



THE CITY OF NEW YORK
OFFICE OF THE MAYOR
NEW YORK, NY 10007

Testimony of Brittny Saunders
Deputy Counsel to the Mayor
Before the Committee on Civil Rights
Monday, February 29, 2016

Good afternoon, Chairwoman Mealy, Chairwoman Cumbo and members of the Civil Rights and Women's Issues Committees. Thank you for inviting me to speak with you this morning about Intro 921, which would direct the Equal Employment Practices Commission ("EEPC" or "Commission") to audit and evaluate physical tests used by City agencies for hiring or promotional purposes at least once each year.

The administration is deeply committed to the goals for fairness and equity. Over the last two years, we have worked with greater focus and urgency and across multiple agencies to ensure greater opportunity and better outcomes for all New Yorkers. We have reinvigorated the New York City Human Rights Commission, appointing a leading civil rights advocate as Chair and Commissioner, strengthening its operations and implementing progressive new policies to prevent discrimination in employment, housing and other areas. We have made changes to performance management systems to integrate equity concerns more deeply into evaluation and launched initiatives such as the Young Men's Initiative to identify and address disparities.

We have also demonstrated a new focus on gender equity. The administration features an unprecedented number of women in leadership positions in City Hall and the agencies: some 60% of the administration's senior leaders are women. We have launched the Commission on Gender Equity, convening a group of 30 diverse leaders hailing from the public sector, private industry, non-profit organizations and academia. The Commission embodies the Mayor's commitment to expand and increase opportunity for all New Yorkers—regardless of sex, gender or sexual orientation—and to build

a City that is safe and free of discrimination. Over the past year, the City has made tremendous strides toward gender parity with the establishment of a historic partnership with UN Women and engagement in the UN's Safe Cities Initiative. We have worked to expand paid sick leave to many of the City's lowest paying industries—industries that employ disproportionate numbers of women. We have also made unprecedented investments in domestic violence response and education through the Mayor's Office to Combat Domestic Violence ("MOCDV"). And just weeks ago, the Mayor announced paid family leave for 20,000 City employees.

We welcome EEPD efforts to promote gender equity and equal employment opportunity for everyone. However, we believe that there will need to be changes to Int. 921 as currently drafted. As currently written, Intro 921 would require the Commission to audit and evaluate any physical tests used by any City agency, either for hiring or promotional purposes, at least once each year. The bill also provides that in conducting these audits and evaluations, the Commission, shall utilize the services of non-governmental experts where such use would assist such auditing and evaluation in any way.

There are a number of important policy considerations related to Intro 921 that require examination. The evaluation of physical tests is likely to be a time-intensive task requiring significant knowledge and expertise. In addition, evaluating a physical test annually, as required by Int. 921 in its current form, regardless of whether there have been any changes made to the exam, may not be the best use of resources. Another set of questions involves the conditions under which it may or may not be appropriate to utilize the services of outside experts. All of these issues merit thoughtful consideration. We look forward to working with the Council to think through these questions and to further our efforts to increase equity and inclusion.



Testimony of Charise L. Terry
Executive Director
Equal Employment Practices Commission
Before the Committees on Civil Rights and Women's Issues
February 29, 2016

Int. No. 921: Amending the New York City Charter to Ensure Fairness in Physical Testing.

Introduction

Good Morning, members of the Council. My name is Charise Terry. It is my pleasure as the Executive Director of the Equal Employment Practices Commission to present this testimony on behalf of the members of this Commission. Agency Attorney and Director of Compliance Marie E. Giraud will join me in presenting this testimony and responding to questions.

About the EEPC

Chapter 36 of the New York City Charter established the Equal Employment Practices Commission (EEPC) as the monitor of the City's employment practices. The EEPC is an independent agency, headed by a Board that consists of 5 per-diem Commissioners: 2 Mayoral appointees, 2 City Council appointees, and a jointly appointed Chairperson. Our official headcount is 12. The EEPC audits agencies where the majority of the board members are appointed by the Mayor; agencies where the majority of the board members serve by virtue of being city officers; or agencies which receive funding, in whole or in part, by the City treasury.

