IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JOHN M. KOHLBEK and MICHAEL PRITCHARD,	)	**CASE NO. 8:03CV68**
	)	
Plaintiffs,	)	**MEMORANDUM AND ORDER**
	)	
vs.	)	
	)	
THE CITY OF OMAHA, NEBRASKA,	)	
	)	
Defendant.	)	

This matter came before the Court on cross-motions for summary judgment (Filing Nos. 12 and 78). This case involves allegations of reverse discrimination brought by firefighters John Kohlbek and Michael Pritchard ("Plaintiffs") against their employer, the City of Omaha, Nebraska.[1] The Plaintiffs allege that, in passing them over for promotions in favor of African-American firefighters employed by the City of Omaha ("City"), the City violated their constitutional rights under 42 U.S.C. § 1981, § 1983, and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d). The City contends that it was simply following its 2002 Affirmative Action Plan ("Plan"), which complies with the law, including the parameters recently explained by the United States Supreme Court in *Grutter v. Bollinger,* 539 U.S. 306 (2003).

The parties have fully briefed the issues presented in the cross-motions.[2] The Court finds that there are no genuine issues regarding the material facts. For the reasons that follow, the Court concludes that the City is entitled to summary judgment as a matter of law,

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[1] William Schrack, formerly a plaintiff, has been voluntarily dismissed (Filing No. 90).

[2] Plaintiffs filed, on March 5, 2004, a motion to file a reply brief. Because this Court made clear that it was willing to accommodate the parties' scheduling and briefing requests, provided that submissions were made on or before March 1, 2004, the motion is denied.

and, therefore, the Plaintiffs' motion for summary judgment will be denied. A separate judgment in favor of the City will be entered.

Undisputed Facts

Historical Facts regarding Discrimination in Omaha Fire Department

The City of Omaha declared in 1957 that the Omaha Fire Department ("Department") was to be racially integrated. The effects of the Department's prior policies of racial segregation and discrimination did not disappear overnight. To demonstrate the genuine remedial nature of the City's 2002 Affirmative Action Plan (Ex. 101), the legality of which is being contested in this case, the City has presented evidence to establish that, through the Department, the City had engaged in racial discrimination in the past. The City has offered the Affidavit of Gordon Sims, who is African-American, and who was employed as an Omaha firefighter in 1964 until approximately 1974. In his affidavit, Sims states that the Omaha Fire Department was segregated by race when he began his employment with the City. Because of his race, Sims had a separate sleeping area; he did not eat his meals with white firefighters; he was given less desirable assignments; he was denied training; and he was restricted in the promotional opportunities offered by the Department. (Filing No. 15, Sims Affidavit.) Some of the practices described by Sims were subjected to judicial scrutiny when an African-American firefighter who was employed by the City of Omaha successfully sued the City in 1974, based on his allegation that the City unconstitutionally discriminated against him on the basis of his race. (Filing No. 15, Hahn Aff. at Ex. 134, *McCarty v. City of Omaha*, CV74-o-49, E134).

The City first implemented an Affirmative Action Plan for the Department in 1971, and revised and subsequent plans were prepared in 1972, 1975, 1979, 1983, 1989, 1990, and 2002. Filing No. 15, First Aff. of Fredericka Minton and First Aff. of Cecil Hicks. Some of the City's affirmative action plans have been challenged in Court. Filing No. 15, Affidavit of Hahn, Exs. 136-138; *Warsocki v. City of Omaha*, 726 F.2d 1358, 1361 (8th Cir. 1984)(challenge to the 1983 affirmative action plan); the Omaha Association of Black Professional Firefighters case (hereafter *"Black Professional Firefighters* case") commenced in 1990 (alleging unconstitutional race discrmination under the 1990 Plan); and the Professional Firefighters Association of Omaha arbitration (challenging the 1990 Plan on equal protection grounds).

The Plaintiffs do not dispute that the Department engaged in racially-discriminatory practices and racial segregation in the past. Rather, the Plaintiffs contend that the evidence shows that more than 30 years of racial preferences in hiring have ameliorated the effects of that discrimination, and that, as of 1991, the City had achieved its affirmative action goals. The Plaintiffs have offered evidence from the *Black Professional Firefighters* case, which was decided in favor of the City by a jury in 1993, to demonstrate that the City's evidence of past discrimination is insufficient to show a compelling governmental interest in remedying prior racial discrmination.

