REPORT OF SAN FRANCISCO INDEPENDENT REVIEWER FOR MAYOR LONDON BREED

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Introduction

> "[T]he struggle was against hopeless odds—hopeless because all who possessed African blood were isolated, ridiculed, despised—and thus regarded as unfit for occupations and work that the white man was willing to perform…"[1]
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> "Who among us would be content to have the color of his skin changed, and stand in his place? Who among us would then be content with the counsels of patience and delay?"[2]
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> "[F]ederal, state, and local governments purposely created segregation in every metropolitan area of the nation. If it could happen in liberal San Francisco, then indeed, it not only could but did happen everywhere… Like cities nationwide, San Francisco practiced discrimination in public employment…"[3]

San Francisco Mayor London Breed has formulated the first big city "reckoning" in the wake of the George Floyd murder a little more than a year ago through the commission of this report on equal employment opportunity in the City workforce last November. Of course, her initiative, however significant, represents the first effort in what will be a line of proposed policies aimed at the centuries-old[4] practices of racial misconduct in the country. On this eve of Juneteenth, it is an attempt to foster the beginnings of what some have characterized as the Third Reconstruction[5]. This movement has "…sparked the biggest civil rights protests in America's history. Some 20m Americans took part, flouting covid-19 restrictions. There were 7,750 protests in over 2,440 places, in every state. Beyond America, Black Lives Matter protests were staged in Brazil, France, Japan and New Zealand, among others."[6]

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[1] 120 Cong. Rec 16, 229-30 (daily ed. May 22, 1974); *Conversations with Earl Warren*, Stan. Law., Summer 1974, at 9.

[2] President John F. Kennedy, June 1963, In Anthony Lewis, *Portrait of a Decade* (New York, 1964), p. 193

[3] Richard Rothstein, *The Color of Law,* 13, 14, 163 (2017). Racial discrimination was so rampant in the Bay Area that it triggered the first major intervention by any state court in this arena. *James v. Marinship Corp.,* 25 Cal. 2d 721, 155 P.2d 329 (1944). Thus, this first job bias "reckoning" emerged just a few miles north of San Francisco. Cf. *Steele v. Louisville & Nashville Railroad*. 323 U.S. 192 (1944); *Betts v. Easley*, 161 Kan, 459, 169 F. 2d 831 (1946)

[4] *Shepherd Tissue, Inc.* 326 NLRB 369 (1998) (Chairman Gould concurring) (a union campaign handbill concerning a sexual harassment investigation stating that "black folks have been wrongly touched by whites for over 300 years" was germane to solidarity and working conditions and therefore did not constitute grounds to invalidate an NLRB election).

[5] William Barber II and Jonathan Wilson-Hartgrove, *'I Can't Breathe.' A Cry for Change,* New York Times, May 23, 2021 at SR2

[6] *What it means to be an American,* Special Report: Race in America, The Economist, May 22, 2021 at p. 3.

The first undertaking to redeem our country's promises of 1776 and '87 emerged with our brief interlude of Reconstruction-fashioned democracy which was quickly abandoned in 1877. The second Reconstruction took place with the civil rights movement of the 1960s and the landmark legislation enacted in the form of antibias strictures[7] contained in the landmark trilogy of statutes in '64, '65 and '68.[8] "Despite the gains in legal and political rights made by African-Americans since the civil-rights era, measures of relative poverty and black-white segregation have barely moved for half a century."[9]

Thus, we have been here before. More than a half-century ago, the 1967-1968 Nation Advisory Committee on Civil Disorders (more commonly known as the Kerner Commission Report) said: "Our nation is moving toward two societies, one black, one white—separate and unequal." Incomes and wages, improving ever so slightly so as to proceed from 55 to 60% for Blacks, as a percentage of that enjoyed by whites from 1967 through the 1990s has remained stuck at 60% in recent years. Though there is considerably more contact between the races than existed in the '60s, the only relative economic change is in long-term unemployment and that is attributable to an increase for whites.[10]

