

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
Plaintiff,

v.

NEW YORK CITY BOARD OF EDUCATION;
CITY OF NEW YORK; WILLIAM J.
DIAMOND, COMMISSIONER, NEW YORK
CITY DEPARTMENT OF CITYWIDE
ADMINISTRATIVE SERVICES (in
his official capacity); NEW YORK
CITY DEPARTMENT OF CITYWIDE
ADMINISTRATIVE SERVICES,
Defendants.

CIVIL ACTION NO.
96-0374 (FB) (RL)

SETTLEMENT AGREEMENT

This action was brought by the Attorney General on behalf of the United States of America against the New York City Board of Education "Board of Education", the City of New York ("City"), the New York City Department of Personnel ("Personnel Department") (currently known as the Department of Citywide Administrative Services), and the Personnel Director for the Personnel Department in her official capacity (hereinafter collectively referred to as "Defendants") to enforce the provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.

In its Complaint, the United States alleges that Defendants have failed and/or refused to recruit blacks, Hispanics, Asians, and women on the same basis as white (non-Hispanic) men for the positions of School Custodian ("Custodian") and School Custodian Engineer ("Custodian Engineer"); have failed and/or refused to hire and promote blacks and Hispanics on the same basis as whites for the positions of Custodian and Custodian Engineer; and have used entry-level and promotional written examinations for the positions of Custodian and Custodian Engineer that disproportionately excluded blacks and Hispanics from employment, although these examinations had not been shown to meet the requirements of federal law. The Defendants deny and continue to deny these allegations.

However, the United States and Defendants, desiring to avoid protracted, expensive and unnecessary litigation, agree to the entry of this Settlement Agreement, which resolves all issues that were or could have been raised by the United States in its Complaint. This Settlement Agreement shall not constitute an admission, adjudication, or finding on the merits of the allegations delineated in the United States' Complaint.

The parties stipulate and agree as follows:

I. DEFINITIONS

1. As used in this Settlement Agreement, the terms "Custodian" and

"Custodian Engineer" shall refer to the titles of Custodian and Custodian Engineer (both permanent and provisional), as well as any successor job titles for these positions, unless otherwise specified.

2. As used in this Settlement Agreement, the terms "Race" and "National Origin" shall refer to blacks, Hispanics, and Asians; the term "Gender" shall refer to women, including pregnancy status.

3. As used in this Settlement Agreement, the term "Challenged Examinations" shall refer to the following: Custodian Examination No. 5040; Custodian Engineer Examination No. 8206; Custodian Engineer Examination No. 8609; and Custodian Examination No. 1074.

4. As used in this Settlement Agreement, the term "Offeree(s)" shall refer to the following individuals. The universe of such individuals as of the date of the execution of this Settlement Agreement by the parties is set forth in Appendix A hereto.

(a) All Custodians or Custodian Engineers who are listed in the Stipulation Regarding Provisional Hires as black, Hispanic, Asian, or female and are still employed as Custodians or Custodian Engineers, either provisionally or permanently, as of the date of the approval of this Settlement Agreement by the Court; and

(b) All black, Hispanic, Asian, or female Custodians or Custodian Engineers who are not listed in the Stipulation Regarding Provisional Hires but are employed as provisional Custodians or Custodian Engineers as of the date of the approval of this Settlement Agreement by the Court and took one or more of the Challenged Examinations.

5. As used in this Settlement Agreement, the term "Median Date" for each of the Challenged Examinations shall refer to the following dates:

Custodian Exam No. 5040: 1/23/89
Custodian Engineer Exam No. 8206: 10/8/92
Custodian Engineer Exam No. 8609: 2/14/92
Custodian Exam No. 1074: 10/27/97

6. As used in this Settlement Agreement, the term "Current Job Title" shall refer to the title held by each Offeree as of November 6, 1998.

