; and state whether the objector wishes the opportunity

to be heard in Court at the Fairness Hearing on the Consent Decree.

- (b) Objections shall be submitted by mailing a copy of any objection to the United States Department of Justice at the following address:

Meredith L. Burrell
Senior Trial Attorney
Employment Litigation Section
U.S. Department of Justice
Civil Rights Division
PHB, Room 4924
950 Pennsylvania Avenue, NW
Washington, DC 20530

- (c) Objections must be mailed to the United States no later than forty-five (45) days prior to the date set for the Fairness Hearing on the Consent Decree. The United States shall serve upon the City copies of the objections it has received no later than thirty (30) days prior to the date set for the Fairness Hearing on the Consent Decree.

23. No later than ten (10) days prior to the Fairness Hearing on the Consent Decree, the United States shall file with the Court copies of all objections received by the United States. In addition, no later than ten (10) days prior to the Fairness Hearing on the Consent Decree, the United States and the City shall file their responses, if any, to all objections timely received by the United States in accordance with the deadlines set forth in Appendix A.

V. ENTRY OF THE CONSENT DECREE

24. If the Court determines that the terms of this Decree are fair, reasonable, equitable and otherwise consistent with federal law, the Court shall enter the Decree at or following the Fairness Hearing on the Consent Decree.

VI. INDIVIDUAL RELIEF

A. Deposit of the Settlement Fund

25. Within thirty (30) days after the date of entry of this Decree by the Court, or on January 15, 2010, whichever is later, the City shall deposit the sum of **\$145,000** into an interest-bearing account (the "Settlement Fund"), established for this purpose, in a federally insured financial institution agreed to by the parties. No later than fourteen (14) days from the date of entry of this Decree, the City shall propose in writing to the United States a federally insured financial institution for deposit of the Settlement Fund. The United States shall provide a written response to the City's proposal within seven (7) days of its receipt, either consenting to the City's proposed financial institution or objecting and proposing an alternative financial institution. If the parties cannot agree on a federally insured financial institution, either party may submit the dispute to the Court for resolution upon providing the other party with seven (7) days written notice of its intent.

B. Monetary Relief Awards from the Settlement Fund

26. The funds in the Settlement Fund, including any interest that accrues on the Settlement Fund, shall be distributed by the City to claimants entitled to monetary relief under this Decree, as provided in Section VI, subsection J, of this Decree.

27. The City shall pay all federal, state or local taxes or contributions that normally are paid by employers and that are due on any monetary relief award paid to a claimant, including the appropriate employer's contributions to Medicare and the Social Security fund. No such taxes or contributions shall be deducted from the Settlement Fund, the interest that accrues on the Settlement Fund, or any claimant's monetary relief award.

28. The City shall, to the extent required by law, withhold from each claimant's monetary relief award all appropriate federal and state income taxes and any other required employee withholdings or deductions to the extent required by law. Such amounts shall be deducted by the City from each claimant's monetary relief award and shall be paid by the City from the Settlement Fund.

C. Preliminary Eligibility for Individual Relief

29. Individuals preliminarily eligible for relief under this Decree shall include all African-American applicants for entry-level firefighter who were considered by the City to have failed the NFST because they received a score of less than 70%, but who received a minimum score of 60 on the reading comprehension component of the NFST. Each such individual is listed in Appendix B to this Decree. No individual must seek priority hiring relief or accept an offer of employment with the City in order to receive an award of monetary relief.

30. Within fourteen (14) days after the entry of this Decree by the Court, the City shall send a copy of the Notice of Entry of Consent Decree and Interest In Relief Form, attached to this Decree as Appendix E, by certified U.S. mail (return receipt requested) to the last known address of each individual preliminarily eligible for relief, as described in the preceding Paragraph.