In 1990, Omaha's Black Professional Firefighters brought an action against the City challenging its 1990 Affirmative Action Plan (Filing No. 15, Ex 138 and Filing No. 83). On March 15, 1991, the City of Omaha filed an affidavit in that case that the Plaintiffs contend demonstrates that the City had met its goals under the 1990 plan with respect to sworn members of the Department, with the exception of two positions, the Fire Apparatus Engineer

and Fire Medic VI. In 1993, a jury rendered a verdict in favor of the City. The Plaintiffs argue in the summary judgment motion, as well as in their motion for judicial estoppel,[3] that the City should not be allowed to take a position in this litigation that is inconsistent with any position it took in the 1991 action or which may be inconsistent with the 1993 jury verdict. The Plaintiffs' argument for judicial estoppel ignores the differences between the actions, and the fluctuation that is inherent in any employment context. The facts in the record demonstrate that the City's position relative to achieving the placement goals under its affirmative action plans has actually regressed, rather than progressed, since the 1991 action was filed. (Filing No. 15, see Exs. 110-114); White Report; and First and Second Hicks Affidavits).

The Plan

In May 2002, the City adopted the 2002 Affirmative Action Plan. (Filing No. 15, Ex. 101). Fredericka Minton has been employed by the City as a Personnel Technician since 1991, and in that capacity she is the Affirmative Action Coordinator for the City. Filing No.

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[3] The Plaintiffs' motion has been considered and will be denied. The doctrine of judicial estoppel prohibits a party from taking inconsistent positions in the same or related litigation, in order to protect the "integrity of the judicial process." *Hossaini v. Western Missouri Medical Center*, 140 F.3d 1140, 1142 -1143 (8th Cir.1998) quoting *Total Petroleum, Inc. v. Davis*, 822 F.2d 734, 737 n. 6 (8th Cir.1987). The Eighth Circuit Court has restricted application of the doctrine only to "those instances in which a party takes a position that is clearly inconsistent with its earlier position." *Id.* In this case, I have concluded that the City is not estopped from providing evidence of the Department's past discrimination because the City's positions in the two cases are not inconsistent. The City's claim in the Black Professional Firefighters case in 1990 was that it did not have a policy to discriminate, based on race, against the plaintiffs. Now, the City's claim is that it has reason to use the 2002 Plan to address its underutilization of African-Americans in making promotion decisions to the rank of Battalion Chief and Captain. These positions are not inconsistent and allowing the City to assert the claim does not damage the integrity of the judicial process.

15, First Minton Aff.). Minton used the affirmative action guidelines developed by the Office of Federal Contracting Compliance ("OFCCP") in preparing the 2002 Plan, and she acknowledges that the City has used the OFCCP in the past in preparing affirmative action plans.[4] (Filing No. 92, Second Minton Aff. at ¶2). Both Plaintiffs and the Defendant acknowledge that there is no requirement that municipalities comply with the OFCCP guidelines in preparing affirmative actions plans because municipalities are specifically exempt. *See* 41 C.F.R. § 60 -1.5(4). Nevertheless, because the guidelines were referenced by the author of the City's 2002 Plan, the Court will consider them.

The OFCCP guidelines identify methodologies that a federal contractor (or for purposes of this case, the City) may employ to determine whether there exists a need for a placement goal for any given position. The City employed one of those methodologies to identify whether there was an underutilization (also referred to by the Plaintiffs as placement goal) relative to firefighter positions. The City engaged in an availability analysis, which is summarized in Exhibit 101A. (Filing No. 15). The OFCCP guidelines grant discretion to federal contractors in developing their individual plans, but the cornerstone of any plan developed under the OFCCP guidelines is the applicant pool, which is also described as the availability percentage. 41 C.F.R. §60-2.14., in the record as Ex. 107. One of the guidelines in the OFCCP regarding *how* to identify that pool – referred to as the reasonable recruitment area – is that any criterion should not have the effect of excluding female or minority candidates. *Id.* at 60-2.14 (e).

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[4] Whether the City actually believed that it was required to follow the OFCCP guidelines or not is not dispositive of any issue in this case.

The City used demographic information from the 2000 census, which is the type of information contemplated in §60-214 (d). The City used the general population statistics for African-Americans taken from the City of Omaha as a starting point, and reduced or weighted that number by 15 percent based upon considerations such as workforce statistics, which included 10 percent for African-Americans; and applicant flow data which, according to the Report of Paul White, showed an average applicant flow of 15 percent, and, on prior eligibility lists, approximately 7 percent. The City then averaged these factors and found an external availability of African-Americans for the position of firefighter of 11.3 percent. That figure represented the percentage of African-Americans with the requisite skills for the firefighter position within the reasonable recruitment area. (Second Minton Aff. at ¶7, Exs. 101A at 58, 157; and Minton Dep. at 8, 17, 25-26, 62-64.)

