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January 19, 2015

Via Fax: (212) 933-3079
Honorable Fidel F. Del Valle
Chief Administrative Law Judge
Office of Administrative Trials and Hearings
100 Church Street, 12th Floor
New York, NY 10007

Re: FDNY v. Simpkins

Dear Chief Judge Del Valle,

Please find enclosed Respondent's post decision motion, heretofore attached and marked **Exhibit A**, which the trial judge refused to consider. Normally, there would be no objection with the judge's refusal. However, this motion was filed after the Court amended the original decision based on the FDNY's Ex-Parte communication with the tribunal.

Most disturbing in the Amended decision is the holding that race based discrimination is an unavailing defense in you tribunal. I remind you that The Office of Administrative Trials and Hearings (OATH) is a City Agency. As such, it is mandated, first and foremost, to follow the NYC Human Rights Law.

The New York City Human Rights Law is one of the most powerful anti-discrimination laws in the country, far stronger than either federal law or most state counterparts. Its emphasis is on maximizing accountability and on creating a real deterrent to discriminatory conduct. To disregard a showing of race based discrimination is to become complicit in the furtherance of this scourge.

Equally disturbing is the Tribunal, seemingly going out of their way, in concluding that the Respondent had an obligation to show the the financial impact on his family, should he be denied a disability pension. As such please find an affidavit from the respondent heretofore attached and marked **Exhibit B** which I trust will

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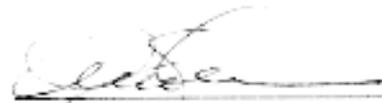
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illuminate the matter.

As such, I reiterate my request of January 8, 2015, to meet with you and discuss these serious concerns regarding your agency. Or in the alternative setting this matter down for a new trial under the constraints of The New York City Human Rights Law.

Thank you in advance for your attention in this matter. I remain

Very Truly Yours,



PETER GLEASON

PJG/ep

EXHIBIT A

THE CITY OF NEW YORK
OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

X

IN THE MATTER OF,
THE NEW YORK CITY FIRE DEPARTMENT (FDNY),
Petitioner,

MOTION

-against-

KEVIN SIMPKINS

Respondent.

OATH Index No: 2308/14
FDNY Case # 244/12 D

X

STATE OF NEW YORK, COUNTY OF NEW YORK) ss.:

PETER J. GLEASON, an attorney licensed to practice before all courts of the State, on behalf of Kevin Simpkins, seeks leave to file a supplemental motion as this Court entertained and acted upon what was tantamount to an Ex-Parte, Post Verdict motion by the Petitioner.

RESPONDENT'S SUPPLEMENTAL MOTION

1. This tribunal rendered a decision on December 10, 2014, in the above captioned matter and notified the parties, via e-mail on the same date.
2. Upon information and belief Petitioner (FDNY) believed there were some factual inaccuracies in the tribunal's decision.
3. Unbeknownst, to the Respondent (Simpkins), the FDNY contacted the tribunal regarding the FDNY's contention that there was a mistake in the final decision.
4. At that time, the FDNY did not put Simpkins on notice that there was any communication with the tribunal. It was not until the amended report and recommendation was issued that Simpkins became aware.
5. Upon information and belief the FDNY's position regarding their communications with the tribunal was to point out a factual error.
6. On December 11, 2014, the tribunal rendered an amended decision, which upon information and belief incorporated the changes suggested by the FDNY.
7. It is shocking that the FDNY would initiate communication with the tribunal

without putting Simpkins on notice.

8. Simpkins, by dint of this motion, requests the same leave granted to the FDNY. To wit, Simpkins requests the opportunity to provide additional citations to the tribunal to correct what is perceived as an error in the amended report and recommendation.

9. Unlike the FDNY, Simpkins will notice the opposing party (FDNY.)

MISTAKE IN AMENDED REPORT

10. Precluding Simpkins from raising the defense of race based discrimination was a mistake.

11. Title 48 of the Rules of the City of New York mandate that City Tribunals are responsible for the fair enforcement of laws that, among other things, maintain the quality of life in the City, *combat discrimination*,... (Emphasis added)

12. Title 48 of the Rules of the City of New York, defines an "ex parte communication" is a communication that concerns a pending or impending proceeding before a City administrative law judge and occurs between the City administrative law judge and a party, or a representative of a party, to the proceeding without notice to and outside the presence of one or more other parties to the proceeding.

13. Simpkins contends that the instant matter, by virtue of the final report and recommendation being amended, via an ex parte communication by the FDNY, is a pending proceeding.