In essence, as Robert Putnam has written, we, in the United States, have taken our "foot off the gas." [11] For a failure to address the past means that it will be left unresolved and unremedied and thus embedded in the present system.[12] Since the closing decades of the 20th century, gains in relative life expectancy for Blacks have stagnated; the closing of the Black-white gap in infant mortality rates has plateaued and in recent years has actually increased for Blacks; the Black-white ratios in high school and college degree attainment have shown little or no improvement; progress toward income equality between the races has gone into reverse, with the Black-white income gap widening significantly.[13]

Now too, the events—particularly the brutality displayed in Minneapolis on May 25—of this past pandemic-filled year have produced what has been called the "Reckoning." Government at all levels can contribute to providing answers. San Francisco, an employer of nearly 35,000 workers, can make an important contribution. The Black exodus from San Francisco during this past half-century makes initiatives such as those advocated in this report all the more important,

[7] Eric Foner, *The Second Founding: How the Civil War and Reconstruction Remade the Constitution.* (2019).
[8] William B. Gould IV, *Title VII of the Civil Rights Act at Fifty: Ruminations on Past, Present and Future.* 54 Santa Clara L. Rev. 369 (2014)
[9] *Race in America*, The Economist May 22, 2021 at p. 9.
[10] Joseph E. Stiglitz, *Economic Justice: Fifty Years after the Kerner Report*, in Healing Our Divided Society: Investing in America, 50 Years after the Kerner Report, Fred Harris and Alan Curtis, eds. (2018).
[11] Robert D. Putnam, The Upswing, 240 (2020)
[12] GEORGE SANTYANA, THE LIFE OF REASON: REASON IN COMMON SENSE 284 (Scribner's 1905) ("Those who cannot remember the past are condemned to repeat it.")
[13] Putnam, supra note 11.

as the City tries to meet the moment before it[14] and to stimulate a more substantial presence in the City.

The significance of the recommendations outlined in the Independent Reviewer's report is dramatized by their focus upon internal conduct which San Francisco can control directly with workforce partners. Litigation before administrative agencies and the courts is inherently costly, time consuming, and divisive—let alone demoralizing by virtue of their Dickens-like pace. Thus, California rightly promotes internal investigative procedures, providing cities like San Francisco with an opportunity to resolve what would otherwise culminate in litigation through both alternative dispute procedure mechanisms as well as investigations. The thrust of this report's recommendations are designed to strengthen these procedures, promoting efficiency as well as equality and thus realize the goals of equal employment opportunity to which San Francisco is committed. San Francisco, through proceeding down such avenues is well suited to engage in reforms advocated by this review which was prompted by Mayor London Breed's leadership.

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On October 23, 2020, Mayor Breed asked William B. Gould IV to accept her appointment as the Independent Reviewer and to lead a comprehensive and independent investigation into the equal employment opportunity (EEO) practices, policies, and procedures of the City and County of San Francisco (the City). As noted above, this is the first big-city municipal initiative of its kind, designed, as it is, to engage the "Reckoning" of '21. This investigation accompanies efforts by the City to address employee dissatisfaction with hiring, discipline, and retention practices and the Equal Employment Opportunity (EEO) complaint process.[15] On November 2, 2020, Mayor Breed commissioned the review.

The Independent Reviewer and staff[16] have held dozens of meetings with Department of Human Resources (DHR) officials and investigators, with the leadership of the City's largest departments, with labor unions, and with employee affinity groups. Additionally, the Independent Reviewer established a website, through which the Reviewer and staff have

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[14] *The Unfinished Agenda. The Economic Status of African Americans in San Francisco 1964-1990*. The Committee on African American Parity of the Human Rights Commission of San Francisco, Feb. 1993.