The next step taken by Minton was to develop an internal availability factor, which represents the number of persons employed by the federal contractor who would be eligible for a given position. In determining this factor, Minton met with the Fire Chief, reviewed the requirements to apply for different positions, and determined the jobs that had the appropriate qualifications from which the Department could draw. (Second Minton Aff. ¶ 8, at Ex. 101A.) Those job categories employed 11.1 percent African-Americans. That percentage was weighted, or reduced, by 85 percent. That weighting recognized the very small percentage of actual applications that came from the City's employees and the number of City employees that were actually hired into the firefighter positions. Thus, the City determined that it had an internal availability of 1.7 percent, representing the number of African-American, City employees who could be transferred or trained into a firefighter position.

The City then combined the 11.3 percent external availability number with the 1.7 internal availability number, the City arrived at the sum, representing its availability percentage, of 13 percent for African-Americans applying for an entry level firefighter position. The City also determined that the then-current employment of African-Americans at the firefighter rank was 7 percent. Based on these statistics, the City determined the underutilization (or placement goal) was the difference, or 6 percent. Ex. 101 at 31. For promotional positions, a similar analysis was used, but 100 percent of the weight of those factors was given to the internal factor because all promotions in the Department are limited to internal candidates.

"Utilization analysis" is defined in the 2002 Plan as "an analysis conducted by an employer to determine whether minorities and females are employed in each major job group at a rate consistent with the availability of qualified minorities and females in the relevant labor market for the positions covered by each EEO category." Ex. 101 at 61. The Personnel Director was charged with referring Affirmative Action candidates for promotion when "underutilization" existed for a specific position. Ex. 105 at 6-7. The record contains several examples of the process used for referring qualified minority candidates for open positions. See, *e.g.*, Filing No. 15 at Exs. 121 and 124.

It was against this backdrop that Fire Chief Joe Napravnik was charged with the responsibility for selecting Department employees for promotion in 2002. Plaintiffs contend that they would have been promoted but for the consideration of the race of some other promotional candidates. All other things remaining the same, that is a contention that appears to be supported by the record.

Generally, to be hired or promoted in the Department, candidates must complete an examination. In the context or promotions, the exam includes a written test and a practical test which is referred to as the assessment center. Those candidates who have passed the written test and satisfactorily completed the assessment center are placed on an eligibility list in rank order of their scores, which also computes bonus points for college and seniority. The Personnel Director is required to send the names of the top five candidates to the Fire Chief, and from that group, the Fire Chief makes an individualized review of each of the candidates. See Omaha Municipal Code section 23-232. This individualized review includes test scores, ranking, seniority, educational background, discipline record, performance of job responsibilities, and attendance. When the Personnel Director determines that there is an underutilization, the Director may refer protected class candidates (twice as many as there are vacancies) from the Eligibility Lists, ensuring that they have met the qualifications for the position. The candidates' race is also part of the individualized review made by the Chief as part of the selection process. See Filing No. 15, Hicks Affidavit at 2.

Recent Promotions - John Kohlbek

On August 11, 2000, the City held a promotional exam for the position of Battalion Chief within the Department, and after a written, multiple-choice test and an assessment center test was given, a final ranking of candidates for the Battalion Chief position was prepared. Twenty names were on the list. That listing was used by Chief Napravnik to make his promotion decisions until at least November 2002. Kohlbek, who is white, was ranked 11th on the list, and Anthony Curtis, who is African-American, was ranked 20th on the list.

When the time came for the Chief to make his first four promotions to the position of Battalion Chief, several firefighters on that list had already been promoted by Chief Napravnik's predecessor. Consequently, the Personnel Director referred to the Chief a list of nine candidates, and both Kohlbek and Curtis were on the list that was referred. Chief Napravnik selected the four top-ranked candidates to fill the Battalion Chief positions, passing over both Kohlbek and Curtis for the promotions.

