

## Key Excerpts from Judge Chaung’s April 22, 2021 Decision on Promotions

### I. PGCPD Leadership Ranks

**Table 1: Percentage of PGCPD Officers by Race and National Origin**

Rank	2015			2020		
	White	Black	Hispanic	White	Black	Hispanic
Captain	76.7%	16.7%	3.3%	80.7%	19.4%	0.0%
Lieutenant	61.2%	34.1%	3.5%	60.9%	27.2%	5.4%
Sergeant	53.1%	39.1%	4.7%	51.2%	41.4%	5.4%
Corporal	43.1%	44.4%	8.6%	39.5%	44.5%	11.1%
POFC	40.3%	49.1%	7.9%	40.2%	47.9%	9.5%
Police Officer	42.5%	40.4%	11.5%	31.2%	46.5%	19.1%
Overall Force	45.5%	42.2%	8.4%	42.5%	43.0%	10.5%

See Joint Record (“J.R.”) 712-713, J.R. 882, ECF Nos. 482-3, 482-4, 482-5, 483-1, 483-2, 483-3, 483-4, 483-5. [Page 3]

Thus, available data establishes that at least from 2015 to the present, there have been substantial disparities between the number of white officers in leadership ranks at PGCPD and the number of Black and Hispanic officers in those same ranks. [Page 4]

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The data demonstrates that whether for POFC or Corporal promotions, there are notable disparities in the test passage rate, and thus promotion rate, between white officers on the one hand and Black and Hispanic officers on the other. [Page 11]

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For promotions to Sergeant, the data shows that in both years, both Black and Hispanic candidates were promoted at substantially lower rates than white candidates, ranging from approximately one-third to one-half the promotion rate for white candidates. [Page 12]

For promotions to Lieutenant, the promotion rates for both Black and Hispanic officers were lower than white officers in both 2016 and 2018. [Page 12]

### IV. PGCPD Response to Disparities

#### A. Reports

Since at least 2012, PGCPD generated reports showing racial disparities at the various ranks. According to Jewell Graves, the manager of the PGCPD Office of Personnel, the Deputy Chief requested such reports, which showed both numerical and percentage data for every rank from Chief of Police down to Student Officer based on gender and race, including for white,

Black, Hispanic, Asian American, and Native American officers. These reports were generated at least once or every year from 2012 to 2017. [Page 16]

These reports are sent to the Office of Human Resource Management (“OHRM”) and the Police Personnel Division. Though PGCPD Chief Mark Magaw was aware of this reporting process, he has stated that he does not recall receiving briefings on those reports. In 2017, however, after HNLEA and UBPOA filed a complaint in October 2016 with the United States Department of Justice (“the DOJ Complaint”), the Deputy Chief requested that the Police Personnel Division compile the last five years of reports, from 2012 to 2017. [Page 16]

The data contained in these reports, which cover each promotion test administered from 2012 through October 2019, show that the mean test score for white candidates for POFC and Corporal was higher than the mean test scores for Black and Hispanic candidates on every single test. [Page 17]

While the PGCPD promotion system was generating these results, PGCPD leadership was already aware of the disparities in promotion rates and the underrepresentation of Black and Hispanic officers in leadership positions. In 2014 and 2015, Chief Magaw engaged in several discussions with Rushem Baker, the County Executive of Prince George’s County, about whether to move the Captain promotion process out of the existing promotion system using a written test and skills assessment and converting it to a system of discretionary appointments, in order to increase diversity in the higher ranks of the PGCPD. Such a change would have required an amendment to the County Code or personnel law. According to Magaw, the Fraternal Order of Police (“FOP”), the police officers’ union, objected to the change, and there was insufficient “political will” to proceed, so no proposal was ever made to the County Council. J.R. 383. [Page 17]

## **B. 2017 Equity Panel**

According to [Panel Chair Carlos] Acosta, during these proceedings, the 2017 Panel identified several possible problems with the existing promotion system. One was PGCPD’s practice of using officers as SMEs to assist in vetting the promotion tests and the concern raised by some officers that these SMEs may have been sharing inside information about the content of the tests with their friends on the police force before they took the written tests. [Page 18]