The proposed bill specifies that this commission *shall audit and evaluate any physical tests used by any city agency, either for hiring or promotional purposes, at least once every year. In so auditing and evaluating, the commission shall utilize the services of non-governmental experts where such use would assist such auditing and evaluating in any way.*

The EEPC's mandate is broad. Section 830 of the City Charter authorizes the EEPC *to review, evaluate and monitor the employment procedures, practices, and programs* of any City agency and the Department of Citywide Administrative Services (DCAS). Section 831, empowers the EEPC to audit and evaluate the *employment practices and procedures* of each City agency and their efforts to



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Practices Commission**

ensure fair and effective equal employment opportunity for minority group members and women. Section 832 provides that this Commission may, pursuant to an audit, make a determination that any *plan, program, procedure, approach, measure or standard* adopted or utilized by any city agency does not provide equal employment opportunity and recommend corrective action as the Commission may deem appropriate. The proposed Bill would put specific emphasis on our authority to audit and evaluate physical testing – which under the aforementioned sections of the Charter is an employment procedure, measure, or standard adopted and utilized by city agencies.

A physical test, which assesses a candidate's ability to perform essential physical tasks of a job, is a selection procedure and is required to be job-related and consistent with business necessity as dictated by Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act of 1990, as well as the NYC Human Rights Law -- which prohibits employment practices that result in disparate impact.

Auditing Civil Service Process/Physical Testing

As delineated in the Charter, the EEPC audits agencies on a quadrennial cycle (every four years), or upon the request of the Civil Service Commission or City Commission on Human Rights. An EEPC audit is a methodical review, analysis, and evaluation of an agency's employment practices; it concludes upon the implementation of corrective action, if any.

The EEPC has 6 primary audit types including the Employment Practices Audit (EPA) -- which is being conducted within the current quadrennial cycle. This type of audit reviews, evaluates and monitors whether an agency has assessed its recruitment or selection procedures to determine if there is adverse impact upon any particular racial, ethnic, disability, or gender group. It also requires that the competencies, skills and abilities outlined in notices of examinations are job-related and required by business necessity. The Charter assigns DCAS the responsibility for establishing and maintaining uniform procedures and standards to ensure equal employment opportunity in competitive civil service examinations. The EEPC requires agencies to work with DCAS and the NYC Civil Service Commission if protected groups are underutilized in civil services titles relative to their availability in the labor market.



Proposed Bill/Provisions

The EEPC supports the intent of the proposed Bill with the following provisions¹ for practical implementation: (1) that the result/approval of the EEPC's audit and evaluation precedes the release of the corresponding exam schedule or implementation of the exam; (2) that DCAS, with the assistance of the relevant agencies, provide to the EEPC the titles (by agency and job group) which require physical testing and the content and construct validation studies which were used to create any physical requirements. A construct validation would support that the test accurately measures criteria such as fitness, strength and endurance. A content validation would ensure job relevancy.

Conclusion

The proposed bill would position the City to limit potential legal exposure, if challenged. The EEPC welcomes the opportunity to work with the Department of Citywide Administrative Services, the NYC Civil Service Commission, the City Commission on Human Rights, and relevant agencies in support of the goals of this legislation.

¹ The NYC Charter section 814(a)(13)- requires DCAS to establish the format for submitting quarterly reports which include the number of provisional employees. In accordance with NYC Charter Section 815(i), the quarterly reports must be submitted to the EEPC. Similarly, provisions could be made for this Bill.