[15] Although the recommendations in this report promote the goal of ensuring an equitable workplace for all City employees, this review was especially concerned with the experience of Black employees as they "overall hold lower-paying positions, are disciplined more frequently, and file more claims of harassment or discrimination than their colleagues of other ethnicities file." Press Release, Office of the Mayor, San Francisco to Launch Independent Review of City's Equal Employment Opportunity Practices to Prevent Workplace Discrimination (Nov. 02, 2020) (available at https://sfmayor.org/article/san-francisco-launch-independent-review-citys-equal-employment-opportunity-practices-prevent). Moreover, Black employees have, for years, publicly communicated their concerns about the City's EEO policies and complaint process, including in hearings before the Board of Supervisors. *See* City and County of San Francisco, *Government Audit and Oversight Committee: Regular Meeting*, SFGOV TV (Sept. 19, 2018), http://sanfrancisco.granicus.com/MediaPlayer.php?view_id=10&clip_id=31377; City and County of San Francisco, *Board of Supervisors: Regular Meeting*, SFGOV TV (Nov. 27, 2018), http://sanfrancisco.granicus.com/MediaPlayer.php?view_id=10&clip_id=31875.

[16] The Independent Reviewer appointed Cody Kahoe and Colin O'Brien, both Stanford Law School '21, to assist in this process.

communicated with over one hundred City employees, who shared their own experiences and perceptions of frustration, inefficiency, and delay with the City's EEO machinery.

We have received cooperation and engaged in dialogue with City and union representatives and many employees as well as affinity groups, and we are grateful to all who so generously gave of their time. My hope is that these proposals will be received in the same spirit of open-mindedness and self-initiative displayed by all of the relevant parties with whom I and my team met during these past six months.

The findings and recommendations of the Independent Reviewer are set forth in greater detail below, but the central points are as follows:

The City's EEO complaint and investigation process needs improvement. DHR's EEO investigators are dedicated and deeply committed to conducting thorough investigations, but they are seriously understaffed. Moreover, the methods for processing complaints are overcomplicated and inefficient. At the outset, employees must choose to either bring a complaint to DHR's EEO team or file a grievance through their union. When employees invoke the EEO complaint process, the investigations can take months or years to complete, during which time employees frequently report being left uninformed about the progress of their complaint and the timeline for its resolution. In addition to these procedural inefficiencies, aspects of the EEO complaint process are not conducive to an independent and neutral investigation of claims. And, the end of the process frequently leaves serious workplace disputes and animosities unresolved. As a result, the vast majority of employees who met with the independent review team—many of whom have also shared their experiences with the Board of Supervisors in public hearings—have lost faith in the City's EEO complaint process.

Barriers also exist within the City when it comes to the recruitment, hiring, and advancement of Black workers. The City should invest additional resources in its incumbent workforce and expand and scrutinize more carefully apprenticeship through bargaining with the relevant unions and continuing education programs that are needed to enable Black employees to secure high-paying jobs and progress in their careers.

With regard to the City's hiring and promotion practices, the discretion given to hiring managers and supervisors in selecting interview panelists, subsequent to initial screening of applicants, has the capacity to skew the independence of the interview panels. And racial disparities exist in employee discipline, terminations, and releases. Finally, lacking clearer pathways for advancement and disciplined disproportionately, many Black employees find themselves congregated in lower-paying positions without an opportunity to grow their careers.

At the same time, the City has pointed to the fact that approximately 16% of department heads (many appointed by the Mayor)—as well as 9.38% of the 34 more senior Manager V-VII management categories[17]—are occupied by Black Americans. Though the numbers in the former

[17] At the highest Manager VIII level, only 2 of 21 individuals are Black. For evidence of general underrepresentation for Black workers, see note 57. For instance, in its Racial Equity Action Plan, the Department of Human Resources (DHR) states: "…while Black and Latinx employees are overrepresented in entry level positions in proportion to the

category are only 37, the City is to be commended for this as well as the number of more senior management appointees. Some positive steps forward have been taken. But, the difficulty is that these statistics, however laudatory, contrast with the plight of most Black workers who have been fighting against workplace inequality in San Francisco for decades, whether in their unions or in hearings before the Board of Supervisors over the last several years. Their frustration and disappointment (sometimes rooted in meritorious complaints as well as those which are non-meritorious) speaks to the scope of the problem and the scale of investment needed to remedy it.