II. GENERAL INJUNCTIVE RELIEF

7. Defendants shall not engage in any act or practice that has the purpose or effect of unlawfully discriminating in the recruitment or the selection of Custodians and/or Custodian Engineers based on the Race, National Origin or Gender of any employee in, or applicant or prospective applicant for, a Custodian and/or Custodian Engineer position.

8. Defendants shall not retaliate against any person because that person has opposed allegedly discriminatory policies or practices of Defendants in the recruitment or the selection of Custodians and/or Custodian Engineers, has filed a charge with the Equal Employment Opportunity Commission or any state or local equal employment or human rights agency (including the New York City Commission on Human Rights and New York State Division of Human Rights), or has participated in or cooperated

with the United States in its investigation and/or litigation of this case, as well as the United States' administration of this Settlement Agreement.

III. GENERAL PROVISIONS

9. If any provision of this Settlement Agreement is challenged, the United States and Defendants shall take all reasonable steps to defend fully the lawfulness of any such provision.

10. The parties shall attempt to resolve informally any dispute that may occur under this Settlement Agreement. If the parties are unable to reach agreement after a matter has been brought to the attention of one of the parties by the other party, the issue may be submitted by either party to the Court for resolution.

11. This Settlement Agreement shall remain in force for a period of four years from the last date of execution of the Settlement Agreement by the parties.

***IV. CONVERSION OF OFFEREES TO PERMANENT POSITIONS AND GRANT OF RETROACTIVE SENIORITY ***

12. All Offerees who execute and return to Defendants a Release pursuant to paragraph 39 shall receive the individual relief delineated in paragraphs 13-19, *infra*.

13. All Offerees who are serving as provisional Custodians as of the date the Court approves this Settlement Agreement will be granted the position of permanent Custodian. All Offerees who are serving as provisional Custodian Engineers as of the date the Court approves this Settlement Agreement will be granted the position of permanent Custodian Engineer.

14. (a) Defendants shall grant to all Offerees retroactive seniority dates to be determined in accordance with paragraphs 15-16, *infra*. These retroactive seniority dates shall apply for all purposes for which seniority is applied except any applicable probation requirement.

(b) Any period of time subsequent to an Offeree's retroactive date of seniority as a permanent Custodian or Custodian Engineer pursuant to the terms of this Settlement Agreement and prior to his or her initial date of employment as a Custodian or Custodian Engineer with the New York City Board of Education shall be deemed to be service as a permanent Custodian or Custodian Engineer with said Board of Education for the purpose of purchasing credit in the New York City Board of Education Retirement System. Each Offeree shall have the right to purchase service credit in the Retirement System for such period, provided that such purchase of service credit otherwise meets all of the requirements of the New York State Retirement and Social Security Law (RSSL), and other applicable statutes.

(c) In the event that two or more Offerees receive the same retroactive seniority date as a result of this Settlement Agreement, seniority between said Offerees shall be determined by a lottery to be conducted by Defendants.

15. All Offerees whose names appear on the Stipulation Regarding Provisional Hires shall receive retroactive seniority as set forth in Appendix A. The parties determined the retroactive seniority dates as follows:

(a) If the Offeree did not take any of the Challenged Examinations that correspond to his or her Current Job Title, then his or her retroactive seniority date shall be the date he or she was hired provisionally in his or her Current Job Title.

(b) If the Offeree took one or both of the Challenged Examinations for the position of Custodian and has a Current Job Title of Custodian, his or her retroactive seniority date shall be the earlier of:

(i) the date he or she was hired provisionally as a Custodian, or

(ii) the Median Date for the Challenged Examination for Custodian that he or she took, or, if he or she took both Challenged Examinations for Custodian, then the Median Date for Custodian Examination No. 5040.

(c) If the Offeree took one or both of the Challenged Examinations for the position of Custodian Engineer and has a Current Job title of Custodian Engineer, his or her retroactive seniority date shall be the earlier of:

(i) the date he or she was hired provisionally as a Custodian Engineer, or

(ii) the Median Date for the Challenged Examination for Custodian Engineer that he or she took, or, if he or she took both Challenged Examinations for Custodian Engineer, then the Median Date for Custodian Engineer Examination No. 8609.