Another potential problem identified by the 2017 Panel was that officers in specialty units, as opposed to patrol units, may have certain advantages in the promotion process. At a 2017 Panel meeting on June 14, 2017, after the Panel heard a presentation on data showing that there was significantly lower Black and Hispanic representation at the command ranks, PGCPD Major Victoria Brock, who is Black, told the Panel that one “significant issue” that she believed was creating this underrepresentation was that more white officers are assigned to specialty units, and officers in specialty units have an unfair advantage in the promotion process because they have more time to study for the promotion tests, and the specialty units provide skills, training, and experience on specific topics more likely to be assessed during the promotion process. J.R. 956. During that same session, one of the panelists stated that certain specialty units were disproportionately white, including the Criminal Investigation Division, the Narcotics Enforcement Division, the Regional Investigation Division, the Special Investigation Division, and the Special

Operations Division. On July 14, 2017, after the 2017 Panel had finished its hearings on promotions, Corporal Thomas Hilligoss, a member of the 2017 Panel, sent an email to the co-chairs of the 2017 Panel summarizing the information gained from the sessions about promotions. Cpl. Hilligoss stated that “there was a very valid concern brought up in regards to the candidate’s opportunities to prepare for that test,” “[t]here absolutely seems to be an advantage that goes to those who are not in a ‘patrol’ capacity when it comes to study and test preparation,” officers in specialty units receive “much more specific training,” and in certain specialty units “the difference was pretty glaring” in that they had “significantly fewer minority members.” J.R. 6566. Corporal Hilligoss characterized this potential problem as “one of the biggest concerns” expressed in the meetings and an “issue that I just don’t feel can be ignored.” J.R. 66. [Pages 18-19]

Nevertheless, after Acosta left PGCPD in January 2018, Chief Stawinski did not appoint a new Co-Chair, and the 2017 Panel never met again. As noted by Acosta, the 2017 Panel never issued a report or list of recommendations as a result of its work, and it “never finished their job, their work.” J.R. 79. [Page 19]

### **C. 2020 Police Reform Work Group**

No other panels reviewed race-related issues, including possible discrimination in the promotion process, until July 2020, when Prince George’s County Executive Angela Alsobrooks issued an Executive Order establishing the 2020 Police Reform Work Group (“2020 Work Group”) to study and review PGCPD policies across the “full spectrum of operations, including hiring, training and use of force policies.” J.R. 823. [Page 20]

On July 23, 2020, Plaintiffs Joseph Perez and Thomas Boone, on behalf of HNLEA and UBPOA, sent a letter to the 2020 Work Group with several recommendations, including that the promotion system should be “overhauled to eliminate bias.” [Page 20]

On July 30, 2020, Acting PGCPD Chief Hector Velez presented information to the 2020 Work Group on the issue of promotions, including the data that over 80 percent of Captains and 60 percent of Lieutenants are white. When it issued its recommendations in December 2020, however, the 2020 Work Group did not propose any reforms to address discrimination in promotions. [Page 20]

## **V. Impact on Plaintiffs**

### **2. Adverse Impact**

Based on the data described above, the Court finds that the PGCPD promotion tests and processes have an adverse impact on Black and Hispanic officers seeking promotion, which has resulted in significant underrepresentation of such officers at the higher ranks of the PGCPD. According to [BDO’s Marc] Simon’s analysis of the annual promotion data for the years from 2012 to 2019 for POFC, Black and Hispanic officers, whether considered separately or together, were promoted at a lower rates than white officers in all eight years, with the lower rates for Black officers being statistically significant rates in six out of the eight test years; the lower rates for Hispanic officers being statistically significant in two out of the eight test years; and the lower rates for the combined group of Black and Hispanic officers statistically significant across eight straight years. [Page 34]

The analysis of individual POFC promotion tests from 2016 to 2019 conducted by Dr. Locklear and Dr. Hausknecht similarly reveals that in all eight of the tests administered from 2016 to 2019, Black officers passed the test and were thus promoted at a lower rate than white officers, and in six of those eight tests, Hispanic officers were promoted at a lower rate. In one administered test, no Hispanic officers were promoted. For Black officers, the promotion rates ranged from only 44 percent to 84 percent of the promotion rate for whites; for Hispanic officers, the promotion rates were at or below 67 percent of the promotion rate for whites on three of the five occasions when there was sufficient data to conduct meaningful analysis. [Page 35]