31. The City shall keep records of all notices required by Paragraph 30 that are returned to the City as undeliverable. Within twenty-one (21) days of the mailing of the notices required by Paragraph 30, the City shall provide to the United States a list of all delivered and undelivered notices, and a copy of all notices, envelopes and mail receipts for all persons to whom a notice was sent. If the United States provides the City with an alternative address for any individual whose notice was returned to the City as undeliverable, the City shall promptly re-mail the notice

to the alternative address for that individual by certified U.S. mail (return receipt requested). If requested, the City shall provide reasonable and prompt assistance to the United States in providing information that may allow the United States to locate an alternative address for any individual whose notice was returned as undeliverable.

D. Claimants to Submit Interest in Relief Form

32. Any person who wishes to be considered for an award of individual relief under this Consent Decree must return the completed Interest in Relief Form (Appendix E) to the United States no later than forty-five (45) days from the date of entry of this Decree. Any person who fails to do so shall be deemed to have waived any right to be considered for an award of individual relief under this Decree, except for good cause as determined by the United States. The date the Interest in Relief Form was mailed, faxed or otherwise delivered to the United States shall be deemed the date of return of the claimant's form. In the event that an Interest in Relief Form is returned by U.S. Mail but no date of mailing is indicated by a postmark of the United States Postal Service, the date of return of the Interest in Relief form shall be deemed to be ten days prior to the date the form was received by the Employment Litigation Section of the Civil Rights Division.

E. Initial Determination of Claimants' Eligibility for Individual Relief

33. No later than (90) days from the date of entry of this Decree, the United States shall provide to the City a Preliminary Relief Awards List that identifies all claimants preliminarily eligible for relief who have submitted an Interest in Relief Form to the United States. The list required by this Paragraph shall indicate the type(s) of relief, if any, for which the United States has determined each such claimant is eligible, each such claimant's race and each such

claimant's presumptive hire date, as defined in Paragraph 8, above. If the United States determines that any claimant is not eligible for a type of relief sought by the claimant, the Preliminary Relief Awards List will include the reason(s) for that determination.

34. If the City disagrees with the United States' initial determinations as to any claimant's eligibility for priority hiring relief stated in the Preliminary Relief Awards List, the City shall notify the United States in writing no later than thirty (30) days after the service of the list. The City's notice shall state in writing all grounds for each of its disagreements, identify and provide contact information for all witnesses with knowledge of facts supporting its position(s), and include a copy of all documents supporting its positions.

35. The parties shall make good faith efforts to resolve any disagreements submitted to the United States pursuant to the preceding Paragraph. Within ten (10) days after the United States requests, the City shall make available for interview or deposition all available officials, agents and employees of the City with knowledge of facts supporting the City's positions stated in its written notice. The United States shall consider the City's positions and all information provided pursuant to this or the preceding Paragraph and, if upon its good faith consideration the United States agrees with any of those positions, the United States shall amend the Preliminary Relief Awards List before filing it with the Court in accordance with Paragraph 36 of this Decree.

G. Filing of Relief Awards List

36. Within one hundred fifty (150) days after entry of this Decree by the Court, the United States shall file with the Court a Relief Awards List stating, for each individual listed in Appendix B to this Decree, whether the claimant timely returned an Interest in Relief Form, the

type(s) of relief sought by the claimant, the type(s) of relief for which the United States deems the claimant eligible, and the claimant's presumptive hire date. In addition, for each claimant the United States deems eligible for monetary relief, the Relief Awards List shall state the share of the Settlement Fund that the United States has determined should be awarded to the claimant. The United States shall simultaneously serve a copy of the Relief Awards List on the City.

37. For purposes of the Relief Awards List, the United States shall determine each claimant's share of the total amount of monetary relief in a manner that is reasonable and equitable in relation to the claimant population and the total amount of monetary relief available under the Decree, and that is consistent with the provisions of this Decree. No claimant shall be offered a monetary award that exceeds fifty (50) percent of the salary that the claimant would have been paid between his or her presumptive hire date and date of execution of this Decree if the claimant had been hired as an entry-level firefighter by the City on his or her presumptive hire date. The United States retains discretion to propose a monetary relief award that is less than fifty (50) percent of the salary the claimant would have received during his or her individual backpay period based on evaluation of equitable factors, including but not limited to each claimant's mitigation.