Accordingly, to address these findings[18] and help chart a path forward, the Independent Reviewer recommends, among other things:

- That the City and the unions bargain to remove the provision in the City's Memoranda of Understanding that forces employees to choose between filing an EEO complaint with DHR and filing a grievance with their union regarding discrimination;
- That the City negotiate with unions contract provisions which expressly empower arbitrators hearing grievances concerning discrimination to award compensatory damages such as damages emotional distress, pain and suffering, and the like, in appropriate cases, as provided for by federal and state nondiscrimination law;
- That the City allow employees to appeal EEO investigation findings of the more consequential cases to independent and diverse hearing officers who are expert in employment discrimination law and supportive of fair employment principles who write opinions, if necessary, a feature which is lacking in the Civil Service Commission process;
- That the City overhaul its investigation processes, including by investing in modern case management software, creating an online complaint portal that will give employees greater transparency in the complaint process, centralizing DHR's authority over EEO investigations, updating EEO investigation manuals and policies, mandating the completion of all EEO investigations in 120 days or less, and hiring additional EEO investigation staff to meet those deadlines;
- That the City embrace and promote third-party mediation as well as the pilot Peer Mediation Program as an alternative and additional forum for employees to resolve grievances, particularly those that may not rise to the level of an EEO violation;
- That the City reinvigorate its efforts to create apprenticeship programs and other upskilling programs that will enable workers to join skilled trades and other sought-after jobs;
- That the City reform its hiring and promotion procedures to reduce hiring manager discretion and ensure the independence of interview panels; and

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total number of entry level employees, they are underrepresented in supervisory and mid-level managerial positions in proportion to the total number of supervisory and mid-managerial positions."

[18] Of course, there has been extensive and considerable litigation about racial discrimination in the San Francisco police and fire departments. See, for instance, *Officers for Justice et al.* v. *Civil Service Comm. of the City and County of San Francisco* 473 F.Supp. 801 (N.D. Cal. 1979); *Davis v. City and County of San Francisco* 890 F.2d 1438 (9th Cir. 1989); Diana Walsh, Court lifts order on Fire Department. SFGate, Feb. 6, 2012. But, though we conducted interviews in both departments, we viewed additional findings about police to be duplicative of the Consent Decree initiated by the U.S. Department of Justice. See *Collaborative Reform Initiative: An Assessment of the San Francisco Police Department*. Oct. 2016. Aspects of Recommendation 14 (as well as others addressing hiring, promotions and recruitment) have applicability to both departments.

- That the City track the frequency with which managers and supervisors discipline their workers and intervene with training for managers who are responsible for disproportionate discipline or corrective actions, where warranted.

To be clear, the findings and recommendations in this report do not address the legal issue of whether individual instances of discrimination, harassment, or retaliation have occurred in City employment or whether any City policy constitutes a discriminatory practice. Such legal issues are best left to the courts, where strict evidentiary and proof standards apply.[19]

Rather, the intent of this report is to chart a path forward. All City employees deserve a workplace that treats them with dignity and affords them equal opportunities for advancement. This report endeavors to aid the City, in cooperation with its labor partners, in making that ideal a reality as all move forward to address a municipal response to the "Reckoning" and the employment patterns which must be remedied.

[19] The Independent Reviewer and staff's research and fact-finding may not be subpoenaed in subsequent employment discrimination litigation. See *N.L.R.B. v. Macaluso, Inc.*, 618 F.2d 51 (9th Cir. 1980); 29 C.F.R. § 1401.2(a); cf. *T. McGann Plumbing, Inc. v. Chicago Journeymen Plumbers'*, 522 F.Supp.2d 1009 (N.D. Ill. 2007); *Blitznik v. Int'l Harvester Co.*, 87 F.R.D. 490 (N.D. Ill. 1980); Cf. William B. Gould IV, "*Using an Independent Monitor to Resolve Union-Organizing Disputes Outside the NLRB: The FirstGroup Experiences*, " Dispute Resol. J., May/July 2011, at 46.