16. All Offerees whose names do not appear on the Stipulation Regarding Provisional Hires shall receive retroactive seniority as set forth in Appendix A. The parties determined the retroactive seniority date as follows:

(a) If the Offeree has a Current Job Title of Custodian, his or her retroactive seniority date shall be the earliest hire date listed in the Stipulation Regarding Provisional Hires for any provisional custodian, i.e., 2/28/92.

(b) If the Offeree has a Current Job Title of Custodian Engineer, his or her retroactive seniority date shall be the earliest hire date listed in the Stipulation Regarding Provisional Hires for any provisional Custodian Engineer, i.e., 4/13/90.

17. There will be no back pay awarded to Offerees under the terms of this Settlement Agreement.

V. TERMS RELATING TO RECRUITMENT CLAIM

18. Defendants agree to adopt, implement, and maintain a recruitment program during the term of this Settlement Agreement that is designed to increase the number of qualified blacks, Hispanics, Asians and females

that apply and are hired for Custodian and Custodian Engineer positions. Compliance with the recruitment obligations delineated in this Settlement Agreement shall be determined by Defendants' good faith implementation and administration of the recruitment program. The minimum requirements of this recruitment program, which Defendants may expand as they see fit, are set forth in paragraphs 19-22, infra. 19. No later than three (3) weeks prior to the closing date of the application period for an examination for permanent Custodian or Custodian Engineer positions, Defendants shall:

(a) prominently post advertisements for the examination and/or notices of examination in all public schools in locations that are clearly visible to all Custodians' and Custodian Engineers' employees;

(b) place prominent print advertisements for the examination in the following newspapers: The Daily News, The New York Times, The New York Post, The Amsterdam News, The Chinese World Journal, Korea Times, India Abroad and El Diario. Such advertisements shall be published on at least two (2) occasions for each paper;

(c) (i) place advertisements for the examination, twice daily, two times a week, for one week, during weekday mornings and evening (7 a.m. until 9 a.m. and 6 p.m. until 8 p.m.) on radio stations whose audience reflects a significant black, Hispanic, or Asian listenership; (ii) make announcements for all Custodian and/or Custodian Engineer examinations, twice daily, three times a week, for two weeks, during weekday mornings and evening (7 a.m. until 9 a.m. and 6 p.m. until 8 p.m.) on the "Crosswalks" cable television channel(s) and on the Board of Education's television channel (WNYC);

(d) send and/or distribute notices of examination to all locations on the Community Mailing List, attached hereto as Appendix B;

(e) participate in selected job fairs, career, placement, and other programs sponsored by schools, colleges, and civil agencies, to be agreed upon by the parties.

** 20. In recruiting for provisional Custodian and Custodian Engineer positions, Defendants shall (a) prominently post notices or advertisements for the positions in all public schools in locations that are clearly visible to all Custodians' and Custodian Engineers' employees; (b) send and/or distribute notices or advertisements for the positions to all locations on the Community Mailing List; and (c) place prominent print advertisements for the positions in the following newspapers: The Daily News, The Amsterdam News, The Chinese World Journal, Korea Times, India Abroad and El Diario. Such Advertisements shall be published on one (1) occasion for each paper. If the applications received as the result of the foregoing recruitment activity exceed by a multiple of five the number of provisional positions needed to be filled at the time of such recruitment, Defendants may (a) cease any further recruitment activity for the aforementioned provisional positions; (b) retain the applications received for the purpose of future provisional hiring, if any; and (c) refrain from further recruitment activity for provisional positions in the same job title until the applications received as a result of the foregoing recruitment activity have been exhausted. If the applications

received as the result of the foregoing recruitment activity do not exceed by a multiple of five the number of provisional positions needed to be filled at the time of such recruitment, the parties may jointly determine the extent of further recruitment activity to be conducted by Defendants. Paragraphs 19(c) and (e), supra, shall not apply to recruitment activities for provisional positions.

