UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, JANET A. CALDERO, *et al.*, Plaintiff-Intervenors, and PEDRO ARROYO, JOSE CASADO, CELESTINO FERNANDEZ, KEVIN LAFAYE, STEVEN LOPEZ, ANIBAL MALDONADO, JAMES MARTINEZ, SILVIA ORTEGA DE GREEN, and NICHOLAS PANTELIDES, Applicants for Intervention, vs. NEW YORK CITY BOARD OF EDUCATION, *et al.*, Defendants, and JOHN BRENNAN, *et al.*, Defendant-Intervenors.	Civ. No. 96-0374 (FB) (RML) **COMPLAINT IN INTERVENTION**

Movants Pedro Arroyo, Jose Casado, Celestino Fernandez, Kevin LaFaye, Steven Lopez, Anibal Maldonado, James Martinez, Silvia Ortega de Green, and Nicholas Pantelides, by their undersigned counsel, allege as follows:

PRELIMINARY STATEMENT

1. This is an action for declaratory and injunctive relief. Movants seek a declaration that the remedies Movants received under the settlement agreement entered into in *United States*

v. New York City Board of Education do not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, Title VII of the Civil Rights Act of 1964, or 42 U.S.C. § 1981. Movants further seek an order entering the settlement agreement as a final resolution of the discrimination claims asserted by the United States, and permanently enjoining all parties to this action from challenging the settlement agreement as unlawful.

JURISDICTION

2. Original jurisdiction is conferred on this Court by 28 U.S.C. §§ 1331 and 1343(3), as this action arises under the Constitution and laws of the United States.

3. Declaratory relief is authorized pursuant to the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201-02. This action presents an actual controversy between the parties relating to the legal rights and obligations arising from the settlement agreement entered into in this case.

PARTIES

4. Movants Pedro Arroyo, Jose Casado, Celestino Fernandez, Kevin LaFaye, Steven Lopez, Anibal Maldonado, James Martinez, Silvia Ortega de Green, and Nicholas Pantelides are Hispanic employees of Defendant New York City Board of Education.[1]

5. Movants are currently employed by the Board of Education as permanent Custodians and Custodian Engineers[2] in New York City public schools in the Bronx, Brooklyn, Manhattan, and Queens.

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[1]The New York City Board of Education has been renamed the New York City Department of Education. This Complaint will refer to it as the Board of Education, its designation in the caption of this action.

[2]During the pendency of this action, the Custodian and Custodian Engineer positions have been re-titled "Custodian Engineer Level I" and "Custodian Engineer Level II," respectively. This Complaint will refer to the positions by their former titles.

6. Movants are among the group of individuals designated "Offerees" under the settlement agreement (the "Agreement") entered into by the United States and Defendants the New York City Board of Education, the City of New York, the New York City Department of Citywide Administrative Services, and DCAS Commissioner William J. Diamond (collectively, the "City Defendants").

7. Defendant City of New York is a municipality organized and existing under the laws of the State of New York.

8. Defendant New York City Board of Education is a municipal agency responsible for the administration of the New York City public school system.

9. Defendant New York City Department of Citywide Administrative Services is a municipal agency responsible for citywide personnel matters, including recruiting personnel; grading and classifying positions in the civil service; scheduling and conducting examinations for positions in the civil service; establishing, promulgating, and certifying eligible lists; and establishing and enforcing uniform procedures for the development of effective affirmative employment plans for city agencies. William J. Diamond is the Commissioner of the Department of Citywide Administrative Services, and is sued in his official capacity.

10. Under the Charter of the City of New York, the City is responsible for the conduct of municipal agencies such as the Board of Education and the Department of Citywide Administrative Services, and as such is the legal entity responsible for implementing any legal or equitable relief ordered by the Court in this action.

11. Defendant-Intervenors John Brennan, John G. Ahearn, Kurt Brunkhorst, Scott Spring, Ernest Tricomi, and Dennis Mortenson (collectively, the "Brennan Intervenors") are

white male employees of the Board of Education, currently employed as Custodians and Custodian Engineers in New York City public schools.

12. Plaintiff-Intervenors Janet A. Caldero, Celia I. Calderon, Martha Chellemi, Andrew Clement, Kristen D'Alessio, Laura Daniele, Charmaine DiDonato, Dawn L. Ellis, Marcia P. Jarrett, Mary Kachadourian, Kathleen Leubkert, Adele A. McGreal, Marianne, Manousakis, Sandra D. Morton, Maureen Quinn, Harry Santana, Carl D. Smith, Kim Tatum, Frank Valdez, and Irene Wolkiewicz (collectively, the "Caldero Intervenors") are black, Hispanic, Asian, or female employees of the Board of Education, currently employed as Custodians and Custodian Engineers in New York City public schools. Each of the Caldero Intervenors is among the group of individuals designated Offerees under the Agreement.

PROCEDURAL HISTORY

13. The United States filed this lawsuit on January 30, 1996, alleging discrimination in the recruitment and hiring of blacks, Hispanics, Asians, and women for the positions of Custodian and Custodian Engineer in New York City public schools, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq.