I. The Complaint Process

Finding 1

At the outset of the complaint process, employees must choose between the remedies offered by the City's internal EEO complaint process and the grievance-arbitration process, and employees are often confused about the remedies available to them in each process.

For a number of years, San Francisco has negotiated with all unions a so-called election of remedies—a collective bargaining agreement provision which requires employees or unions to choose between either the invocation of the grievance-arbitration machinery or EEO procedures. The employee or union must choose one or the other, the City contends, to avoid inefficient duplication of procedures and remedies and inconsistent procedures generally. Frequently, as noted above, employees do not have a full understanding of the available options and do not make the election choice with the presence of a union representative or other advisor.

The election of remedies approach, once so dominant in the private sector,[20] has virtually disappeared since the U.S. Supreme Court's decision in *Alexander v. Gardner-Denver*,[21] which suggested the appropriateness of both avenues (grievance arbitration and the EEO complaint process) to resolve employment discrimination disputes, though holding that judicial procedures were supreme.[22] And although the U.S. Supreme Court and the Supreme Court of California have yet to address the question of whether the grievance-arbitration process can be waived or held in abeyance while other complaint procedures are utilized or whether the EEO process may be held in abeyance, the weight of judicial authority supports the view that requiring a waiver or abeyance constitutes either unlawful retaliation or the deprivation of a benefit on a discriminatory basis, where the source of the benefit is to be found in the statutory scheme addressing job discrimination complaints.[23] It seems more than arguably inconsistent with precedent, as well as bad policy, to require the employee to invoke one or another procedure when the uncertainties of the process are many—making it difficult for the employee to make a truly informed choice, prospectively or in advance of the exhaustion of either process. Even if the recommendations below are accepted and implemented, there could be a difference between

[20] The decision of the Court of Appeals for the Sixth Circuit in *Dewey v. Reynolds Metals Co.*, 429 F.2d 324 (6th Cir. 1970), represented the apogee of this approach which soon disappeared in the wake of *Alexander v. Gardner-Denver*, 415 U.S. 36, (1974).

[21] *Gardner-Denver*, 415 U.S. at 60 n.21.

[22] Though the Court propounded some approaches which are different or at variance from *Gardner-Denver* in *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009), no aspect of the discussion of *Gardner-Denver* is affected by the more recent ruling.

[23] The Supreme Court of Oregon has so held. See *Portland State Univ. Chapter of Am. Ass'n of Univ. Professors v. Portland State Univ*., 291 P.3d 658, 670-73 (Or. 2012). So have most of the federal courts. *E.E.O.C. v. Board of Governors of State Colleges and Universities*, 957 F.2d 424 (7th Cir. 1992); *Watford v. Jefferson County Public Schools*, 870 F.3d 448, 453 (6th Cir. 2017). *Contra Richardson v. Commission on Human Rights & Opportunities*, 532 F.3d 114 (2d Cir. 2008).

EEO procedures leading to a full panoply of remedies or, alternatively, expeditious resolution of a robust grievance-arbitration machinery, which will both mimic the remedies available in an employment discrimination judicial proceeding as well as contain a procedure different from EEO.