On November 9, 2002, another Battalion Chief position became vacant. The Personnel Director referred additional names from the list, and Chief Napravnik selected Curtis to fill the position. Chief Napravnik stated the following with regard to Curtis's promotion:

> I based my decision to promote Curtis on a variety of factors, including the interview, the fact that he was qualified, had no prior disciplinary action or problems with attendance; and the fact that I had worked with Anthony Curtis in the past, for approximately one and a half years and knew that he worked well with others and was quite capable. In addition, I considered the fact that at that time the City had only one black Battalion Chief out of 28 and the Department was underutilized in that position. Race was only one of the factors that I considered in this review.

Filing No. 15, Napravnik Affidavit at 2, see also Napravnik Dep. at 38-9. In his deposition, Chief Napravnik stated that absent the affirmative action plan, he probably would not have promoted Curtis out of rank order over other more highly-ranked employees. Napravnik Dep. at 39.

On November 15, 2002, when yet another Battalion Chief position became open, Chief Napravnik again selected the top-ranked candidate for the position. After the November 15, 2002, promotion was made, Kohlbek was the next highest ranking firefighter on the eligibility

list. Had all other things remained the same, and had Chief Napravnik made all of his promotion decisions by rank-order only, Kohlbek would have been promoted on November 15, 2002. As it happens, he was not promoted in 2002, and, though he has taken another eligibility exam, Kohlbek still has not been promoted.

Michael Pritchard

In March 2002, Plaintiff Michael Pritchard applied for the position of "regular" Captain with the Department, and he sat for an exam on March 14, 2002. Theoretically, the 60 highest-scoring candidates, plus any minority applicant who achieved a passing score (if needed to comply with the City's 2002 Affirmative Action Plan), would have been allowed to sit for the second part of the examination. However, because only 52 persons achieved a passing score on the first part, only 52 candidates were allowed to participate in the second phase of the exam. At least two African-American male candidates, Ron Estes and Michael Andrews, also achieved a passing score. The relevant final scores were as follows: Pritchard, 85.02 %; Estes 72.04 %; and Andrews 71.83 %.

Chief Napravnik promoted Estes and Andrews out of rank order, and I will assume for purposes of the Defendant's motion, to the detriment of Pritchard.[5] As with Battalion Chief Curtis's promotion, Chief Napravnik testified that had it not been for the identified underutilization in the City's 2002 Affirmative Action Plan, he probably would not have skipped

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[5] The City has attempted to demonstrate that Pritchard, by declining a promotional opportunity to a different type of captain, Paramedic Captain, has suffered no injury because those promotions are taken from the same eligibility list as regular Captains.

down several persons in rank order to promote Estes and Andrews to Fire Captain. Napravnik Dep. at 67-8.

The Issues

Plaintiffs take aim at the City's application of underutilization and of its utilization analysis, contending that City's use of these methodologies represents an unlawful balancing of races that the United States Supreme Court has identified as illegal reverse discrimination. In this action, the Plaintiffs are advocating the application of a more restrictive analysis under the OFCCP guidelines that would minimize the percentage representing the availability pool and correspondingly reduce the underutilization percentage and goals.

For two reasons, I conclude that this case is not about whether the City has complied with the OFCCP guidelines. First, the City, as a municipality, is expressly exempt from the provisions. Second, the OFCCP guidelines not only allow, but actually require, the exercise of discretion and adaptation to meet the needs of individual federal contractors. The City admits that the Plaintiffs' statistical and analytical approach would be an acceptable methodology under the OFCCP guidelines, but the City argues that its methodology is equally acceptable. I agree, on both assertions. I find that there are no material facts in dispute, and that this case should be decided as a matter of law, with the issue being whether the City's 2002 affirmative action plan actually complies with the strict scrutiny standard recently reiterated and more fully developed in *Grutter v. Bollinger*, 539 U.S. 306 (2003).

Summary Judgment Standard

With respect to summary judgment, the Court must examine the record in the light most favorable to the nonmoving party. *U.S. ex rel. Quirk v. Madonna Towers, Inc.,* 278 F.3d 765,

767(8th Cir. 2001). The proponent of a motion for summary judgment "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56 (c)). The proponent need not, however, negate the opponent's claims or defenses. *Id.* at 324-25.