14. The United States and the City Defendants entered into a negotiated settlement agreement (the "Agreement") that the parties submitted to this Court in February 1999. The Agreement included provisions enjoining the City Defendants from discriminating on the basis of race, national origin, or sex in the recruitment and hiring of Custodians and Custodian Engineers; granting permanent positions and constructive seniority to identified Offerees; requiring that the City Defendants act to minimize the disparate impact of any new civil service

exams; and requiring that both parties take reasonable steps to defend the lawfulness of the Agreement against any challenge.

15. In or about May or June 1999, Defendant-Intervenors John Brennan, James G. Ahearn, and Kurt Brunkhorst filed objections to the Agreement and also moved to intervene in the action pursuant to Rule 24(a) of the Federal Rules of Civil Procedure.

16. On February 9, 2000, this Court denied Defendant-Intervenors' motion to intervene and approved the Agreement in its entirety.

17. On August 3, 2001, the United States Court of Appeals for the Second Circuit vacated this Court's order denying the motion to intervene, vacated the approval of the Agreement, and remanded with instructions to this Court to permit Defendant-Intervenors to intervene.

18. On or about January 7, 2002, Defendant-Intervenors moved to amend their complaint in intervention and to add Defendant-Intervenors Scott Spring, Ernest Tricomi, and Dennis Mortenson. The Court granted this motion on or about September 30, 2002.

19. On or about March 4, 2002, with the consent of the United States, the City Defendants, and the Brennan Intervenors, this Court entered all provisions of the Agreement with the exception of paragraphs 13-16.

20. Paragraphs 13-16 of the Agreement converted those Offerees serving as provisional employees at the time of its implementation to permanent positions; granted to all Offerees retroactive seniority dates of the earlier of their provisional start date or the median hire date from the earliest challenged exam taken; and, for those Offerees who were given a retroactive seniority date preceding their initial employment date, counted the time after the

retroactive seniority date as service as a permanent employee for the purpose of purchasing credit in the New York City Board of Education Retirement System, allowing them to make buy-back contributions to the retirement system for the years for which they received retroactive seniority.

21. In or around April 2002, the United States filed papers in this action indicating that it had ceased to defend the legality of the remedy received under the Agreement by a number of the Offerees, including the Caldero Intervenors.

22. On or about November 1, 2002, the Caldero Intervenors moved to intervene in this action to protect their interests. This Court granted the Caldero Intervenors' motion for permissive intervention on or about February 13, 2003.

23. On or about September 2, 2003, the United States filed papers in this action indicating that it had ceased to defend the legality of the full remedy received under the Agreement by an additional group of Offerees, including Movants.

24. On or about January 14, 2004, this Court appointed a mediator and referred the case to mediation.

FACTUAL ALLEGATIONS

25. The United States filed this lawsuit on January 30, 1996, alleging disparate impact and pattern-and-practice disparate treatment discrimination in the recruitment and hiring of blacks, Hispanics, Asians, and women for the positions of Custodian and Custodian Engineer in New York City public schools. Litigation focused on two of the United States' claims: (1) the claim that several written civil service exams for the positions of Custodian and Custodian Engineer had a disparate impact on black and Hispanic test-takers in violation of Title VII (the "testing claim"); and (2) the claim that the City Defendants' recruitment practices for the

positions of Custodian and Custodian Engineer had a disparate impact on blacks, Hispanics, Asians, and women in violation of Title VII (the "recruitment claim").

26. The civil service exams challenged in the testing claim are Custodian Exam 5040, administered in 1985; Custodian Engineer Exam 8206/8609, administered in 1989; and Custodian Exam 1074, administered in 1993 (collectively, the "challenged exams").

27. Each of the challenged exams had a gross disparate impact on black and Hispanic test-takers compared to whites, in violation of Title VII, 42 U.S.C. § 2000e-2(k). The exams were not job-related or required by business necessity.

28. The City Defendants' administration of the challenged exams constituted intentional discrimination against Movants on the basis of their race and national origin in violation of Title VII, 42 U.S.C. § 2000e-2(a).

29. The United States and the City Defendants settled this case in an Agreement that designated certain black, Hispanic, Asian, and female employees as Offerees. Movants are included in the group of Offerees under the Agreement.

30. The Brennan Intervenors alleged that the remedies provided by the Agreement discriminate against them on account of their race and gender in violation of the Fourteenth Amendment Equal Protection Clause, U.S. Const. amend. XIV, § 1; Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2; and 42 U.S.C. §§ 1981, 1983, and 1985(3).

31. In support of the Agreement, the United States demonstrated a gross disparity between the rate at which black and Hispanic applicants passed the challenged civil service exams and the rate at which white applicants passed the challenged civil service exams. The United States also demonstrated a gross disparity between the representation of black, Hispanic,

Asian, and female applicants for Custodian and Custodian Engineer positions, and the representation of those groups in the relevant labor market.

