

## City Seeks To Disqualify Morgenthau In Bias Suit

BY MARK FASS

NEW YORK CITY has moved for the disqualification of Robert M. Morgenthau as the special master charged with overseeing the remedial stage of a discrimination action filed on behalf of black and Hispanic firefighter applicants.

Eastern District Judge Nicholas G. Garaufis appointed Mr. Morgenthau on Wednesday, citing the city's "chronic" failure to fulfill its obligations under an order the judge issued in January that established a multi-step plan to create a non-discriminatory hiring system for firefighters (NYLJ, May 27).

In a five-page letter sent to Judge Garaufis on Friday, Georgia Pestana, who heads the Law Department's labor and employment law division, outlined Mr. Morgenthau's run-ins with the department, the Bloomberg administration and the fire department during the final months of his 35-year tenure as Manhattan district attorney.

A "reasonable person, knowing all the facts concerning Mr. Morgenthau's relationship with the corporate entity that is the City of New York, the New York City Fire Department, and high-ranking City officials, would reasonably question his impartiality," Ms. Pestana wrote.

On Friday afternoon, Judge Garaufis responded to the letter by ordering the city to file a formal motion by this Friday, June 4. The judge gave the plaintiffs one week to respond.

The judge also adjourned, at the city's request, a conference that Mr. Morgenthau had scheduled with the parties for June 7.

In a statement released Friday afternoon, Mr. Morgenthau said, "I was asked by the judge to assist by helping the parties meet his ordered relief. My record and independence in my role as district attorney are no secret and I wouldn't have accepted the position if I didn't think I could be impartial. Nonetheless, of course I will do what is in the best interest of moving this important matter forward."

The underlying discrimination case, *United States v. City of New York*, 07-cv-2067, was filed on behalf of the Vulcan Society, an organization of black firefighters, against the city in 2007. In July, Judge Garaufis found that a test used by the city from 1999 to 2002 had a discriminatory effect. In January, he found that the city intentionally discriminated against black applicants. The city continues to deny wrongdoing.

Ms. Pestana's letter on Friday described the relationship between Mr. Morgenthau and top city officials as "chilly," "strained" and "adversarial."

The letter quoted several news reports documenting that friction, including a Wall Street Journal article in which Mr. Morgenthau dismissed with an expletive an accusation by Mayor Michael Bloomberg that Mr. Morgenthau's office hid roughly \$80 million from fines and settlements in "undisclosed" bank accounts.

The letter quoted articles in the New York Law Journal and elsewhere describing the tension between Mr. Morgenthau and city officials when Mr. Morgenthau convened a grand jury to consider whether to levy criminal charges against the city in connection with a 2007 fire at the former Deutsche Bank, which killed two firefighters (NYLJ, May 27). Ultimately, no such charges were brought.

Ms. Pestana stated that although Mr. Morgenthau had been "one of the great prosecutors of this country," he was unquali-

fied to oversee the remedial stage of a federal action.

"With the exception of a few civil litigations alleging constitutional violations for which damages were sought, Mr. Morgenthau has had no dealings with the Federal Rules of Civil Procedure since his term as U.S. Attorney for the Southern District of New York ended more than 40 years ago," Ms. Pestana wrote.

"The candidates for Special Master suggested by all of the parties were persons familiar with the federal procedural rules as well as experienced in mediation and/or employment litigation. Mr. Morgenthau is not known for his experience in any of these areas," she noted.

Darius Charney of the Center for Constitutional Rights, which serves as co-lead counsel for the plaintiffs, said that he is concerned that the motion will lead to yet more delays in implementing a new, non-discriminatory hiring system.

"If the court has to deal with the city's motion to disqualify, and the court does in fact disqualify, it's just going to delay the implementation of remedies, which is why the court appointed a special master in the first place," Mr. Charney said. He added that Judge Garaufis is "very frustrated by the city's foot dragging, as are we, of course."

A spokeswoman for the Law Department said, "Under the circumstances outlined in our letter, we think it would be inappropriate for Mr. Morgenthau to serve as the Special Master."

In her letter, Ms. Pestana stated that the department intends to submit a declaration from Corporation Counsel Michael A. Cardozo that will "attest to other comments about the Mayor made by Mr. Morgenthau to Mr. Cardozo."

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