For annual Corporal promotions from 2012 to 2019, Black officers had lower rates of promotion than white officers in all eight years, and Hispanic officers had lower rates in seven of the eight years, with the differences, whether considering Black and Hispanic officers separately or together, statistically significant in the five years from 2015 to 2019. Focusing on the individual tests administered from 2016 to 2019, in all eight of the tests for promotion to Corporal, Black and Hispanic officers both had a lower rate of promotion than white officers. For Black officers, the promotion rate ranged from 44 percent to 84 percent of the white promotion rate for any given test cycle; for Hispanic officers it ranged from 20 percent to 87 percent of the promotion rate for white officers in any given test cycle. In all eight tests, the lower promotion rates for Black officers were of practical significance, statistical significance, or both. For Hispanic officers, the lower rates of promotion were of practical significance, statistical significance, or both for five of the six administered tests for which there was sufficient data to conduct meaningful analysis. [Pages 35-36]

For the competitive ranks, based on the data referenced above, Black and Hispanic officers had lower rates of promotion to Sergeant and Lieutenant in both 2016 and 2018. [Pages 36]

Based on these statistical results, the Court finds that there are sufficient disparities to conclude that the PGCPD promotion process has an adverse impact on Black and Hispanic officers seeking promotion to the ranks from POFC to Lieutenant. [Pages 37]

The Court further finds that the adverse impacts on the various promotion processes are interconnected in that the results of the tests for promotion to POFC and Corporal have a direct impact on promotion rates to the competitive ranks because they result in a lower number of Black and Hispanic officers eligible to be considered for Sergeant, Lieutenant, and Captain. In turn, the results of the promotion processes for Sergeant and Lieutenant serve to reduce the number of Black and Hispanic officers eligible for promotion to Lieutenant, Captain, and higher ranks. Therefore, the notable adverse impact on Black and Hispanic officers at each identified promotion level contributes to underrepresentation at higher ranks as the universe of officers eligible for promotions becomes less and less diverse, with the result that PGCPD has significant underrepresentation of Black and Hispanic officers at the more senior positions that has been found to be statistically significant. The Court therefore finds that the promotion processes have an adverse impact as to all ranks up to and including Captain. [Page 38]

#### 4. Deliberate Indifference

Plaintiffs also argue that where the adverse impact of the PGCPD promotion process was known to PGCPD leadership as far back as 2012, yet PGCPD took no action to even attempt to rectify it, such “deliberate indifference” to potential discrimination provides further evidence in support of a finding of discriminatory intent. [Page 40]

As evidence of such deliberate indifference, Plaintiffs point to a series of events demonstrating that PGCPD leadership was fully aware of the adverse impact of the promotion processes on Black and Hispanic officers, yet took no meaningful action over a period of years. First, the evidence establishes that PGCPD regularly compiled reports on the racial makeup of each rank within PGCPD, at least as far back as 2012. . . . Although PGCPD identified the problem and at least one potential means to mitigate it, it took no action, as the FOP opposed any change to the Captain promotion process and the Chief decided that there was a lack of “political will” to make a change. J.R. 383. [Pages 41-42]

Second, after HNLEA and UBPOA filed the DOJ Complaint in October 2016 about “rampant discrimination” at PGCPD, including in the “denial of promotions,” J.R. 818, the Deputy Chief requested a compilation of the last five years of the Field Consulting reports on the promotions process, which showed statistically significant differences in test scores in many of the test cycles. . . . Thus, although the 2017 Panel was aware of the adverse impact of the promotion process on Black and Hispanic officers and identified several different problems that could be addressed in order to alleviate that adverse impact, PGCPD took no action in response. Rather, once Co-Chair Acosta left PGCPD, Chief Stawinski never appointed anyone to fill his position, and the 2017 Panel never produced a report or list of recommendations. Chief Stawinski took no further steps to examine or address the adverse impact of the promotion process. [Pages 42-43]

Third, Plaintiffs note that although the Prince George’s County Executive convened the 2020 Work Group and directed it to study and review a range of PGCPD policies, the Acting Chief presented it with certain information on the underrepresentation of Black and Hispanic officers at the senior ranks, and HNLEA and UBPOA sent to it a detailed letter requesting, among other actions, that the promotions system be “overhauled to eliminate bias” and recommending steps to address the problems with the promotion process identified by the 2017 Panel, J.R. 948, the 2020 Work Group did not address the issue of discrimination in promotions at PGCPD in its December 2020 report. . . . The Court finds no reason that during this litigation, which has extended for over two years to date, the County could not, through the 2020 Work Group or otherwise, review its promotion policies and implement remedial changes to mitigate any potential discrimination. *See* Fed. R. Evid. 407 (stating that subsequent remedial measures are inadmissible as evidence). [Pages 43-44]