H. Fairness Hearing on Individual Relief

38. Upon filing the Relief Awards List described in Paragraph 36 of this Decree, the United States shall move the Court to hold a Fairness Hearing on Individual Relief to allow the Court to determine whether the Relief Awards List filed by the United States should be approved or amended. The Court shall provide the parties with at least ninety (90) days notice of the date and time set for the Fairness Hearing on Individual Relief.

39. If the City disagrees with the United States' priority hiring relief determinations as stated in the Relief Awards List, the City may file objections with the Court no later than seventy-five (75) days prior to the date set for the Fairness Hearing on Individual Relief. The City may not object to any claimant's eligibility for priority hiring relief unless, pursuant to Paragraph 34 of this Decree, the City objected to a preliminary determination by the United States that the claimant was eligible for priority hiring relief, and may not object on any grounds or support its objections with any documents or testimony not timely disclosed to the United States pursuant to Paragraph 34 of this Decree. The City may not object to the United States' determinations regarding monetary relief reflected in the Relief Awards List filed by the United States. The United States shall file its response to any objections filed by the City pursuant to this Paragraph no later than thirty (30) days after the objections are filed.

40. No later than seventy-five (75) days before the date set for the Fairness Hearing on Individual Relief, the United States shall send by certified U.S. mail to each claimant, addressed to the last known or corrected/updated address of such individual, a Notice of Fairness Hearing on Individual Relief and Instructions for Filing an Objection to Individual Relief and Objection form, in the formats attached as Appendix F to this Decree, as well as a cover letter, in the format attached as Appendix G, notifying the claimant of the United States' determinations regarding the claimant's eligibility for relief under the Decree, the reasons for any determination that the claimant is ineligible for any particular form of relief, and the claimant's proposed share of the Settlement Fund, if any.

41. Claimants who object to the United States' proposed relief determinations may file objections, in accordance with the requirements and format set forth in Appendix F, as follows:

- (a) Objections shall state the objector's name, address and telephone number; set forth a description of the objector's basis for disputing the United States' relief determination; include copies of any documentation supporting the objections; state the name and address of the objector's counsel, if any; and state whether the objector wishes the opportunity to be heard in court at the Fairness Hearing on Individual Relief.
- (b) Objections shall be submitted by mailing a copy of any objection to the United States Department of Justice at the following address:

Meredith L. Burrell
Senior Trial Attorney
Employment Litigation Section
U.S. Department of Justice
Civil Rights Division
PHB, Room 4924
950 Pennsylvania Avenue, NW
Washington, DC 20530

- (c) Objections must be mailed to the United States no later than forty-five (45) days prior to the date set for the Fairness Hearing on Individual Relief. The United States shall serve upon the City copies of the objections it has received no later than thirty (30) days prior to the date set for the Fairness Hearing on Individual Relief.

42. No later than ten (10) days prior to the Fairness Hearing on Individual Relief, the United States shall file with the Court copies of all objections received by the United States. In addition, no later than ten (10) days prior to the Fairness Hearing on Individual Relief, the United States and the City shall file their responses, if any, to all objections timely received by the United States in accordance with the deadlines set forth in Appendix F.

I. Approval of Final Relief Awards List

43. At or following the Fairness Hearing on Individual Relief, the Court shall determine which, if any, objections to the United States' Relief Awards List filed pursuant to Paragraph 36 of this Decree are well-founded. The Court shall then approve the Relief Awards List as submitted or, if the Court finds that any objection(s) are well-founded, shall amend the list to adjust the amount and nature of the relief to be awarded to the claimants consistent with such finding, while maintaining, to the extent possible, the proportionate shares of monetary relief awarded to all other claimants. The list approved by the Court will be the Final Relief Awards List.

44. The Court shall find that any objection by a claimant regarding the amount of monetary relief to be awarded to a claimant is well-founded only if the amount is not reasonable and equitable in relation to the claimant population and the total amount of monetary relief to be awarded under this Decree.

