

Presently, the parties are Group B Plaintiffs-Intervenors, Defendant City of Chicago (“the City”), and Third-Party Defendant The Firemen’s Annuity and Benefit Fund of Chicago (“the Fund”). The procedural background and facts underlying the litigation are set forth in this Court’s prior orders, including the Court’s 2001 and 2007 Orders denying the City’s motions for summary judgment as to Group B Plaintiffs-Intervenors (docket nos. 454 and 1303, respectively) and the Court’s Order Granting Preliminary Approval of the Damage Allocation Process (docket no. 1356).

Here, it suffices to say that the City was deemed to have unlawfully adjusted Plaintiffs-Intervenors’ scores on the 1986 Lieutenant’s promotion exam. After a liability trial, by agreement, the parties divided the class into three main groups: those who would have been promoted or promoted sooner based on the number of promotions to Lieutenant the City actually made from the 1986 Lieutenant’s exam (Group A); those who may have been promoted from the 1986 Lieutenant’s exam if the City had not removed the promotion eligibility list (Group B); and those who would not have been promoted from the 1986 Lieutenant’s exam based on their scores (Group C) (docket no. 270). The parties were able to resolve the claims of all Group A Plaintiffs-Intervenors after a series of damages trials to juries both before and after an appeal. The Court granted summary judgment to the City as to Group C based on the speculative nature of their claims (docket no. 454). Now the parties have proposed a Damage Allocation Process to resolve claims of Group B Plaintiffs-Intervenors.

The parties presented the Court with a Stipulation of Damage Allocation Process, an agreed Damage Allocation Process Class Definition, proposed Class Representatives, proposed Class Counsel and Lead Class Counsel, Damage Allocation Process approval procedures, a list of Class Members, a Notice of Preliminary Approval (with an Objection Form, a Hearing Participation Form, and an Exclusion Request Form), a Notice of Final Approval & Claim Form (with Individualized Relief Questionnaire), a proposed Stipulated Final Judgment Order for use by each Class Member, and a proposed Schedule of Deadlines. The parties also proposed that

Dr. Jerry Goldman, Ph.D. serve as a Special Master for Damages and that Lynn Cohn, Esq. to serve as Damages Allocator.

After preliminary approval by this Court, notice was sent to all Class Members. Class Counsel reported their belief that all Class Members were contacted (docket no. 1357). None of the Class Members opted out of the Damages Allocation Process, as was their right. Six Class Members objected to the Damages Allocation Process. Three of those objectors - Mr. John Power, Mr. Ed O'Connor and Mr. William Pabich - explained their objections in more detail at the Final Approval Hearing. One objector, Mr. Michael Cullen, was granted permission to withdraw his objection. The remaining objectors chose not to speak or were not present at the Final Approval Hearing. One Class Member, Mr. William Block, one Class Representative, Mr. Roger Luedtke, and several Group A Plaintiffs-Intervenors thanked their counsel - and specifically Linda D. Friedman - for their efforts over the course of the litigation. The parties and certain of these individuals also thanked the Court and Defendants.

APPLICABLE LEGAL STANDARD

The Seventh Circuit explained this Court's obligation in reviewing a proposed class action resolution in *Mirfasihi v. Fleet Mortgage Corp.*, 450 F.3d 745 (7th Cir. 2006). The Seventh Circuit made clear that this Court must "'exercise the highest degree of vigilance in scrutinizing proposed settlements of class actions' to consider whether the settlement is 'fair, adequate, and reasonable, and not a product of collusion.'" *Mirfasihi*, 450 F.3d at 748 (quoting *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 279 (7th Cir. 2002)). As the Seventh Circuit stated: "[a]s a general principle, a district court should evaluate, among other things, the probability of plaintiff prevailing on its various claims, the expected future costs of litigation, and hints of collusion." *Mirfasihi*, 450 F.3d at 748 (citing *Mars Steel Corp. v. Cont'l Illinois Nat'l Bank & Trust Co.*, 834 F.2d 677, 681-82 (7th Cir. 1987), and *Reynolds*, 288 F.3d at 283-85)). Bearing these factors in mind, the Court analyzes the proposed class resolution.

FINAL APPROVAL OF THE DAMAGE ALLOCATION PROCESS

This Court already determined that Rule 23's requirements were met for Plaintiffs-Intervenors as a whole (docket no. 62). Because the Damage Allocation Process applies to only a sub-class of those individuals, the Court nonetheless analyzes each of Rule 23's requirements. For the reasons explained in the Court's order granting preliminary approval, the Court finds that the requirements of Rule 23 are met.

The Class Representatives - Mark Frigo, Mark Thomas, Roger Luedtke, James Voris, and William Beemsterboer - have attended Court proceedings during the litigation and assisted in the negotiation of the Damage Allocation Process. As a group, the Class Representatives represent the various career paths Group B Plaintiffs-Intervenors may have had but for the City's conduct stopping promoting from and eventually removing the 1986 Lieutenant's exam eligibility list (*e.g.*, some were promoted to Lieutenant and/or Captain, and some are still Firefighters). Collectively they represent various points on the spectrum of performance by Class Members on the 1986 Lieutenant's exam. Thus, the Court appoints the proposed Class Representatives.