In response to the proponent's showing, the opponent's burden is to "come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (quoting Fed. R. Civ. P. 56(e)). A "genuine" issue of material fact is more than "some metaphysical doubt as to the material facts." *Id.*

"[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). "If the evidence is merely colorable . . . or is not significantly probative . . . summary judgment may be granted." *Id.* at 249-50 (citations omitted). In addition, "the mere existence of some alleged factual dispute between the parties is not sufficient by itself to deny summary judgment. . . . Rather, 'the dispute must be outcome determinative under prevailing law.'" *Get Away Club, Inc. v. Coleman*, 969 F.2d 664, 666 (8th Cir. 1992) (citation omitted) (quoting *Holloway v. Pigman,* 884 F.2d 365, 366 (8th Cir. 1989)). The Rule 56 exercise must be considered relative to each parties' motion.

Analysis

Because the evidence demonstrates that Chief Napravnik's employment of the 2002 Affirmative Action Plan guided his selection of African-American candidates over white candidates for the positions of Battalion Chief and Fire Captain, the Court must conduct a constitutional analysis of the 2002 Plan. Because the candidates' race was a factor in the employment decisions made in connection with the 2002 Plan, the Plan will be judged according to the strict scrutiny standard. *See Grutter v. Bollinger*, 539 U.S. 306 (2003); *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 236 (1995), and *Richmond v. J.A.. Croson, Co.*, 488 U.S. 469, 493 (1989).

The *Adarand* Court explained that strict scrutiny means that "[f]ederal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest." *Id.* at 235. The United States Supreme Court recently stated that "although all governmental uses of race are subject to strict scrutiny, not all are invalidated by it." *Grutter,* 539 U.S. at __, 123 S.Ct. 2338.

Compelling Governmental Interest

The City asserts two compelling interests that support its 2002 Affirmative Action Plan. First, the City contends that it has a compelling interest in seeking to remedy its own past racial discrimination. The City argues that it has made a strong evidentiary showing that remedial action was necessary in 2002. The Plaintiffs contend that the City has no facts to establish that it has a compelling interest. The Plaintiffs contend that there was no need to remedy the Department's past racially discriminatory practices, relying in part on the jury

verdict in the *Black Professional Firefighters* case to demonstrate that the effects of past discrmination had already been remedied by the Department as of 1991 (the time of the original Minton Affidavit offered in that case) or at least as of the 1993 verdict that was in favor of the City.

The City has identified as a second compelling interest the need for a diverse fire department, which includes racial diversity, because a diverse Department serves and advances the public interest. The Plaintiffs argue that diversity in the work place is not a compelling state interest, and that what the City purports to do is simply racial balancing which was rejected in *Grutter* and in *Regents of University of California v. Bakke,* 438 U.S. 265 (1978).

Evidence of Past Discrimination and the Need for Remedial Measures

The Supreme Court has already recognized that a government's interest in remedying its own past racial discrimination, where there is a "strong basis in evidence" to conclude that the remedial action was necessary, is compelling. *Richmond v. J. A. Croson*, 488 U.S. 469, 493 (1989), quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986).

There is no genuine dispute, on the record before the Court, that the City of Omaha has demonstrated that it engaged in racially discriminatory practices in the past within the Department. *See McCarty v. City of Omaha,* CV74-o-49, E134; and Affidavit of Gordon Sims.

The Plaintiffs make the argument that, for more than 30 years, the City has used affirmative action plans to remedy the existence of and effects of racial and other kinds of

discrimination in City employment. The Plaintiffs argue that by 2002, the effects of discrmination have been remedied and that statistical analysis bears that out. See Affidavit and Report of Charles R. Mann, Ph.D.

The City's affirmative action plans have been challenged in judicial and quasi-judicial proceedings. In 1983, this Court considered whether the City's 1983 Affirmative Action Plan was constitutional. Applying a strict scrutiny analysis, the Court found that the statistical imbalances in the Department between protected classes of employees and non-protected classes demonstrated that the City's Plan was remedial and not unlawfully intrusive into the rights of white employees. The district court's decision was affirmed. *Warsocki v. City of Omaha,* 726 F.2d 1358 (8th Cir. 1984). Eight years later, in 1991, two white firefighters challenged the 1990 Affirmative Action Plan on equal protection grounds, and an arbitrator determined that the Plan was necessitated by the City's historical racial practices. Filing 15, Hahn Aff. at Ex. 138.

In 1990, the Black Professional Firefighters sued the City alleging race discrmination in employment, and in 1993, a jury found in favor of the City. In connection with that litigation, Fredericka Minton prepared and filed an affidavit stating:

> The City of Omaha has met the goals in its 1990 Affirmative Action Plan with respect to sworn members of the Omaha Fire Division . . .. [T]he Omaha Fire Division is in compliance with all goals set in the 1990 Affirmative Action Plan with the exceptions of the categories of Fire Apparatus Engineer and Fire Medic IV...