45. The Court shall find that any objection, including any objection made by the City, challenging a claimant's eligibility for priority hiring relief is well-founded only if the objector(s) prove(s) by a preponderance of the evidence that at the time the claimant took the NFST, the claimant was not qualified for the position of entry-level firefighter in the City's Fire Department using the lawful, objective hiring criteria in use by the City at that time. In the case of an objection filed by a claimant challenging his or her ineligibility for priority hiring consideration (as reflected on the Relief Awards List filed pursuant to Paragraph 36), the Court shall determine that the objection is well-founded only if it finds that, at the time the claimant took the NFST, the claimant was qualified for the position of entry-level firefighter using the

lawful, objective hiring criteria in use by the City at that time.

J. Notice of Relief Award and Acceptance and Release

46. No later than thirty (30) days after the Court determines, at or following the Fairness Hearing on Individual Relief, each claimant's eligibility for relief under this Decree, the United States shall mail by certified U.S. mail (return receipt requested) a notice of award of individual relief to all claimants determined by the Court to be entitled to individual relief, as stated in the Final Relief Awards List, at their current or last known address. Each notice shall include:

- (a) a statement of the amount of the monetary relief award for that claimant as stated on the Final Relief Awards List and an explanation of the time limit for acceptance of the monetary relief offer;
- (b) if the claimant has been determined by the Court to be eligible for consideration for an offer of priority hire, a statement of the claimant's eligibility for such consideration and the retroactive seniority date the claimant will receive if he or she is ultimately hired by the City and successfully completes the applicable probationary period;
- (c) an Acceptance of Relief and Release of Claims as described in the following Paragraph of this Decree; and
- (d) any withholding forms provided that are necessary for the City to comply with its withholding obligations under law.

47. As a condition for the receipt of a monetary relief award and/or priority hiring consideration, each claimant otherwise entitled to relief as indicated in the Final Relief Awards List shall be required to execute a copy of the Acceptance of Relief and Release of Claims form

set forth in Appendix H of this Decree, along with any withholding forms if the claimant is eligible for monetary relief, and return them to the United States no later than sixty (60) days after the Court approves the Final Relief Awards List. The date the Acceptance of Relief and Release of Claims form was mailed, faxed or otherwise delivered to the United States shall be deemed the date of return of the claimant's form. In the event that an Acceptance of Relief and Release of Claims form is returned by U.S. Mail but no date of mailing is indicated by a postmark of the United States Postal Service, the date of return of the Acceptance of Relief and Release of Claims form shall be deemed to be ten days prior to the date the form was received by the Employment Litigation Section of the Civil Rights Division. A claimant's failure to return an executed Acceptance of Relief and Release of Claims form within the time allowed shall constitute a rejection of the offer of relief and shall release the parties from any further obligation under this Decree to make an award of relief to that claimant.

48. No later than seventy-five (75) days after the Court approves the Final Relief Awards List, the United States shall forward to the City copies of all executed Acceptance of Relief and Release of Claims forms and withholding forms it received from claimants listed in the Final Relief Awards List.

49. If any claimant listed on the Final Relief Awards List rejects a monetary relief award, the United States shall reallocate the amount of monetary relief allocated to that claimant to those other claimants who timely returned all forms required by Paragraph 47, in a manner consistent with the limitation set forth in Paragraph 37 and designed to allocate the total amount of monetary relief available in the Settlement Fund while preserving the relative proportions of the claimants' shares of the Settlement Fund as stated on the Final Relief Awards List. No later than

ninety (90) days after the Court approves the Final Relief Awards List, the United States shall either amend the Final Relief Awards List to reflect any such reallocation of monetary relief and to reflect any rejections of priority hiring relief and provide a copy of the Amended Final Relief Awards List to the City, or inform the City that no amendments are required. If the amount reflected for each claimant on the Amended Final Relief Awards List after any reallocation under this Paragraph (or on the Final Relief Awards List if no amendments are required) is the maximum amount each claimant may be entitled to receive under Paragraph 37, any additional monies remaining in the Settlement Fund shall revert to they City one hundred and fifty (150) days after the United States provides the City with the Amended Final Relief Awards List or informs the City that no amendments are required.