21. Each notice of examination or job advertisement, including radio advertisements, for Custodian or Custodian Engineer positions, whether in print or verbal forms, shall:

- (a) emphasize that Defendants are equal opportunity employers that are actively recruiting qualified blacks, Hispanics, Asians, and women;
- (b) describe the positions and job duties;
- (c) describe the minimum qualifications required for the positions;
- (d) describe the minimum starting salaries for the positions;
- (e) describe the application procedures and the closing date for applications for the positions; and
- (f) specify the name, address, telephone number, and hours of operation of the office to which inquiries and requests for applications may be made.

22. Defendants shall create a standardized form to be provided to and completed by applicants for all Custodian or Custodian Engineer examinations or provisional positions. The form shall specify the date of the application, the applicant's name, social security number, Race, National Origin, sex, mailing address and place of residence, the job applied for, and how the applicant learned of the job opening (broken down by several categories, including but not limited to: relative or acquaintance; newspaper advertisement; radio advertisement; community organization; job fair; posting in school, college, or at one of Defendants' office locations). The form shall appear on a separate page of the application and shall state that providing information relating to Race, National Origin, and Gender is optional. Defendants shall tear off this form from each application prior to submitting it to any individual involved in the hiring process, use it in preparing reports to be provided to the United States pursuant to Section VIII of this Settlement Agreement, and make it available to the United States upon request pursuant to Section VIII of this Settlement Agreement.

23. Defendants shall bear the cost of all advertising and publication requirements set forth in Section V of this Settlement Agreement.

24. After Defendants have engaged in recruitment efforts for Custodian or Custodian Engineers, the parties will meet at the request of either side to evaluate the effectiveness of such efforts and to determine whether any modifications are needed.

VI. TERMS RELATING TO TESTING CLAIM

25. Defendants shall not administer any of the Challenged Examinations again, or any written examination derived substantially therefrom.

26. Defendants will consult with an expert to be designated by the United States on ways to attempt to reduce the adverse impact of Custodian Engineer (BOE) Examination No. 7004 through any available means that complies with applicable federal law. Accordingly, Defendants shall not establish an eligible list from Exam No. 7004 until this consultation effort has been completed. If Defendants re-administer the 7004 Examination during the term of this Settlement Agreement, and if the written examination has adverse impact, Defendants shall continue to consult with the United States' designated expert on an alternative use of the examination that complies with applicable federal law and reduces the adverse impact of the examination.

27. Nothing herein shall prohibit defendants from continuing to hire off the eligible list from Custodian Exam No. 1074, provided that if the 31 Offerees who may be entitled to conversion from provisional Custodian to permanent Custodian under this Settlement Agreement have not yet been converted, there will remain sufficient vacancies in the title of Custodian to do so. In addition, nothing herein shall prohibit defendants from hiring off the eligible list from Custodian Engineer (BOE) Exam No. 7004 after the completion of the consultation referred to in paragraph 26 above, subject to the proviso in the previous sentence, and provided further that if the 12 Offerees who may be entitled to conversion from provisional Custodian Engineer to permanent Custodian Engineer under this Settlement Agreement have not yet been converted, there will remain sufficient vacancies in that title to do so.

28. If Defendants develop, administer and/or utilize an examination for Custodians and/or Custodian Engineers other than Custodian Engineer (BOE) Examination No. 7004, that examination must comply substantially with the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607 et seq. (1998). Defendants must consult with the United States' designated expert as to the validity of such examinations. As part of this consultation effort, upon the request of the United States, prior to their use Defendants shall supply evidence of job-relatedness for the examinations Defendants intend to use for Custodian or Custodian Engineer positions. For purposes of this paragraph, evidence of job-relatedness shall not be construed to require Defendants to conduct an empirically-based validity study for any examination. However, if Defendants conduct such validity study, the study and the data underlying the study shall be provided to the United States, upon request, for purposes of the consultation effort required under this paragraph.