Testimony of
Sarinya Srisakul, President, United Women Firefighters
On Int. 921
February 29, 2016

Members of the Committee:

Thank you for inviting me to testify on Int. No. 921, a bill to create oversight over New York City's programs for the hiring of women and minorities, and specifically to review and audit any "physical tests" used for hiring and promotion of women and minorities. I will comment on issues affecting women firefighter candidates, probationary firefighters and the New York City Fire Department. Women in the FDNY account for less than 0.5% of the force, or 49 women out of approximately 10,000 firefighters in total. New York City has the worst gender disparity of all the major metropolitan cities in the U.S. With the help of the Council's oversight on FDNY testing, together we can change these horrible statistics.

The UWF strongly supports having an independent body that will review the exams used for physical testing in the FDNY. It is our deep belief that two of the existing tests--the Functional Skills Training (the "FST") and the exit run--discriminate against women and are not valid tests of the physical capacity needed to be a good firefighter. Although the DeBlasio Administration and Commissioner Nigro have expressed concern about past discriminatory practices and have made isolated reforms to improve the FDNY's interaction with women firefighters, the FDNY, supported by the Corporation Counsel's Office, has adamantly refused to abandon these two tests that are invalid and have a plainly adverse effect on women. We hope that an independent body, after taking a fresh look at the tests, will force the needed changes that we have been urging for a long time.

The first test that we believe is unfair to women, and not based on science or validated on a scientific basis, is the FST. The FST was originally used as a training tool at the Fire Academy for probationary firefighters. Significantly, after the Vulcan society suit, that required the hiring of more firefighters of color, and the record number of women firefighter candidates, the FST became a test for graduation from the Fire Academy. In other words, as diversity of the pool of candidates for the FDNY increased, the FST turned into a testing tool under which probationary firefighters were timed and graded. In 2013 the probationary firefighters were forced to achieve a minimum time on the FST to graduate from the Academy, which adversely affected the very few women in the academy classes. Many gender disparity lawsuits in fire departments across the country suggest that speed to completion tests have an adverse impact on women and have little job relevance.

It is worth noting the "test" was developed by an instructor at the Academy. He was not certified in developing tests, and had no formal training in the subject. Nonetheless, his "test" was used to screen out candidates for graduation. What's worse, the test had never been formally validated. In 2015, the instructor was removed from the Academy and transferred elsewhere.

In response to the UWF criticisms of the FST, the FDNY and the Corporation Counsel attempted to validate it. A firm without any expertise in physical testing was hired to oversee the validation process. Not surprisingly, it was filled with flaws, and rushed. Firefighters were asked in a survey to guess how many seconds it took them to complete various firefighting tasks--instead of objectively measuring the length of time required through observations in the field. The people who designed and defended the FST were named as subject matter experts. And, to top things off, even though the validation is supposed to test for skills over the course of a firefighter's career, the only people who were used to validate the physical testing were probationary firefighters who had graduated from the Academy just three months earlier. These are people who had the FST course memorized and had been forced by their instructors to complete the course as quickly as possible. They are also the people with the least experience in the field. Any objective person would recognize that the FST is clearly tainted, but for over a year, probationary firefighters, including women, have lived with its unfair findings.

Another example of irrelevant and invalid testing that the FDNY academy engages in is the requirement to run a mile and a half under 12 minutes in order to graduate from Academy, which by the Corporation Counsel's own admission, had no valid reason for being in place. In response to our complaints about this test, the FDNY has modified this policy to include a stair alternative. However, probationary firefighters at this stage would have already completed this stair test twice as part of their medicals and as part of an entry run right before they start academy. There is no valid reason to do this test a third time, except to create barriers to entry into the department.

What is more, once probationary firefighters finish their final FST exam and run in the Academy, they will no longer be tested on either test ever again, proving that these measures are not necessary to demonstrate needed firefighting skills, and suggesting that they were created just to keep women and diversity out of the Fire Department.

The United Women Firefighters can list many more examples of why independent oversight for testing in the FDNY is critical. Physical fitness and job experts need to be relied on instead of home grown, irrelevant and illegal tests. The FDNY needs to base its tests on current science and the law to ensure fairness and erase barriers for all firefighter candidates, including women.

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I represent: Equal Employment Practices Commission

Address: 11 11

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