This evidence demonstrates that PGCPD has been aware of the significant disparities in promotion rates based on race dating back at least to 2012 but has done virtually nothing to address them. Even when the 2017 Panel identified specific issues that could be examined in order to address the adverse impact of the promotion process, it did nothing. Rather, Chief Stawinski effectively let the 2017 Panel die without issuing a report and did not task anyone else to address the issues. Conspicuously, the County’s 2020 Work Group, even when confronted with the issue of discrimination in the promotion process, did nothing to address it. The evidence thus supports the

conclusion that PGCPD’s efforts to address such possible constitutional violations were “uninterested and superficial,” *Fiacco*, 783 F.2d at 331, and that PGCPD effectively engaged in a “policy of inaction” to address possible discrimination in the promotion process, *Connick*, 563 U.S. at 61. Such deliberate indifference provides additional evidence of discriminatory intent under § 1983. [Pages 44-45]

Thus, even if the promotion tests could be deemed to have content validity, the failure of PGCPD to follow the EEOC Uniform Guidelines and to investigate actual alternatives that would mitigate the adverse impact advances, rather than undermines, the claim of discriminatory intent. The Court therefore finds that the evidence supports a finding that Defendants acted with deliberate indifference to the clear evidence that the PGCPD promotion system was causing an adverse impact, and thus potential discrimination against, Black and Hispanic officers. [Page 47-48]

**5. Discriminatory Interest**

Here, the significance of the evidence of adverse impact is magnified by the fact that Defendants have acknowledged that the lower promotion rates for Black and Hispanic officers cannot be readily explained based on other factors. In its Answers to Plaintiffs’ Requests for Admissions, Defendants admit that “neither the Department, the County, or Fields/ESCI possesses, or is aware of, any data, study, or analysis that indicates that, as compared to white promotion candidates, Black [and Hispanic] promotion candidates, are less intelligent, were not as well trained at the Police Academy, are less motivated to work towards promotions, or study less for the tests.” J.R. 474-475. Moreover, as noted in the presentations to the 2017 Panel, Black and Hispanic officers are taking the promotion exams at the same rate or higher than white officers. [Page 49]

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Within this case, Plaintiffs have presented, through the expert report of Sheriff Michael Graham, evidence that during the same time period that the promotion tests and processes have been in effect, PGCPD has had numerous incidents in which police officers, including captains and sergeants, have made serious, racially derogatory statements and received what appears to be inadequate discipline, even accounting for the explanations offered by PGCPD’s expert witness, Chief Thomas Manger. These incidents include Sgt. Thomas Denault posting numerous racially charged statements in a group chat, including referring to members of the command staff as “baboons,”<sup>1</sup> for which the Internal Affairs Division recommended termination but Denault was

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<sup>1</sup> These postings included (1) “Unless you’re in with the ghetto-fide, butt-slappin, high-fivin, incompetent retard that runs D4, you will always be wrong....and especially if you don’t speak Ebonies”; (2) a photo of a Black female officer behind a dog that had to be shot with a caption stating “You never gonna believe this girl-friend, I was just getting my hairz dun . . . . I aintz gotz time to mess with this sh\*t, I got’s to get my babies off the bus”; and (3) a separate photo with a Black male subject in handcuffs bleeding from his head and face with a caption that read “As I woke up this day at 6pm, I thought to myself: ‘Self, what can I do today to be a productive member of society.’ So as I sat about in my section-8 free housing, eating chicken nuggets and Hennessey, paid for with my WIC card, and playing my X-Box that I stole from a B&E, it came