50. No later than thirty (30) days after the United States provides to the City the Amended Final Relief Awards List or informs the City that no amendments are required, the City shall mail a monetary relief award check to each claimant eligible for monetary relief, as listed on the Amended Final Relief Awards List (or original Final Relief Awards List if no amendments were required), in the amount stated for the claimant on the relevant List, less all appropriate taxes and other amounts required to be withheld by law in accordance with Paragraph 28.

51. No later than forty-five (45) days after the United States provides to the City the Amended Final Relief Awards List (or notifies the City that no amendment is required), the City shall provide to the United States a copy of each monetary relief award check mailed to a claimant pursuant to the preceding Paragraph, along with a statement indicating the amounts withheld from each such check and the purpose of each withholding.

52. No later than one hundred and twenty (120) days after the United States provides to the

City the Amended Final Relief Awards List (or informs the City that no amendments are required), the City shall provide to the United States a list of all checks that have been returned to the City as undeliverable and of any other checks that have not been cashed, as well as a statement of the amount of funds remaining in the Settlement Fund. If each claimant listed on the Amended Final Relief Awards List (or the Final Relief Awards List of no amendments are required) did not receive the maximum award to which he or she may be entitled under Paragraph 37, the amount remaining in the Settlement Fund will be redistributed as directed by the United States in a manner consistent with this Decree, unless the United States determines that the amount of money represented by the returned and uncashed checks is *de minimis*. If each claimant received the maximum amount of monetary relief to which he or she may be entitled under Paragraph 37, the amount of money represented by the returned and uncashed checks shall revert to the City within thirty (30) days of the date the City gives the United States the notice required by this Paragraph.

K. Priority Hiring with Retroactive Hire Date

53. The City shall make up to, but no more than, ten (10) priority hires of claimants eligible for priority hiring relief as indicated on the Final Relief Awards List (or the Amended Final Relief Awards List). Any claimant on the Final Relief Awards List (or the Amended Final Relief Awards List) who did not return an Interest in Relief Form in accordance with Paragraph 47, or who returned an Interest in Relief Form rejecting priority hiring relief, will not be eligible to receive consideration for an offer of priority hire.

54. In order for a hire to count as a priority hire under this Decree, the person hired must be a claimant eligible for priority hire as listed on the Amended Final Relief Awards List (or the Final

Relief Awards List if no amendment was required), who is hired by the City after receiving an offer of priority hire as defined in Paragraph 57. A claimant is considered hired only when the claimant begins his/her first day of paid employment as a Portsmouth entry-level firefighter trainee.

55. In order to obtain an offer of priority hire, claimants must appear for and successfully complete the City's lawful entry-level firefighter screening and selection procedures then in effect and required of all other entry-level firefighter applicants, except for any written examination requirement. The screening and selection procedures may include, but are not limited to: the applicable minimum qualification requirements, a background screening, a physical ability screening, and an oral interview. The City shall make reasonable efforts to accommodate claimants in scheduling the screening and selection procedures described in this Paragraph.

56. If the City disqualifies any claimant listed on the Amended Final Relief Awards List (or the Final Relief Awards List if no amendment was required) from an offer of priority hire based on any part of its screening and selection process, the City shall, within ten (10) days of making such determination, send the United States written notice of its determination, the basis of its determination and any supporting documentation. If the United States disagrees with the City's determination to disqualify any claimant, it shall notify the City in writing and the parties shall make a good faith effort to meet and confer in order to resolve the disagreement. If the parties are unable to resolve the disagreement, the United States may submit an objection to the claimant's disqualification to the Court no later than thirty (30) days after receipt of the City's written notice of determination.

57. An offer of priority hire is made to a claimant only when the City sends to the claimant, by certified mail (return receipt requested), a written offer of employment in the entry-level firefighter position, prominently indicating:

- (a) that the offer is an offer of priority hire being made pursuant to this Decree;
- (b) that, at the completion of the claimant's probationary period, the claimant will be entitled to retroactive seniority as of the claimant's presumptive hire date as provided by this Decree;
- (c) the beginning salary the City will pay the claimant and the benefits the claimant will receive if the offer is accepted, as well as the salary and benefits the claimant will receive after completion of the probationary period;
- (d) the date on which the claimant will begin employment if the offer is accepted;
- (e) the telephone numbers at which the claimant may contact the City and the United States with any questions regarding the offer of priority hire; and
- (f) that the claimant has at least thirty (30) days from the date on which the claimant receives the written offer of priority hire to notify the City that the claimant accepts the offer.