Filing No. 83, Ex. 17, Minton Affidavit at ¶¶ 2, 3. Had the numbers not changed since that case, the outcome of this action might be different. However, the fact that the City made some progress toward an integrated fire department, and the fact that one jury in 1993 concluded

that the Department was not discriminating against African-Americans on the basis of their race, does not neutralize the effects of past discrmination on the Department as a whole from that time forward.

The City has presented evidence that, to this day, complaints of race discrmination in the Department exist, and that, statistically, the progress made in the early 1990s has not been sustained. The Department continues to work toward an environment free of racial discrmination. The City has demonstrated, for example, that the number of applications for firefighter positions has decreased from 22 percent in 1984 to 13 percent in 2000 (for an average of 14 percent over this time period); that the percentage of African-Americans employed in the Department has actually decreased from 7.1 percent in 1989 to 6.3 percent in 2000, while the Department increased its numbers by 84 sworn employees during the same period; and that the number of African-American Battalion Chiefs has remained the same since 1979 – one. White Report at 4-8. In addition, the City's Personnel Director, Cecil Hicks, Jr., demonstrated that there are ongoing complaints of racial discrmination within the Department, and that litigation connected to claims of racial discrmination has continued throughout this time and did not conclude with the 1993 verdict in the *Black Professional Firefighters* case. Filing No. 15, Hicks Aff. at ¶ 5, and Exs. 140-149. I conclude that the City has presented statistical information that supports the conclusion that the City continues to require affirmative action to remedy the effects of past discrimination.

Based on these facts, I find that the City's interest in remedying its own past racial discrimination has a "strong basis in evidence" and the City has shown that remedial action is necessary. As a matter of law, I conclude that the City has demonstrated a compelling

governmental interest as that term is used in the strict scrutiny analysis. *J. A. Croson*, 488 U.S. at 493.

The City also argues that it has a compelling interest in developing and retaining a diverse workforce within the Department. See Filing No. 92, Ex. 171 and 174, Crosby Report and Pini Report. The City argues that diversity in the Department's workforce would promote trust and confidence between the Department and the people it serves; would reduce stereotypes and prejudices among people; and would promote problem-solving and effectiveness within the Department. I agree that the City has an interest in ensuring that a diverse workforce is responsible for providing public services to its racially and ethnically diverse population, particularly in positions such as fire and medic services where a foundation of trust is advantageous. Certainly since Grutter there is some legal support for the argument. The *Grutter* Court has held that the Equal Protection Clause does not prevent a state-affiliated law school's "narrowly tailored use of race in admissions decisions to further the compelling interest in obtaining the educational benefits that flow from a diverse student body." *Grutter*, 306 U.S. at __, 123 S.Ct. 2347.

However, having found that the City has a compelling interest still in continuing to remedy the effects of its past racial discrmination, I need not determine whether the *Grutter* analysis extends into an employment context. Moreover, I do not believe this record on this issue is sufficiently developed to enable the Court to make a determination on the diverse workforce interest. Thus, the Court declines to use the City's interest in having a diverse workforce as the linchpin of this Court's strict scrutiny analysis.

Finding that the City has a compelling state interest in remedying the current effects of past discrmination is only the first part of the strict scrutiny analysis. Whether the 2002 Plan is narrowly tailored to achieve the City's objective is the second part of the analysis, complicated in this case because there are several ways to manipulate statistics to support a variety of outcomes.

The Plan is Narrowly Tailored

The *Grutter* Court emphasized that in the context of analyzing a university admissions policy, a plan or policy that includes race as a factor for selection must be narrowly tailored to satisfy the strict scrutiny standard. The Court explained:

> Even in the limited circumstance when drawing racial distinctions is permissible to further a compelling state interest, government is still "constrained in how it may pursue that end: [T]he means chosen to accomplish the [government's] asserted purpose must be specifically and narrowly framed to accomplish that purpose." *Shaw v. Hunt*, 517 U.S. 899, 908, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996) (internal quotation marks and citation omitted). The purpose of the narrow tailoring requirement is to ensure that "the means chosen 'fit' ... th[e] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Richmond v. J.A. Croson Co.*, 488 U.S. at 493, 109 S.Ct. 706 (plurality opinion).

