

**UNITED STATES
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
NEW YORK DISTRICT OFFICE**

_____ x
**NEW YORK CITY
FIRE DEPARTMENT,**
Respondent,

**DECLARATION OF
PAUL WASHINGTON**

--and—

VULCAN SOCIETY, INC.,
Charging Party.
_____ x

Paul Washington hereby declares:

I am the President of the Vulcan Society, Inc., the fraternal organization of Black and African American firefighters of the New York City Fire Department (the "Department"). I make this declaration and submit the attached materials in support of the Charge of Discrimination filed by the Vulcan Society against the Department on August 9, 2002.

The Public Advocate has described the Department as de facto segregated

The first attachment to this affidavit is the Report of the Public Advocate of the City of New York regarding minority representation in the Fire Department of May 3, 2001 ("*Public Advocate Report*," appended as **Exhibit A**). This report describes the statistics on the racial composition of the department as revealing a "shocking under representation of minorities" which is "astounding and inexplicable." *Public Advocate Report* at 3, 1. The percentage of African American firefighters "is actually lower today than it was twenty-five years ago." *Id.* at 1. "The firefighter force is the least diverse ethnically, racially, and by gender of all the uniformed services in the City." *Id.*, citing City Administrative Services, *Workforce Summaries by Agency, Job Group, Ethnicity and Gender* (Dec. 31, 2000). The report refers to a "long and unacceptable history of de facto and formal segregation" of the FDNY. *Id.* at 3.

The Public Advocate has made recruiting recommendations which have not been implemented

The Public Advocate Report puts forward several recommendations for improving the recruitment of minority candidates. "New York City needs to create a

pipeline of qualified minority and women applicants for the Fire Department.... more frequent firefighter exams, changes in how the [New York City] residency bonus is applied and expanded recruitment efforts are all worthwhile initiatives.” *Id* at 3. It suggests the creation of “two citywide high schools of fire sciences and a minimum of two fire sciences programs at CUNY community colleges,” and suggests that the City should take the “affirmative step of locating the new high schools and fire science programs in predominantly minority communities and at CUNY facilities currently located in these communities.” *Id*. The Public Advocate recommended that the fire science programs should be at schools open to students citywide and that “recruitment efforts should focus on minorities and women,” with appropriate guidance at schools from counselors and professionals. *Id*.

The Fire Commissioner’s own statements belie the effectiveness of the current recruitment methods

The second attachment to this affidavit is the written version of the testimony of former Fire Department Commissioner Thomas Van Essen before the City Council Committee on Fire and Criminal Justice Services on September 28, 1999 (“*Van Essen Testimony*,” appended as **Exhibit B**). In his testimony, Commissioner Van Essen expounds at length on the particular nature of the recruiting challenge facing the Fire Department in its efforts to attract applicants from minority groups from which the Department has not traditionally drawn firefighters:

The mission of our recruitment staff is to raise the job of firefighter on the radar screen of many people who never thought of being a firefighter. It’s not a job that immediately surfaces as a desirable career unless you know and grew up with someone who has had it. Many of the minority firefighters who now serve ... come from firefighting families or were introduced to the job by a minority recruiter who spent time with them. Unless you see first hand that this profession has tremendous rewards and you see how members balance the risks with the rewards, it isn’t easy to grasp why you would want such a physical demanding, dangerous job. If you have the luxury of seeing your father, mother, uncle or cousin raise a family, buy a house, provide school tuition ... it’s different. ... Once you attend the family days and picnics with the whole fire company, get to see the fire equipment first hand and grow comfortable with the idea, you can get past the fear and the trepidation.

People who don’t grow up with this have a definite disadvantage in terms of familiarity with what to expect. Our recruiters in meeting after meeting contrived ways to communicate those mysteries to their recruits. They needed to be that cousin or aunt. ... You can’t just put an ad on TV or a sign on the subway and convince people it’s OK to run into fire. it takes personal hands on mentoring and dialogue.

Van Essen Testimony at 4-6. Despite these acknowledgements, the rest of Commissioner Van Essen's testimony details recruitment efforts that are not calculated to address these specific challenges.

Commissioner Van Essen's testimony reveals that recruitment advertising efforts have generally been aimed at those perceived to be likely to pass the physical tests: "student athletes, gym members, military personnel," among others. *Id.* at 14. However, on information and belief, the majority of African American applicants who are not accepted have underperformed on the written test, not the physical test. Similarly, physical tutoring programs have been located in minority neighborhoods (*e.g.*, Castle Hill, Bedford, Harlem), *see id.* at 22-23, whereas written testing tutoring programs have not been specifically targeted at minority neighborhoods, *see id.* at 19.