On the date on which such an offer of priority hire is sent to a claimant, the City shall send a copy of the offer of priority hire to the United States.

58. Beginning one hundred and fifty (150) days from the date the Court approves the Final Relief Awards List, the City shall not hire any person other than a claimant eligible for priority hire into an entry-level firefighter position until either: (a) ten (10) priority hires have been made or (b) all eligible claimants either have been hired as priority hires pursuant to this Decree, have

rejected an offer of priority hire, have accepted an offer of priority hire but failed to appear to begin the fire academy on the date scheduled without good cause as determined by the United States, or have failed the post-offer medical or psychological examination regularly required of newly-hired Portsmouth firefighters.

59. If a claimant fails to timely accept the City's offer of priority hire, or if the claimant fails to report for work on the start date identified in the City's offer of priority hire, the City's obligation to provide the offer to or make a priority hire of that claimant ceases, except for good cause as determined by the United States.

60. No later than thirty (30) days after the beginning of any academy class for which offers of priority hire have been made, the City shall provide to the United States a written report identifying the name of each claimant who accepted such an offer of priority hire, whether or not each claimant who accepted such an offer was actually employed by the City, and a statement of the reason(s) that any claimant to whom an offer of priority hire was made was not hired, along with all available documentation of such reason(s).

61. On the date on which a claimant who was hired as a priority hire under this Decree completes his/her probationary period, the City shall credit the claimant with a retroactive hire date in the firefighter position that corresponds to the claimant's presumptive hire date as stated on the Amended Relief Awards List (or the original Final Relief Awards List if no amendments were required).

62. Any claimant hired as a priority hire pursuant to this Decree who, at the time of hire, is already certified by the Commonwealth of Virginia as a firefighter will be given credit for any experience the claimant may have had as a certified firefighter with a department other than the

City's Fire Department, in accordance with the City's existing policy regarding certified or experienced firefighters at the time of hire.

63. Nothing in this Consent Decree shall preclude any claimant from applying for hire or being hired into the entry-level firefighter position under any of the City's regular selection or hiring processes. However, hire of a claimant under one of the City's regular selection or hiring processes shall not be counted toward fulfillment of the City's priority hiring obligations under this Decree. Hire of a claimant under one of the City's regular selection or hiring processes shall not affect the claimant's eligibility for monetary relief under this Decree. The City also may not refuse to select or hire a claimant under one of its regular selection or hiring processes because the claimant is eligible for priority hiring or monetary relief under this Decree.

VII. RECORD KEEPING AND COMPLIANCE MONITORING

64. While this Decree remains in effect, the City shall maintain all of the following records (including those created or maintained in electronic form):

- (a) all applications for entry-level firefighter positions in the City's Fire Department;
- (b) all documents relating to the screening, evaluation or selection of applicants for the entry-level firefighter position;
- (c) all records relating to the development and/or validation of any selection practice or procedure the City uses to screen or select entry-level firefighters;
- (d) all documents relating to written or verbal complaints made by any person or organization regarding discrimination in hiring of entry-level firefighters on the basis of race;
- (e) all documents relating to the evaluation or selection of claimants to be offered

priority hire and/or to the employment of claimants hired as priority hires under this Decree; and

- (f) all other documents relating to the City's compliance with the requirements of this Decree, including but not limited to documents relating to the payment or award of individual relief to any claimant under this Decree.

65. Except as otherwise provided in this Decree, the City will make available to the United States, no later than thirty (30) days after the United States so requests in writing, any records maintained in accordance with the preceding Paragraph of this Decree and any additional documents relating to any dispute arising under the Decree.

66. When possible, all records furnished to the United States shall be provided in a computer-readable format to be agreed upon by the parties prior to production.