ultimately retained but demoted; a similar series of racist postings by a Captain<sup>2</sup> that did not result in a charge of discriminatory language and, in addition to other allegations of misconduct, resulted in a reduction of rank rather than termination; an incident in which a Corporal told a Hispanic civilian employee “you are lucky to be in this country”; and an incident in which a Police Officer referred to a photograph used in a training session as “Blacks Live Matter crap” and then filed a false charge that an officer of color had attempted to attack her over the comment. Graham Report at 66-67, 70-73, ECF No. 445-13. Graham has also identified numerous other incidents of discriminatory statements and actions by police officers in which no investigation was conducted, or the investigation resulted in no meaningful charges, including incidents in which a sergeant emphasized the word “nigga” four times in reading a suspect’s text message, told another officer that his wife was cheating on him because she is Latina and “all Latino women are whores,” and said, “I can’t wait to see Donald Trump check these Hispanics,” then arranged for the transfer of the officer who filed a complaint about these statements ; a Corporal, during a K-9 demonstration to students, used the example of “if a black bad guy is running”; a Corporal made a series of negative comments about Black people, including that “at least slaves had food and a place to live,” referred to President Obama as a “coon,” and referred to a Black officer as a “signal 7,” referring to a suspect; and a white officer posted derogatory images of a senior Hispanic officer with a caption, “I want to wish everyone Cinco de Mayo,” and a white sergeant later circulated the images by email. *Id.* at 48-50, 59-60. [Pages 51-52]

Even if one or more of these and other similar incidents identified by Sheriff Graham could be deemed to have been adequately addressed, there has been no persuasive showing that PGCPD has taken effective steps to address broadly this highly troubling pattern of discriminatory animus among officers within the PGCPD. Tellingly, although PGCPD appears to have held training sessions on implicit bias, in another incident identified by Sheriff Graham, when a group of predominantly white officers walked out of a 2018 implicit bias training workshop, senior command officers decided there should be no investigation or discipline. [Pages 52-53]

This evidence suggesting that PGCPD management has not meaningfully addressed a pattern of discriminatory animus within the PGCPD provides important context for the lack of any action to address the disparities in promotion rates and bolsters the argument that this failure is based not just on negligence or oversight, but on deliberate indifference to discrimination and, ultimately, discriminatory intent. Such a conclusion is reinforced by the fact that an officer such as Denault, who was found to have engaged in misconduct based on egregious racially derogatory statements, has continued to be promoted, at this point beyond Sergeant to the rank of

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to me: ‘Self, I think I am gonna finish this bottle of Hennessey, smoke some PCP, and pick a fight with Squad 46.’ Wrong Squad Sucka!!!!” Graham Report at 70, ECF No. 445-13.

<sup>2</sup> Posts and exchanges made on the Captain’s Facebook page included: (1) references to Reverend Al Sharpton as a “race hustling asshole”; (2) a picture of several Black individuals with the caption “line out the door of the liquor store in da hood!!! . . . only three murders in the parking lot in 4 years”; (3) a posting that “he comes the white peivedge [sic] bozos . . . I’m going to return my white skin for a darker complexion.. sue to my priviledge [sic]... so tired of the cupcake Obama supporters blaming race for everything..”; (4) a reference to another Facebook user as “frito frank ... the good news is it’s a long weekend those chip shelves, we be empty and ready to be stocked”; (5) a statement telling a Hispanic person to “go outside and mow your moms lawn”; and (6) a posting that he was “Black from the waist down.” Graham Report at 71.

Lieutenant, while PGCPD has taken no meaningful steps to assess why many officers of color are not able to advance through the current promotions system. [Page 53]

Accordingly, when the evidence is viewed in this context, the Court finds that the statistical evidence of longstanding adverse impact, the evidence of deliberate indifference to those disparities, and the additional evidence on both the operation of the promotion process and the broader operations of PGCPD establish that Plaintiffs have satisfied the requirement of demonstrating a likelihood of success on the merits of their claim. [Page 53]

#### **E. Remedy**

[T]he Court will grant a preliminary injunction barring the continued use of the existing promotion system after the 2020 competitive promotion cycle and the April 2021 non-competitive promotion tests and requiring the appointment of an independent expert, selected with the agreement of the parties, to review the promotion system—including but not limited to the written tests, the skills assessments, and the selection processes—and to recommend changes to reduce or eliminate adverse impact and discrimination against Black and Hispanic officers. A revised promotion system, adopting all reasonable recommendations of the independent expert, must be adopted in time to conduct new promotion cycles in October 2021. [Page 59]

In recognition of the harm that a delay of another full year would cause to those Plaintiffs seeking competitive promotions, the Court will require that PGCPD conduct the next competitive promotion cycle, pursuant to the revised promotion system, in October 2021, six months earlier than usual, and that any use of the 2020 competitive promotion eligibility lists generated under the existing promotion system end no later than the standard 60 days before this October 2021 promotion cycle begins. [Page 61]