29. The United States shall bear the costs associated with its designated expert. If any action taken by Defendants pursuant to their consultation with the United States' designated expert under this section is challenged, the United States and Defendants shall take all reasonable steps to defend fully the lawfulness of any such action.

30. Defendants shall select all provisional Custodians and Custodian Engineers using lawful procedures that are job-related and consistent with business necessity.

31. Whenever any applicant is interviewed as part of the selection procedure for a Custodian or Custodian Engineer position, Defendants

shall use a written list of job-related questions and record results on the existing Board of Education Interview Form. Any substantive questions asked in addition to the standard written questions shall be summarized in writing by the interviewer(s). The written interview questions and Interview Forms, as delineated in this paragraph, shall be provided to the United States upon request, or pursuant to Section VIII of this Settlement Agreement.

32. If, during the term of this Settlement Agreement, Defendants change the qualification criteria for the selection of Custodians or Custodian Engineers, Defendants shall provide the United States sixty (60) days advance notice in writing of the proposed change(s) and the reasons for such change(s).

33. If Defendants administer competitive examinations for permanent Custodians and/or Custodian Engineers, Defendants shall create and administer test preparation sessions for up to 200 applicants and create and disseminate, upon request, study materials at cost. If the aforementioned test preparation sessions are oversubscribed, preference will be given to black, Hispanic, Asian and women applicants. Defendants shall advertise and post notices of the test preparation sessions and availability of study materials at the places and times delineated in paragraph 19(a), and in The Chief, The Amsterdam News, and El Diario. All advertisements and notices shall emphasize that Defendants are equal opportunity employers that are actively recruiting qualified blacks, Hispanics, Asians, and women.

VII.* *PROCEDURE FOR FAIRNESS HEARING AND FOR DETERMINING AND AWARDDING PERMANENT STATUS/RETROACTIVE SENIORITY TO OFFEREES

34. Upon the parties' execution of this Settlement Agreement, the parties shall file a joint motion with the Court stating that the parties have entered into this Settlement Agreement and requesting that the Court schedule a fairness hearing no later than ninety (90) days after the date the joint motion is granted by the Court for purposes of: (1) hearing all objections to the terms of this Settlement Agreement; and (2) resolving all disputes regarding the proposed conversion of Offerees from provisional to permanent status and granting of retroactive seniority, so that the Settlement Agreement may be entered by the Court.

35. Within fifteen (15) days after notification from the Court of the date of the fairness hearing, Defendants shall provide notice to all interested persons and parties of their right to object to the provisions of the Settlement Agreement, by, inter alia: (1) sending notice to all Custodians and Custodian Engineers by first-class mail to their last known home address; (2) sending notice to Local 891 of the International Union of Operating Engineers by first-class mail; (3) sending notice to the individuals who remain on the eligible list for Custodian Examination No. 1074 by first-class mail to their last known home address; (4) sending notice to all individuals who took Custodian Engineer (BOE) Examination No. 7004 by first-class mail to their last known home address; (5) posting notices at the Board of Education, the Department of Citywide Administrative Services, and all New York City public schools; and (6) arranging for published notices, twice during two (2) consecutive weeks, in each of the following newspapers: The New York Times, The New York Post, The Daily News, The Chief, The Amsterdam

News, The Chinese World Journal, Korea Times, India Abroad and El Diario. The forms of these Notices shall be substantially in the form set forth in Appendices C & D hereto.

36. Within fifteen (15) days after notification from the Court of the date of the fairness hearing, Defendants shall, in addition to the requirements set forth in paragraph 35, supra, provide written notice by first-class mail ("notification letter"; Appendix E hereto) to all Offerees that, pursuant to the Settlement Agreement, they are entitled to conversion to permanent status and/or a proposed retroactive seniority date upon their execution of a Release of all claims, which will be provided by Defendants at a later date in accordance with paragraph 39, infra.