Pursuant to Rule 23(g), the Court accepts the parties' proposal that Stowell & Friedman, Ltd. continue as Lead Class Counsel. The Court also appoints J. Bryan Wood of The Law Office of J. Bryan Wood as Class Counsel. The Court observed Mr. Wood and finds that he, too, meets the standards for Rule 23(g).

As explained in the parties' Stipulation, the total payment from the City of all claims for damages, attorneys' fees and costs, and fees and costs for administration of the Damage Allocation Process will be (and shall not exceed) \$6,000,000.00, the Total Damages Fund. A Damage Allocation Process will be created and each Class Member will be presented with two options for seeking damages – a fixed amount based on the Class Member's Estimated Lost Lieutenant's Back Pay or an individualized determination. Specifically, "Option A" will be to accept relief equal to 75% of the Class Member's Estimated Lost Lieutenant's Back Pay;

“Option B” will be to accept relief based on individual facts and circumstances in an amount equal to no less than 50% of the Class Member’s Estimated Lost Lieutenant’s Back Pay.

The Special Master for Damages will be responsible for calculating Estimated Lost Lieutenant’s Back Pay for each Class Member based on records provided by the Fund and the City and verified by each Class Member. All damage allocations under “Option A” will be paid prior to any awards of relief under “Option B.” Class Members who elect “Option B” will provide information (in writing or in an interview) in response to an Individualized Relief Questionnaire. The primary bases the Damages Allocator shall consider in allocating damages to Class Members who elect “Option B” are: (a) the Class Members’ Estimated Lost Lieutenant’s Back Pay; (b) emotional distress suffered by the Class Members; (c) the Class Members’ lost opportunities for subsequent promotions; and (d) the Class Members’ lost pension benefits.

Presently, the parties anticipate that the Total Damages Fund will be divided in the following manner: approximately \$3.9 million for the award of Estimated Lost Lieutenant’s Back Pay (including for those individuals who choose “Option B”); approximately \$1.27 million for the award of individualized relief; and approximately \$830,000 for attorneys’ fees and costs associated with obtaining approval of the Damage Allocation Process, for administration of the Damage Allocation Process, for payment of Class Counsel’s fees and costs, and for other costs associated with the Damage Allocation Process as directed by the Court.

Pursuant to Section 7 of the Stipulation, Class Counsel initially will receive \$530,000 (\$500,000 to Stowell & Friedman, Ltd. and \$30,000 to The Law Office of J. Bryan Wood) as payment for attorneys’ fees and costs for work performed prior to preliminary approval. For work performed after preliminary approval, Class Counsel will be awarded their hourly fees and out-of-pocket costs, but may not receive more than \$50,000. The Court finds Class Counsel’s fees fair and reasonable. As noted in open court, Class Counsel will receive less than 10% of the overall award of damages, an amount far lower than is frequently approved in similar cases.

The Court appoints Dr. Jerry Goldman, Ph.D. as Special Master for Damages and appoints Lynn Cohn, Esq. as Damages Allocator. As explained in the Court's preliminary approval order and in open court, the Court cannot think of any other individuals more qualified to serve in these capacities. As explained in Section 6 of the Stipulation, Dr. Goldman and Ms. Cohn will be compensated through payment of their hourly fees for work performed subject to agreed limits that may be exceeded only with Court approval. The Court finds the mechanism for compensating the Special Master for Damages and the Damages Allocator fair and reasonable.

The Court also finds that the risks of prevailing - for each party - demonstrate that the proposed resolution is fair, adequate and reasonable. Notably, the Supreme Court agreed to review the case of *Ricci, et al. v. DeStefano, et al.*, Supreme Court Case No. 08-328 (reviewing 530 F.3d 88 (2d Cir. 2008)), after the parties submitted their proposal for preliminary approval. Class Counsel believes the Supreme Court's answers to the questions presented will significantly affect Class Members' ability to recover damages. Class Counsel believes it is in the Class Members' best interests to avoid the risk of an adverse decision by the Supreme Court, which could limit their recovery significantly. The Court agrees an adverse decision by the Supreme Court poses risks to Class Members, which favors approval of the proposed resolution.

But regardless of any action by the Supreme Court, Group B Plaintiffs-Intervenors face risks in continuing the litigation. This Court is bound by the Seventh Circuit's decision in *Biondo et al. v. City of Chicago et al.* as to how damages are to be determined. Moreover, the passage of the Civil Rights Act of 1991, the City's removal of the 1986 eligibility list, and the offering of subsequent promotion opportunities provide the City with defenses to Group B Plaintiffs-Intervenors' claims. If successful, those defenses would severely limit or entirely eliminate any damages award.