67. Within thirty (30) days after the United States so requests in writing, the City shall make available for interview by the United States any agent, employee or official of the City who the United States reasonably believes has knowledge of information necessary to verify the City's compliance with the terms of this Decree or to resolve a dispute arising under this Decree.

VIII. DISPUTE RESOLUTION

68. The parties shall attempt in good faith to resolve informally any disputes that arise under this Decree. If the parties are unable to resolve the dispute expeditiously, either party may submit the disputed issue to the Court for resolution upon seven (7) days written notice to the other party, unless a different time period has been specified elsewhere in this Decree.

IX. DURATION OF DECREE

69. This Decree shall be dissolved and this action shall be dismissed, without further order of

the Court, upon the occurrence of the later of the following two events:

- (a) 30 days after the establishment of an eligibility list based on the City's adoption of an alternative selection device that has been agreed upon by the United States, or approved by the Court, pursuant to Paragraphs 14 through 17 of this Decree;
- (b) the fulfillment of all the parties' obligations regarding Individual Relief contained in Section VI of this Decree, including crediting by the City of retroactive seniority in accordance with the retroactive hire date assigned to claimants hired as priority hires.

If both of these events have not occurred within three years of the entry of this Decree, the parties shall jointly move the Court for a status hearing to determine a procedure and timeline for fulfilling the parties' obligations under the Decree.

X. COSTS AND FEES

70. Except as set forth in this Decree, each party shall bear its own costs and expenses incurred as a result of obligations imposed by this Decree, including the cost of all notification and publication procedures.

71. Each party shall bear its own costs, expenses, and attorney's fees incurred in this litigation.

XI. MISCELLANEOUS

72. The Court shall retain jurisdiction over this Decree for the purpose of resolving any disputes or entering any orders that may be appropriate to implement the Decree.

73. Except as otherwise provided in this Decree, all documents required to be delivered

under this Decree to the United States by the City shall be sent to the attention of:

Meredith L. Burrell
Senior Trial Attorney
Portsmouth Fire Department Settlement Team
U.S. Department of Justice
Civil Rights Division
Employment Litigation Section-PHB 4924
950 Pennsylvania Ave., NW
Washington, D.C. 20530

74. Any documents required to be delivered under this Decree by the United States to the City shall be sent to the attention of:

Alfred W. Bates III
Deputy City Attorney
Office of the City Attorney
801 Crawford Street
Portsmouth, VA 23704

It is so **ORDERED**, this 23rd day of July, 2009.



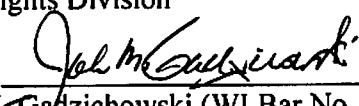
Mark S. Davis
United States District Judge
UNITED STATES DISTRICT JUDGE

AGREED AND CONSENTED TO:

FOR PLAINTIFF UNITED STATES OF AMERICA:

LORETTA KING

Acting Assistant Attorney General
Civil Rights Division

By: 

John M. Gadzichowski (WI Bar No. 1014294)

Chief

Attorney for United States of America

U.S. Department of Justice

Civil Rights Division

Employment Litigation Section

950 Pennsylvania Avenue, N.W.

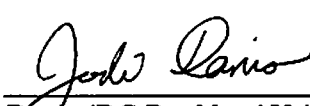
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Washington, D.C. 20530

Telephone: (202) 514-3831

Facsimile: (202) 514-1005

John.M.Gadzichowski@usdoj.gov

By: 

Jodi B. Danis (DC Bar No. 453493)

Deputy Chief

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DANA J. BOENTE
Acting United States Attorney
for the Eastern District of Virginia

By: Susan L. Watt
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FOR DEFENDANT CITY OF PORTSMOUTH:

A handwritten signature in black ink, appearing to read "G. Timothy Oksman", is written over a horizontal line.

G. Timothy Oksman (VA Bar No. 12761)

City Attorney

Alfred W. Bates III (VA Bar No. 19834)

Deputy City Attorney

Attorneys for City of Portsmouth

Office of the City Attorney

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Portsmouth, VA 23704

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