Id., at __, 123 S.Ct. at 2341. The Court also explained some of the characteristics of a narrowly tailored policy:

> To be narrowly tailored, a race-conscious admissions program cannot use a quota system--it cannot "insulat[e] each category of applicants with certain desired qualifications from competition with all other applicants." *Bakke, supra,* at 315, 98 S.Ct. 2733 (opinion of Powell, J.). Instead, a university may consider race or ethnicity only as a " 'plus' in a particular applicant's file," without "insulat[ing] the individual from comparison with all other candidates for the available seats.", at 317, 98 S.Ct. 2733. In other words, an admissions program must be "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on

> the same footing for consideration, although not necessarily according them the same weight." *Ibid.*

Id., at __, 123 S.Ct. at 2341-2342. In addition, the *Grutter* Court explained that a plan must consider race-neutral alternatives, must be limited in time, and cannot unduly harm members of any racial group. *Id.* at __ , 123 S.Ct. at 2342-46.

In applying the principles outlined in *Grutter* to the City's 2002 Affirmative Action Plan, I conclude that the Plan is narrowly tailored to achieve the City's purpose. *Grutter* makes clear that the Plan may not be a quota system.

> Properly understood, a "quota" is a program in which a certain fixed number or proportion of opportunities are "reserved exclusively for certain minority groups." Quotas '"impose a fixed number or percentage which must be attained, or which cannot be exceeded,'" . . . and "insulate the individual from comparison with all other candidates for the available seats." . . . . In contrast, "a permissible goal ... require[s] only a good-faith effort ... to come within a range demarcated by the goal itself," and permits consideration of race as a "plus" factor in any given case while still ensuring that each candidate "compete[s] with all other qualified applicants.

Id. at 2342, some citations omitted.

Based on these principles, I conclude that the 2002 Affirmative Action plan sets permissible goals and does not contain quotas. The Plaintiffs would have the Court believe that the City's use of underutilization is actually a quota requirement. I disagree. There were no "spots" reserved for African-American employees. As Chief Napravnik has stated, each individual was considered for the positions, and though race was one factor considered by him in selecting Curtis, Estes and Mathews for promotion, it was not the only factor. Napravnik Aff. and Dep. at 38-9; 67-70. His statement is supported by the fact that Anthony Curtis was passed over for the first promotion to Battalion Chief, demonstrating that race was a factor,

not *the* factor. The undisputed evidence demonstrates that the 2002 Plan, as written and as applied by Chief Napravnik, uses race as a "plus" factor.

In her Second Affidavit, Minton takes the reader through the process she employed in identifying the reasonable recruitment area, and the availability pool for African-Americans. She used the percentage of population for the City of Omaha, rather than the Omaha MSA, for African-Americans because the "vast majority" of African-American applicants came from the City of Omaha, and very few came from any county other than Douglas County, Nebraska. Filing No. 83, Minton Dep. at 29. 35. Minton determined that using the Omaha MSA figures to derive the African-American percentage would have had the effect of excluding minorities on a geographical basis, which is the one thing that the OFCCP guidelines warn against in identifying a reasonable recruitment area.

The Plaintiffs argue that the 2002 Plan is not narrowly tailored because the City did not apply the OFCCP guidelines correctly, and because the reasonable recruitment area from which the City developed the percentage of African-Americans for the external availability pool resulted in inflated percentage figures because the City disregarded the Omaha MSA figure and instead used the City of Omaha figures.

I conclude that one interpretation of the OFCCP guidelines over another interpretation should not be a determining factor in this case, particularly because the City, as a municipality, is expressly exempt from their application. The fact that the City decided to refer to the guidelines in the implementation of the 2002 Plan does not translate into a legal requirement that the City is now bound by the guidelines' every nuance.

The Plaintiffs also have offered the report of Charles Mann, Ph.D., a statistician who has reviewed information related to this case. In his report, he notes that the City's use of census information for the City of Omaha does not eliminate from the availability pool any persons who are too young, too old, or unfit for duty for another reasons. Filing No. 81, Mann Report. Plaintiffs contend that the City's use of the City of Omaha as its reasonable recruitment area in developing the percentage of African-Americans in the external availability pool results in inflation of the final availability percentage, and Mann questions the use of the City of Omaha as the recruitment area because so many of the firefighters who were hired from 1991 to 2003 were hired from outside Omaha. Minton states that the City numbers were intentionally used because the vast majority of African-Americans who are hired by the Department are from within the City of Omaha. In addition, firefighter applicants who have served as volunteer firefighters get credit for that work, and such volunteer work is usually found in small towns and rural communities that have a very small, if any, African-American community.