A large amount of financial resources appear to have been devoted to television, radio, newspaper and subway ads. This is despite Commissioner Van Essen's acknowledgment that "[y]ou can't just put an ad on TV or a sign on the subway and convince people [without familial experience in the Department that] it's OK to run into fire. It takes personal hands on mentoring and dialogue." *Id.* at 5-6. (Ironically, the greatest number of advertisements seem to have been placed in the subways. *See id.* at 14.) Other recruitment efforts appear to have centered on mail advertisements, *see id.*, and on distribution of written test applications, *see id.* at 16.

Other factors have had a disparate impact on minorities

Commissioner Van Essen's testimony acknowledges that the infrequency of the written test administrations is discouraging to applicants who are not already self-motivated to enter the hiring process. "In the past we have scheduled tests every 4 to 5 years to keep up with the need to fill our positions." *Id.* at 3. "We think the time period between tests is [currently] too long. We believe we should give a promotional test every year and at the same time have an open competitive test every 2 years. ... It's certainly a challenge for the recruiters to try and encourage young people to take a test that's given every 4-6 years for a job they may have to wait 5 years to get!" *Id.* at 8.

Commissioner Van Essen's testimony identifies the college credit requirement as one of the two major factors in the sharp (approximately 50%) drop-off in applicants between the last two administrations of the written test. *Id.* at 11. On information and belief, this requirement has had a disparate impact on minority potential applicants.

Finally, one effective method for increasing the hiring of minority recruits is awarding credit to residents of the City. The Department currently does factor a small credit for residents into the factors leading to the ranking of applicants. According to Commissioner Van Essen's testimony, the residency requirement has been lengthened as of 2000, but the amount of credit granted for residency has not been increased. *Id.* at 6.

The New York City Equal Employment Practices Commission has found that several of the features of the current system have or may have an adverse disparate impact on minority hiring

Included for your information as **Exhibit C** are minutes from a public hearing on Fire Department recruiting from 1993, which indicates that many of the current problems existed at that time and had been brought to the department's attention. As a result of these hearings, the Equal Employment Practices Commission ("EEPC") conducted an Audit of the Fire Department's recruiting practices in 1994 and a follow-up Audit in 2000.

By resolution of August 1, 1994, attached as **Exhibit D(1)**, and in its preliminary determinations, dated August 5, 1994 and attached as **Exhibit D(2)**, the EEPC found that the minority recruitment program surrounding the May 9, 1992 Firefighter's Exam (exam no. 0084) "did not utilize a sufficient number of recruiter role models," that there were insufficient vehicles and other resources devoted to the recruitment program, that it was insufficiently funded, and that fewer minority test-takers had taken the 1992 exam than had taken the previous one. An advisory committee formed by the EEPC made recommendations for improving recruitment, attached as **Exhibits D(3)** and **D(4)**.

After the next written examination, no. 7029, was administered, the EEPC conducted a follow-up audit of recruiting. The EEPC's May 25, 2000 resolution containing its recommendations together with its preliminary determinations as conveyed to the Department are attached as **Exhibit E**. Once again, the EEPC found that the number of recruiters was too low in comparison to the size of their task. In addition, the EEPC found that incentives offered to firefighters to work in recruitment were inadequate, and that the Advisory Committee formed in the wake of the earlier audit was not consulted sufficiently by the Department or involved enough in Department decision making. The EEPC also found that the fact that there was no dedicated recruitment budget, fixed in advance of each recruitment cycle, was problematic.

The EEPC recommended that the First Responder Certification training be made part of the Fire Academy training, and its costs borne by the Department, "as it was in the past, for reasons of fairness and cost." First Responder training is currently a requirement that must be fulfilled before an individual is hired from the list at that individual's own expense. *See Preliminary Determination*, Exhibit E(2), at 4-7. As indicated in its charge, the Vulcan Society agrees with the EEPC that this requirement has a disparate impact upon minority applicants.

Starting with exam 7029, applicants were required to have 30 hours of college credit by their date of appointment. (Initially, the department intended to require 60 credits, but lowered the requirement in the face of opposition from the Advisory Committee.) "Given the egregious and long-standing under representation of minorities" in the Department, EEPC found that the Department should "conduct an adverse impact study to determine if the new educational requirement disproportionately screens out members of historically under represented groups. If the study reveals such disparate impact, the Department should conduct a validation study in accordance with the federal government's 'Uniform Guidelines on Employee Selection Procedures,' 29 C.F.R. sec. 1607." *Id.* at 7-8. To my knowledge, such a study has not been carried out, and the

requirement continues in place for both the current list and the next recruitment cycle (commencing with the December 14, 2002 written exam).