The primary problem from the City's perspective relates to the potential duplication of remedies. This concern is not without merit. However, it is noteworthy that the City previously operated without the election-of-remedies provision, and courts have largely concluded that "[i]t is immaterial that an employee might have overlapping contractual and legal remedies."[24] In any event, to the extent that a decision under either the contractual or statutory route constitutes duplication in the forum before which the matter is placed, compensation which is rooted in the same facts and theory must be deducted from any award or remedy previously rendered.[25]

Second, employees have expressed confusion about the remedial options available to them when they have claims of discrimination or harassment. Presently, employees seeking a remedy for workplace discrimination have two internal avenues for redress within the City: They can file an EEO complaint with DHR, or they can invoke the antidiscrimination clause in their union's Memorandum of Understanding (MOU) with the City and file a grievance. Yet some employees, and even some union representatives, have been unaware that the grievance process can be used to remedy harm from discriminatory treatment. And employees are frequently unaware that they are entitled to union representation when filing an EEO complaint and pursuing an investigation. Given the fact that any representative is unlikely to be clairvoyant in in assessing either avenue and the centrality of anti-discrimination policy in the workplace, the burden of more than one possible proceeding is outweighed by protection against possible discrimination.

When employees do choose to pursue their complaints through the EEO complaint process rather than through arbitration, it is still not clear what remedies are available to them. Existing City guidance informs employees at the outset of the EEO complaint process that they are entitled to "make-whole" remedy only and that damages for pain and suffering, emotional distress, and the like are not available. Yet, the Independent Reviewer has been informed that a "make-whole" remedy is all that is within the DHR director's power to offer, but EEO investigations that find violations of employment law are referred to the City Attorney's Office for settlement. And those settlements have awarded to employees damages such as emotional distress in addition to back-pay and reinstatement.

Recommendation 1.1

The parties should bargain a revision of the election of remedies provision contained in the collective bargaining agreements and allow all to make an informed decision what statutory or contractual avenues to pursue, if any. The decision should be made by employees with the advice and representation of a union representative or another employee of the employee's own choosing.

[24] *Board of Governors*, 957 F.2d at 428.
[25] *See Gardner-Denver*, 415 U.S. at 51 n.14 (noting that "relief can be structured to avoid windfall gains").

Recommendation 1.2

The City and unions, whether the recommendation relating to election of remedies is negotiated or not, employees should be apprised of all their procedural rights pursuant to City policy and the relevant MOU at the outset of all intake interviews for EEO complaints. So long as the election-of-remedies policy remains intact, they should be made aware that filing an EEO complaint forecloses the possibility that they can pursue their complaint through the grievance process. They should receive complete information about this through publicity promoted by the City and relevant unions. They should also be made aware that they are entitled to a union representative to aid them in navigating the EEO complaint process. And they should be given clear information and expectations about the timeline of the complaint process and what steps the investigator will take at each stage of the process.

Recommendation 1.3

DHR should clarify its current guidance regarding what EEO issues employees may bring through grievance arbitration. DHR's current information sheet explaining how to file an EEO complaint states: "Issues: Actions complained of may include the following: Denial of Employment, Denial of Training, Denial of Promotion, Denial of Reasonable Accommodation (for disability or religion), Termination, Lay-Off, Constructive Discharge, Disciplinary Action, Harassment, Work Assignment, Sexual Harassment and Compensation. ***Other issues, such as a disagreement regarding Department rules or regulations affecting working conditions, may be subject to review through the Employee Grievance procedure.****" This could be misleading because it suggests that the grievance process does not permit employees to bring EEO-related claims over denial of training, denial of promotion, termination, and the like. DHR should make clear that employees can bring these issues in arbitration as well as through the EEO process. The information regarding the scope of the nondiscrimination clause, its provision for remedies, and the procedures available when the union is confronted with competing, irreconcilable employee positions should all be publicized.*

Recommendation 1.4

Until the City has made explicit the availability of a broader array of remedies under its MOU no-discrimination provisions, as recommended below, DHR should clarify what varieties of remedies are available through the EEO process. Existing guidance to City departments from DHR states that employees are entitled only to a make-whole remedy and that this remedy does not include damages for emotional distress, pain and suffering, or the like. But other documents examined in this review suggest that employees may be able to obtain such damages, where appropriate, through the EEO process, via settlements with the City. DHR must clarify what forms of relief may actually be awarded at the end of each process so as not to mislead employees about the scope of remedies available to them.