32. In or around April 2000, after this Court approved the Agreement in its order of February 9, 2000, the City Defendants implemented the Agreement. Since the Second Circuit's decision of August 3, 2001, vacating this Court's approval of the Agreement, the City Defendants have not rescinded any of the remedies provided by the Agreement. The Offerees, including Movants, presently retain the permanent positions and retroactive seniority dates that they received under the Agreement.

33. Seven of the Movants – Pedro Arroyo, Jose Casado, Celestino Fernandez, Kevin LaFaye, Steven Lopez, James Martinez, and Silvia Ortega de Green – received permanent Custodian and Custodian Engineer appointments under the Agreement. Permanent employees have a number of rights that provisional employees do not have. Permanent employees are eligible to bid for transfer to open building assignments. Because the salaries of Custodians and Custodian Engineers are scaled to the size of the assigned school, eligibility as a permanent employee to bid for transfer to larger schools affects the salary that can be earned. In addition, permanent employees are eligible to undertake "temporary care" assignments, which occur when a building is temporarily without a Custodian or Custodian Engineer, and allow the temporary care employee to earn a portion of the salary for the temporary building in addition to the full salary from the permanent assignment. Finally, permanent employees enjoy civil service rights and protections not available to provisional employees. Provisional employees can be fired immediately upon receiving an unsatisfactory performance rating, and can be transferred between schools whenever the Board of Education decides to do so.

34. If those Movants who received permanent appointments under the Agreement were to lose their permanent positions, they would not only lose the rights and benefits described, but would also be at risk of losing their jobs entirely. Provisional positions are only available when there is no open civil service list for permanent positions. Because a civil service list for permanent positions is currently open, the affected Movants could lose their jobs if they are not permitted to retain their permanent appointments.

35. All of the Movants received constructive seniority dates under the Agreement. Seniority greatly affects the rights of Custodians and Custodian Engineers, because applications to transfer to other schools are successful based largely on seniority. Temporary care lists are also maintained in order of seniority.

36. If Movants were to lose their grants of retroactive seniority, their ability to transfer to larger schools – and consequently to earn higher salaries – would be diminished.

37. Several of the Movants were eligible under the Agreement to purchase credit in the Board of Education Retirement System for the years for which they received retroactive seniority. Three Movants – Jose Casado, Celestino Fernandez, and Nicholas Pantelides – bought back pension credits in this way, which will allow them to receive a higher pension when they retire than they otherwise would have received. One Movant, Anibal Maldonado, is eligible to purchase pension credits and plans to do so.

38. Movants have reasonably relied on the remedies they received under the Agreement, and have made financial and other decisions for themselves and their families in reliance on the remedies they received.

39. After the implementation of the Agreement, five of the Movants – Pedro Arroyo, Kevin LaFaye, Steven Lopez, James Martinez, and Silvia Ortega de Green – were offered permanent Custodian and Custodian Engineer appointments from a new civil service eligibility list. Each of the five Movants turned down the offer of permanent appointment in reliance on the permanent positions they received under the Agreement. Movants are no longer able to accept permanent appointments from that eligibility list.

40. The United States is not defending in full the remedies Movants received under the Agreement.

COUNT ONE: NO VIOLATION OF TITLE VII OR 42 U.S.C. §§ 1981 AND 1983

41. Movants repeat and reallege each of the allegations above as if set forth in full herein.

42. The remedies Movants received under the Agreement do not violate Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, or 42 U.S.C. §§ 1981 and 1983. The remedies provided by the Agreement are justified by the existence of a manifest imbalance reflecting under-representation of minorities in a traditionally segregated job category; are intended merely to attain, not to maintain, a balanced work force; and do not unnecessarily trammel the interests of white employees.

COUNT TWO: NO VIOLATION OF THE FOURTEENTH AMENDMENT EQUAL PROTECTION CLAUSE

43. Movants repeat and reallege each of the allegations above as if set forth in full herein.

44. The remedies Movants received under the Agreement do not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The remedies provided by the Agreement are narrowly tailored to serve the compelling state interest of remedying prior discrimination in the administration of the challenged civil service exams.

PRAYER FOR RELIEF

WHEREFORE, Movants respectfully request that this Court grant the following relief:

1. Enter a declaratory judgment that the remedies Movants received under the Agreement do not constitute unlawful race discrimination in violation of Title VII or 42 U.S.C. §§ 1981 and 1983.

2. Enter a declaratory judgment that the remedies Movants received under the Agreement do not constitute unconstitutional race discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment.

3. Enter the Agreement as a final resolution of the claims asserted by the United States.

4. Enter a permanent injunction barring the United States, the City Defendants, and the Brennan Intervenors from challenging the race-conscious provisions of the Agreement as unconstitutional or unlawful.

5. Award Movants reasonable attorney's fees pursuant to 42 U.S.C. § 1988 and 42 U.S.C. § 2000e-5(k).

6. Grant such other and further relief as this Court finds just and proper.

Dated: _____.

Respectfully submitted,

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