The EEPC found that the differential pass rates on the written test for Caucasians and minorities “indicate adverse impact.” *Id.* at 9 (applying 4/5th rule to pass rates). Therefore, the EEPC also recommended that “an adverse impact study” be conducted “based on the results of the written examination,” and that “[i]f the Department’s study reveals that the test disproportionately screens out minority or female candidates, FDNY should conduct a validation study in accordance with the” federal EEOC guidelines and the City’s 1996 Equal Employment Opportunity Policy. *Id.* To my knowledge, such a study has not been carried out, and the written test continues to be not only required but the centerpiece of the hiring process.

Finally, the EEPC recommended that exams be administered more frequently—on a biannual basis. *See id.* at 10.

The results of the follow-up Audit have been the subject of an ongoing correspondence between the FDNY and the EEPC, included as **Exhibit F**. The first item in Exhibit F is a letter of July 14, 2000 from Commissioner Van Essen responding directly to the findings and recommendations of the follow-up Audit documents of May 25, 2000. The EEPC replied to this letter with a letter of August 21, 2000, which found Commissioner Van Essen’s reply “inadequate and ... unacceptable” as it was non-responsive in many important respects. The EEPC threatened to take “corrective action” if the issues in dispute were not addressed.

The Department attempted to resolve these issues in a more detailed response of September 14, 2000. In a letter of October 31, 2000, the EEPC replied to the Department’s September 14 submission, finding that a number of its answers were nonresponsive or contradictory with earlier positions. Most significantly, the Department’s September 14 submission claims that the Department of Citywide Administrative Services routinely “conducts a content validation study on all examinations to ensure that the content of the examination was developed to reflect the job functions to be performed.” The EEPC responded by stating that “the agency (i.e. the FDNY),” not the Department of Citywide Administrative Services, is required by the EEPC guidelines to conduct an adverse impact study on the written examination. Furthermore, the Vulcan society is unaware of any such validation study of the written examination being performed by the Department of Citywide Administrative Services.

We anticipate that there are further documents in this series of correspondence which will be produced as our Freedom of Information Law requests (described below) are processed. In those requests, we have asked that the Department of Citywide Administrative Services (and/or the Fire Department) produce any validation studies performed on the written examination.

Pending FOIL Requests

The subsequent attachments consist of Freedom of Information Law (“FOIL”) requests made by counsel for the Vulcan Society to the Fire Department, the Custodian of Records of the Department of Citywide Administrative Services (“DCAS”), and the Public Advocate. Also included are acknowledgments of receipt from two of the three

agencies to which requests were made. (Please note that the request made to the Fire Department, appended as **Exhibit C**, refers to three previous FOIL requests made by counsel to the Vulcan Society to the Department which have to date gone unanswered.) These requests are calculated to lead to information that will allow us to evaluate, *inter alia*, the following:

- the formal validation—or lack thereof—of the written test (*see* FDNY FOIL request at ¶¶ 5-6, DCAS FOIL request at ¶¶ 5-6);
- the actual methods used in recruitment by the Fire Department (*see* FDNY FOIL request at ¶¶ 16-20, DCAS FOIL request at ¶¶ 17-21);
- the impact of the written test on the hiring of minorities (via the requested results and outcomes from recent examinations, *see* FDNY FOIL request and DCAS FOIL request, *passim*);
- the procedures for investigating the backgrounds of recruits, and evaluating the results of those investigations (*see* FDNY FOIL request at ¶ 7, DCAS FOIL request at ¶ 7);
- any responses made to the *Public Advocate Report* of May 3, 2001 and the suggestions therein (Public Advocate FOIL request at ¶ 2, FDNY FOIL request at ¶ 27, DCAS FOIL request at ¶ 28).

The Vulcan Society intends to submit, through counsel, a further supplement to the EEOC charge of August 9, 2002 once adequate responses to the above FOIL requests are made by the respective agencies.

Sources of information in the August 9, 2002 charge

Finally, the Vulcan Society would like to take this opportunity to detail some of the sources of information contained in our original charge of August 9th. They are as follows:

The source of statistics on the current department's racial/ethnic composition is a communication from the Fire Department's Department of Personnel to Paul Washington.