Mann's report also criticizes the City's Plan because, he states, a referral based on race could be made under the Plan when the difference between the observed incumbency in a particular position and the expected number of protected class members is not statistically significant. *Id.* In reaching that conclusion, Mann assumes that "a finding of underutilization generally requires that the result must be unusual enough that the observed difference or a large adverse difference would occur less than 5 percent of the time if accession was made at random with regard to membership in the protected class." I do not believe that a strict scrutiny analysis requires such statistical precision. Even Mann

acknowledges that the "availabilities are all estimates and may, even in the best of circumstances not be correct." *Id.* at 6.

Mann is also concerned with the City's availability analysis because the City did not consider how many of the African-Americans represented in the external availability percentage should not have been included because they were ineligible for hire, because they did not take the test, or because they had drug problems or criminal histories that would have precluded their employment. One City employee estimated that of the persons who apply for the firefighter job, nearly 40 percent of the applicants do not show up for the initial written examination. Filing No. 83, Olsen Dep. The Plaintiffs argue that If those who were ineligible for hire were taken out of the external availability pool, then the percentage of African-Americans with the requisite skills in the reasonable recruitment area would decrease and there would be no underutilization in the Department. However, because that analysis was not conducted across the board, I conclude that it does not defeat the City's claim that their Plan is narrowly tailored to satisfy its purpose.

The undisputed evidence also demonstrates that the City uses race-neutral alternatives to create equal opportunities for employment and for promotion. The hiring and promotion examinations, which include written testing and assessment center testing, and consideration of disciplinary and attendance records, demonstrate that race-neutral alternatives are employed by the City to ensure equal employment opportunities. Hornick Dep. at 61, 114-16. In addition, Minton states that the City has targeted advertising campaigns at career fairs, colleges, and high schools to actively recruit minority candidates. On the job, the City offers job training, tuition reimbursement (which is important because college credit is a factor in the

construction of the eligibility lists for promotion to such jobs as Battalion Chief), and sponsorship of internal and external seminars to assist employees in pursuing promotions. Minton Aff. at 5; White Report.

Finally, the 2002 Plan is of a limited duration – it will not be used after December 31, 2005, regardless of whether the goals have been achieved. The Plan is audited annually, and if a Department achieves its goals, then the Plan may terminate for that Department. Minton Aff. at 1, Ex. 101 at 15.

There is no doubt that certain white firefighters, including the Plaintiffs, have been directly harmed by the use of the City's 2002 Affirmative Action Plan. The evidence demonstrates that other opportunities for the Plaintiffs to be promoted will arise, though I readily acknowledge that hope for the future does not make up for the differential in pay, prestige, and responsibility that comes with a promotion. There is no mistaking that innocent individuals bear some of the burden when a constitutional affirmative action plan is exercised in an attempt to achieve legitimate goals. In this case, however, the burden on the individuals is not sufficient to declare the City's 2002 Plan unconstitutional.

I conclude there is no genuine issue that the City's 2002 Affirmative Action Plan is narrowly tailored to fit the City's compelling need to remedy past discrmination, so there was little or no possibility that the motive in selecting African-American candidates for promotion was illegitimate racial prejudice or stereotyping. *See J.A. Croson*, 488 U.S. at 493. Based on the undisputed evidence, I conclude that the 2002 Plan is narrowly tailored to achieve the governmental interest of remedying past discrmination.

CONCLUSION

For the reasons set forth in this memorandum, I conclude that the City's 2002 Affirmative Action Plan satisfies strict scrutiny analysis. Accordingly, the Plaintiffs' claims against the City under 42 U.S.C. § 1981, §1983 and Title VI fail as a matter of law.

IT IS ORDERED:

1) The Plaintiffs' Motion for Leave to File a Reply Brief (Filing No. 96) is denied;

2) The Plaintiffs' Motion for Judicial Estoppel (Filing No. 71) is denied;

3) The Defendant's Motion for Summary Judgment (Filing No. 12) is granted in all respects, and the Plaintiffs' Motion for Summary Judgment (Filing No. 78) is denied in all respects;

4) All other pending motions are denied as moot; and

5) A separate judgment in favor of the Defendant City of Omaha will be filed with this Memorandum and Order.

DATED this 30th day of March, 2004.

BY THE COURT:

s/Laurie Smith Camp
Laurie Smith Camp
United States District Judge