14. Precluding Simpkins from the identical relief afforded the FDNY would violate Simpkins due process rights as well as impugn the integrity of the tribunal. (see section 101 Title 48 of the Rules of the City of New York)

15. The cases regarding the preclusion of raising a race based discrimination defense that are cited in the amended report and recommendation are usurped by the implementation of the Rules of Conduct for New York City administrative law judges (ALJs) enacted well after the State court rulings cited in the amended report and recommendation. (Please note that the reference to *Fire Dep't v. Harper*, OATH Index No. 503/14, was settled shortly after men. dec of Jan. 21, 2014 thus precluding any appeal)

16. In November 2005, New Yorkers voted by referendum to implement Rules of Conduct for New York City administrative law judges (ALJs). In February 2007, under the auspices of the Deputy Mayor for Legal Affairs, the City adopted the Rules of Conduct for administrative law judges and hearing officers for the City of New York. Please find heretofore attached and marked Exhibit A the Rules of Conduct for Administrative Law Judges and Hearing

Officers of the City of New York.

17. The edict of said rules under section 103(A)(6) requires that the parties and their representatives refrain from a variety of unconstitutional and biased behavior. Therefore, those who enter the halls of this tribunal shall come with clean hands not bloodied with the scourge of racism. Hence, the FDNY should not benefit from their problematic history with race relations by silencing respondents like Simpkins when they are facing disciplinary charges.

18. Hence, not allowing Simpkins to avail himself to the defense go race based discrimination clearly violates the aforementioned Rules and was therefore a mistake.

19. As Simpkins testified, "I was called a nigger, a low life, a chimp" in the workplace. This vile terminology should have been permitted as a basis for, among other things a defense of race based enforcement. Hence, by allowing the FDNY the ability to ignore the allegation of racial discrimination this Tribunal make a mistake in the amended report and recommendation.

WHEREFORE, the Respondent (Simpkins) respectfully requests the opportunity to be heard, with notice on the FDNY on a date that is convenient to the Court.

Dated: New York, New York
December 16, 2014



Peter J. Gleason, Esq.
Attorney for the Respondent
115 Christopher St.
NY, NY 10014
(646) 872-3546

EXHIBIT B

AFFIDAVIT OF KEVIN SIMPKINS

KEVIN SIMPKINS, being duly sworn, deposes and says:

1. I am forty-seven years old. I reside at 220-08 146th Avenue, Springfield Gardens, New York 11413.
2. I make this affidavit as part of my submission to Commissioner Nigro in response to the recommendation of Administrative Law Judge Astrid Gloade that I be terminated from my position as firefighter.

Personal Background

3. I have been a firefighter since May 4, 2003, working at Engine 233 in Brooklyn for my entire career.
4. I have been married to Laura Simpkins since 1996. We have three children, ages seventeen, sixteen and nine. My seventeen-year-old son, Marquis, is graduating from Pathways College Preparatory in Hollis, Queens, in June and is currently applying to college. My sixteen-year-old daughter, Tamia, is in eleventh grade at Excelsior High School in Springfield Gardens, Queens. My nine-year-old son, Saadiq, is in the fourth grade at P.S. 181 in Springfield Gardens.
5. I am the sole supporter of my family. My wife, who works as a medical assistant, was laid off on December 5, 2014, from Fulton Medical, after working there since January 6, 2014. Prior to that, she was receiving unemployment benefits as a result of a layoff from her previous employer, Cell Medical, where she worked from July 2011 to September 2013.
6. We are completely dependent on my salary as a firefighter. We have no family that can help us. My children and wife depend on my health insurance.

7. Supporting three children on my salary has been extremely difficult, especially because in the last year I have not been able to earn overtime, due to my having been assigned to modified duty at FDNY headquarters since October 2012.

8. We rent our apartment in Queens, which costs us \$1650 per month. Utilities and home-related expenses cost approximately another \$450 each month. I have savings that would allow us to pay rent for about three months if I am terminated. After that, I have no way to support our family, and we could become homeless.

9. The thought of my children losing their home or going hungry is absolutely devastating to me and my wife.

My Life as a Firefighter

10. As ALJ Gloade acknowledged, prior to October 2012, when I was charged with marijuana use, I had no disciplinary record of any kind in my career as a firefighter. I enjoyed my work and received consistently good reviews from supervisors.

11. Since being appointed in May 2003, I have felt very proud to be among the very few African-American firefighters in the FDNY. It was not easy being among the very few black firefighters in my firehouse, and I experienced an enormous amount of hostility from my co-workers. Nonetheless, I worked hard to try to get along with others.