The sources for the account of hiring procedures and stages are the Fire Department website, http://nyc.gov/html/fdny/html/community/firefighter_requirements.html

A description of the 1973 litigation is available in the reported caselaw. *See Vulcan Society v. Civil Service Comm'n of the City of New York*, 490 F.2d 387, 391 (2d Cir. 1973) (detailing 3 to 1 ratio), *aff'g* 353 F. Supp. 1092 (S.D.N.Y. 1973), *as supplemented* 360 F. Supp. 1265 (S.D.N.Y. 1973).

the source for the statement that the FDNY is the “whitest fire department in a large urban area” (defined as the highest non-African American or Latino composition of departments in cities in the United States with a population over one million as listed in the 2000 census) is the *Public Advocate Report* at 2, citing NYC Equal Employment Practices Comm’n, *Audit Report* (May 25, 2000), and LAFD and City of Phoenix Equal Opp’ty Comm’n official statistics.

The source for the statistics indicating that for the most recent test, no. 7029, only 10% of test takers and 7% of the people who passed the test were African American was New York City Equal Employment Practices Commission data contained in Appx. II, *Preliminary Determination Pursuant to Follow-Up Audit of the New York City Fire Department’s Recruiting Program for Examination No. 7029 of Feb 27, 1999* (May 25, 2000).

The assertion that the relevant labor pool contains far more African Americans that would succeed but for the disparate impact of various is based on information and belief. 25.5% of that part of the City’s population between the ages of 16 and 29 was African American as of the year 2000, as calculated by counsel from 2000 U.S. Census data, available online at factfinder.census.gov.

The source for the new requirements (first responder certificate, a valid NYS drivers license, a minimum of 30 credits at an accredited college) is the FDNY website. *See* http://nyc.gov/html/fdny/html/community/firefighter_requirements.html, at 2.

The statement that the Department considers certain “Subjective Factors” in the background check stage in a discriminatory fashion is based on information and belief, and on representations of counsel based on their interviews with various individual candidates rejected by the Department for, for example, having records of arrests by the NYPD without convictions or, often, without charges being filed.

The failure of minority recruitment efforts historically is set forth throughout the various EEPC documents appended to this affidavit.

The statement that the City has been put on notice regarding the failures of its recruiting methods and the disparate impact of its job qualification requirements is based on several recent Annual Reports of the EEPC, which contain reports of public hearings where these matters were brought to the attention of the Department leadership, *see, e.g.*, Equal Employment Practices Commission, *Annual Report Calendar Year 1993*, at 32-47.

The statements that the written test is based on questions composed by active firefighters, and that there has been no competent validation of the written test are based on information and belief.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on October 22, 2002.

Paul Washington

ATTACHMENTS

EXHIBIT A:

Public Advocate Report (Mar. 3, 2001).

EXHIBIT B:

Commissioner Thomas Van Essen, *Testimony before City Council Committee on Fire and Criminal Justice Services* (Sep. 28, 1999).

EXHIBIT C:

Excerpt from Equal Employment Practices Commission, *Annual Report Calendar Year 1993*, pages 32-47.

EXHIBIT D:

1994 EEPC Recruitment Audit Documents, including (1) two Resolutions dated June 20, 1994 and August 1, 1994; (2) Equal Employment Practices Commission, *Preliminary Determinations Pursuant re. Fire Department's Recruitment Program for Firefighter Exam #0084* (Aug. 5, 1994); (3) Advisory Committee Recommendations for Improvements in the Recruitment Process (Sep. 26, 1994); (4) Recommendations to improve the Fire Department Recruitment Program (Oct. 18, 1994);

EXHIBIT E:

2000 EEPC Recruitment Follow-Up Audit Documents, including (1) Resolution of May 25, 2000; and (2) Equal Employment Practices Commission, *Preliminary Determination Pursuant to the Follow-Up Audit of the New York City Fire Department's Recruitment Program for Examination No. 7029 of Feb. 27, 1999* (May 25, 2000)

EXHIBIT F:

Correspondence between EEPC and FDNY regarding EEPC Audit of Fire Department Recruitment Program, including letters of July 14, 2000; August 21, 2000; September 21, 2000; and October 31, 2000.

EXHIBIT G:

FOIL request to Mary O'Sullivan, Records Access Officer, New York City Fire Department (Oct. 2, 2002).

EXHIBIT H:

FOIL request to Betsy Gotbaum, Public Advocate for the City of New York (Oct. 2, 2002).

EXHIBIT I:

FOIL request to Custodian of Records, Department of Citywide Administrative Services (Oct. 2, 2002).

EXHIBIT J:

Acknowledgment of FOIL request from Public Advocate for the City of New York

EXHIBIT K:

Acknowledgment to FOIL request from Department of Citywide Administrative Services