37. All objections to the relief provided pursuant to this Settlement Agreement must be filed in writing with the Clerk of the Court, with copies mailed to counsel for the parties, at least thirty (30) days before the scheduled fairness hearing. All objections must state the objector's name, address, telephone number, a brief description of the objection, a description of the basis for the objection, the identity of all documents (if any) in support of the objector's position, the name and address of the objector's counsel (if any), and a statement as to whether the objector wishes to be heard at the fairness hearing.

38. The parties may file written responses to any objections filed in accordance with paragraph 37, supra, prior to the fairness hearing.

39. Within ten (10) days after the date the Court enters this Settlement Agreement, Defendants shall provide an offer letter and Release to all Offerees by first-class mail. The offer letter and Release shall be accompanied by a self-addressed, stamped envelope. The Release will discharge Defendants from all claims arising out of any discrimination on the basis of Race, National Origin, or sex with respect to the positions of Custodian or Custodian Engineer occurring before the execution of the Release. The offer letter and Release shall be substantially in the form set forth in Appendices F & G hereto.

40. An Offeree shall have thirty-three (33) days from the date of the mailing of the offer letter from Defendants that he or she is entitled to conversion to permanent status and/or retroactive seniority in which to return the executed Release to Defendants. If an Offeree notifies Defendants that he or she does not accept the relief or, absent good cause, does not return the Release within the thirty-three (33) day period, Defendants shall be released from their obligation to him or her under this Settlement Agreement.

41. Upon receipt of their executed Releases by Defendants, all Offerees who return such executed Releases within the thirty-three (33) day period will be converted from provisional to permanent status and/or will receive their retroactive seniority.

42. Defendants shall bear the cost of all mailing, publication, and advertising notices required under Section VII of this Settlement Agreement.

VIII. RECORDS AND REPORTS

43. For purposes of this Settlement Agreement, a reporting period shall run from January 1 through June 30 and from July 1 through December of each year during the term of this Settlement Agreement.

44. Within thirty (30) days after the close of each reporting period, Defendants shall provide to the United States a compliance report containing the following information for the Custodian and Custodian Engineer positions:

(a) Each applicant's name, address, social security number, Race, National Origin, Gender, and how applicant learned of the position;

(b) Adverse impact data and test results for the examination(s) administered or utilized by Defendants;

(c) Eligibility lists from the examination(s);

(d) Appointments made, either permanently or provisionally, Interview Forms and the existing Applicant Flow Charts;

(e) Text of any print or other media advertisement or vacancy/notice of examination announcement;

(f) List of all places (or, where appropriate, precise information regarding radio or television advertisements or appearances at job fairs) where advertisements or vacancy/notices of examination were posted, published, aired, or contacted;

(g) All complaints or allegations of discrimination based on Race, National Origin, or Gender by any Custodian or Custodian Engineer, or applicants or prospective applicants for Custodian or Custodian Engineer positions;

If any of the information set forth above does not exist or is not applicable for the relevant reporting period, Defendant shall inform the United States in writing.

45. Upon reasonable notice to Defendants, and upon a showing of good cause, the United States may request, inspect, and copy records or documents underlying the contents of any compliance report. Requests for such additional materials must be made in writing and must specify with reasonable particularity the information, records, or documents being sought, as well as the reason for the request.

46. If any Offeree is discharged during the probationary period, Defendants shall, within 30 days of the discharge, provide the United States with the Offeree's name, the date of the discharge, the reason(s) underlying the discharge, and all supporting documentation relating to the discharge.

IX. RETENTION OF JURISDICTION

47. The Court shall retain jurisdiction over this lawsuit during the term of this Settlement Agreement to resolve all disputes that may arise from or relate to Defendants' compliance with this Settlement Agreement. The Court's jurisdiction shall automatically terminate at the expiration

of this Settlement Agreement as set forth in paragraph 11, supra.

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Stipulated and Agreed to on this ____ day of _____ by:

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Good cause appearing therefor, IT IS SO ORDERED.

ENTERED this _____ day of _____ 1999.

UNITED STATES DISTRICT JUDGE