12. When the Vulcan Society fought to diversify the Fire Department, I was an active supporter. I became a named plaintiff in the lawsuit because I believed that diversifying the FDNY was for the good of the Department and all New Yorkers. Successful firefighting depends on the trust of communities we serve, including communities of color. I passionately believe that a more diverse fire department will provide better services, and I am proud to have been part of a successful effort to help the FDNY become stronger.

13. Unfortunately, my role as a named plaintiff meant that I became a target.

Release of Drug Test Results

14. On September 27, 2012, I was asked to submit to a drug test. In a document dated October 3, 2012, the FDNY issued me a notice of suspension due to a positive result from the test indicating the presence of THC in my urine.

15. This document was supposed to be confidential. I found it attached to the front door of my home on October 4, 2012. When I found it, it was unsealed and torn.

16. The next day, October 5, 2012, Darius Charney, one of the attorneys at the Center for Constitutional Rights who had been representing the Vulcan Society as well as me and other named plaintiffs in the lawsuit against the Fire Department, received a call from a *New York Post* reporter asking for a comment on my positive drug test. Mr. Charney advised me that the *New York Post* had called him. The *New York Post* also tried to find me at home.

17. On October 11, 2012, the *New York Post* published a story entitled “Firefighter in court fight vs. FDNY suspended after positive pot test: sources.” The article cited an “FDNY document” and FDNY personnel as its sources, thus making clear that it had received both verbal reports and written documentation of the drug test from an official source inside the FDNY.

18. The article’s first sentence reads, “He was riding high after a landmark federal-court victory – then got even higher.” It seemed obvious that whoever released my confidential information to the *New York Post* believed the story was of interest because of my role in the lawsuit.

19. This article was followed shortly thereafter by a posting on a website called *IrateIrishman.com*, entitled “NigNog Appointed to the FDNY by Federal Court Order Suspended for

Failing Drug Test,” and on a website called thecrant.yuku.com. Both the website postings received numerous reader comments that described me in terms that were extremely racially offensive.

20. Although only a small number of FDNY personnel had access to my drug test information, the FDNY has still not identified the culprit, and no one has been punished for releasing my private information to the public.

Discipline and Disability

21. Following the results of my drug test, I was assigned to work at FDNY headquarters, where I worked in the Audio-Visual Department. The FDNY began to pursue termination proceedings.

22. While my case was pending, I was assigned to drive an FDNY vehicle for the Audio-Visual Department. In November 2013, while I was on assignment, the FDNY van I was driving was hit by another vehicle coming down Flatbush. I was seriously injured. I had to have ten stitches above my right eye, and I underwent arthroscopic shoulder surgery three months later.

23. On January 16, 2014, reporters from the *New York Post* again appeared at my home, where they took a photograph of me without permission. I was told by a colleague at my firehouse that they had also gone to the firehouse to find me. The next day, January 17, the *Post* published another inflammatory article about me, titled, “Firefighter barred from driving FDNY van seeks disability pension after crash.” The article, citing an “FDNY official,” described the car accident, claimed falsely that I had been driving without permission, and stated that I had filed for a disability pension, even though I had not yet done so. Like the earlier article from October 11, 2012, this article cited FDNY sources and emphasized my involvement in the *U.S. v. City of New York* lawsuit.

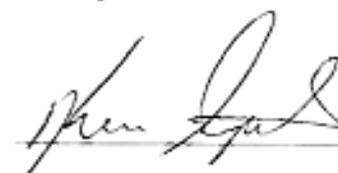
24. Again, the FDNY has not identified or disciplined the individual or individuals involved in leaking private and false information to the media.

25. I eventually did apply for a disability pension, in March 2014. I did so because my injuries, which I sustained while on a modified assignment in the FDNY, required me to have extensive physical therapy and rehabilitation as well as surgery. In February 2014, doctors from the Hospital for Special Surgery in Manhattan operated on my shoulder and inserted an implant. I no longer have full range of motion in my shoulder, making it impossible for me to fulfill my full duties as an active firefighter.

Conclusion

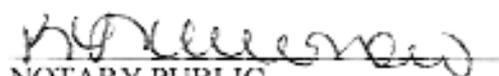
26. Termination from my position with the FDNY will have a crushing financial impact on my family. I will lose the pension I have worked so hard for. Because of my injuries, job opportunities in fields that require lifting or other physical work will be limited. In addition, the damage to my reputation caused by leaks to the media by FDNY personnel could permanently affect my job prospects.

27. I have worked hard all my life, and dedicated my best years to the Fire Department. I hope that the Commissioner will consider my years of exemplary service, my otherwise blemish-free record, and my family's complete dependence on my salary in making a decision that preserves my job and honors my service to the City of New York.



KEVIN SIMPKINS

Sworn to before me this 31 day of December, 2014


NOTARY PUBLIC