Finally, even if Group B Plaintiffs-Intervenors succeed at trial, they face risk Defendants will appeal favorable verdicts and re-trials will be required (as was the case for Group A

Plaintiffs-Intervenors). This process may take years, increasing the costs and risks of no recovery.

Resolution prior to trial enables each Class Member to obtain relief. A key component of that relief will be the wages lost as a result of not being promoted from the 1986 Lieutenant's exam, as Class Members contend they would have been but for the City's race-based adjustment of their scores on that exam. Based on the parties' calculations, the total award of relief to Class Members roughly approximates the wages they, as a group, would have earned (without interest) between the dates promotions to Lieutenant would have occurred but for the City's conduct and the dates they achieved promotion to Lieutenant (or approximately the present for individuals not yet promoted to Lieutenant). This total amount of relief available appears fair and reasonable in light of the risks to the parties.

The Damage Allocation Process also allows for individuals to seek damages based on other types of harm suffered. Class Members are provided with a choice about whether to receive a fixed sum more quickly or an individualized determination through a slightly longer process. The factors the Damage Allocator will consider in making individualized determinations reflect the primary considerations that influenced the juries during the damages trials for Group A Plaintiffs-Intervenors. Thus, many of the individualized circumstances raised by the objectors can be addressed through the individualized awards of relief. This, too, evidences the fairness, adequacy and reasonableness of the Damage Allocation Process.

Damages will not include promotions or adjusted promotion dates. Although most Class Members advanced to the rank of Lieutenant at some point since the City removed the eligibility list for the 1986 Lieutenant's exam, some have not. The fact that Class Members who have not yet advanced to Lieutenant will not become Lieutenants as part of the resolution was a primary basis of the objectors' objections. After hearing those objections and the parties' positions on the issue, the Court does not believe the lack of promotions renders the resolution unfair, inadequate or unreasonable. Rather, particularly in light of the efforts of Class Counsel and the

Class Representatives to negotiate terms that included that relief, the lack of promotions merely demonstrates both parties compromised.

Lastly, the Court finds no evidence of collusion between Class Counsel and the Defendants or the Class Representatives. Although class representatives frequently receive bonuses for their service to the class in class resolutions, here no monetary bonus was agreed to be paid. Additionally, the Court observed the negotiations between Class Counsel and Defendants closely, including by overseeing settlement conferences. No evidence of collusion was ever apparent. Nor was collusion alleged by any Class Member. And in the end, no Class Member found the Damage Allocation Process sufficiently objectionable to opt out of the process. For all these reasons and the reasons explained in the Court's preliminary approval order and in open court, the Court finds the resolution satisfactory under the standards set forth in *Mirfasihi*. Thus, the Court grants final approval of the Damage Allocation Process.

Accordingly, Class Counsel is directed to mail notice of final approval to all Class Members on or before March 3, 2009. Class Members must return claim forms choosing "Option A" or "Option B" and, if applicable, return completed Individualized Relief Questionnaire forms, postmarked on or before April 3, 2009.

The Damages Allocator shall notify Class Counsel of the awards of relief to individuals who chose "Option A" on or before April 17, 2009. Class Counsel shall submit agreed final judgment orders for Class Members who chose "Option A" on or before April 24, 2009. The Court will endeavor to enter final judgments for all Class Members who elect "Option A" by May 1, 2009. Assuming final judgments are entered by that date, the City shall satisfy judgments for all Class Members who elect "Option A" on or before July 1, 2009, or sixty (60) days after the entry of final judgment orders for "Option A" Class Members.

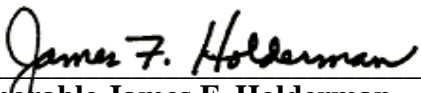
The City shall pay Class Counsels' agreed attorneys' fees and costs for work performed prior to preliminary approval (\$500,000 to Stowell & Friedman, Ltd. and \$30,000 to The Law Office of J. Bryan Wood) on or before May 30, 2009.

The Damages Allocator shall promptly complete review of information submitted by those Class Members who choose “Option B” and award them relief pursuant to the Stipulation. The Court directs all parties and the Damages Allocator to proceed such that final judgment orders for Class Members who choose “Option B” can be submitted to the Court on or before October 1, 2009, and all judgments can be satisfied on or before December 1, 2009, or sixty (60) days after the entry of final judgment orders for “Option B” Class Members. Class Counsel, the Special Master for Damages and the Damages Allocator shall submit a petition for fees and costs available under the Stipulation prior to October 1, 2009.

Pursuant to the Stipulation, the total collective monetary amounts of all judgment orders, including judgement orders for all claims for damages, attorneys’ fees and costs and all costs for the administration fo the Damage Allocation Process will be (and shall not exceed) the Total Damages Fund.

Class Counsel shall submit a status report to the Court by May 1, 2009. Class Counsel may also submit a status report on July 1, 2009, if they deem it necessary.

SO ORDERED



The Honorable James F. Holderman
Chief Judge, United States District Court
Northern District of Illinois, Eastern Division

Date: February 20, 2009