Finding 2

The antidiscrimination provisions in the City's current Memoranda of Understanding do not expressly incorporate the remedies

provided for in federal antidiscrimination law, such as compensatory damages for emotional distress and the like, under appropriate circumstances. Additionally, the City's MOUs could be improved by providing for third-party representation in cases where unions face a potential conflict of interest between a grievant and another bargaining unit member in arbitration proceedings.

First, the City's Memoranda of Understanding (MOUs) with its labor unions do not expressly empower arbitrators to award the full scope of compensatory damages available under antidiscrimination law.

City workers are currently represented by 37 different labor unions. The collective bargaining agreements all contain no-discrimination clauses, but none of these contractual provisions purport to adopt employment discrimination rights, obligations, or procedures contained in either Title VII of the Civil Rights Act of 1964 or related legislation such as California's Fair Employment and Housing Act. This pattern exists notwithstanding the United States Supreme Court's admonition in *Alexander v. Gardner-Denver* that courts should give weight to arbitral proceedings as evidence in Title VII cases only if the provisions of the collective bargaining agreement "conform substantially with Title VII."[26] The Independent Reviewer has acted as an arbitrator where parties negotiated such procedures.[27]

SEIU Local 1021 has pointed out that procedures allowing for the awarding of full compensatory damages—as permitted by the Civil Rights Act of 1991 amendments—are not now expressly available to arbitrators under any of the MOUs between the City and various unions. Arbitrators are somewhat divided on the availability of such remedies where the collective bargaining agreement is silent about the arbitrator's remedial authority.[28] Where the parties have not restricted the arbitrator's remedial authority, the Court of Appeals for the Ninth Circuit, like others, has concluded that the arbitrator's exercise of broad remedial authority is appropriate.[29] But, notwithstanding the view that arbitrators can award back pay even when the collective bargaining agreement does not provide for such, many arbitrators are of the view that they will not award compensatory damages as that determination is better left to the courts rather

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[26] *Gardner-Denver*, at 60 n.21 (listing a collective bargaining agreements' conformity with Title VII, the fairness of the procedures adopted by the arbitral forum, the strength of the arbitral record, and the arbitrator's competence as relevant factors when courts determine whether arbitral decisions deserve weight); see also William B. Gould IV, *Labor Arbitration of Grievances Involving Racial Discrimination*, 118 U. PA. L. REV. 40 (1969).

[27] *Weyerhauser Co*., 78 Lab. Arb. Reports 1109 (1982); *Basic Vegetable Products, Inc*., 64 Lab. Arb. Reports 620 (1975). The Independent Reviewer's arbitral experience in these cases and most of his writings on this subject preceded the Civil Rights Act of 1991 amendments, which explicitly provided for compensatory damages. *See* William B. Gould IV, *The Supreme Court and Employment Discrimination Law in 1989: Judicial Retreat and Congressional Response*, 64 TUL. L. REV. 1485 (1990); William B. Gould IV, *Title VII of the Civil Rights Act at Fifty: Ruminations on Past, Present, and Future*, 54 SANTA CLARA L. REV. 369 (2014).

[28] KRISTINA E. MUSIC BIRO ET AL., 19 STANDARD PENNSYLVANIA PRACTICE 2D 103:150 (2021); see also FRANCIS M. DOUGHERTY ET AL., 22A FEDERAL PROCEDURE, LAWYERS EDITION 52 103:1929 (2021) ("Arbitrators must have flexibility to determine remedies in labor disputes, and the authority to interpret and find a breach of a collective bargaining agreement implies the authority to prescribe a remedy to cure the breach.").

[29] *Ass'n of W. Pulp & Paper Workers, Loc. 78 v. Rexam Graphic, Inc*, 221 F.3d 1085, 1090 (9th Cir. 2000).

than to labor arbitrators.[30] The Independent Reviewer has long subscribed to the view of the Ninth Circuit and others and believes that the arbitrator has considerable scope and flexibility in fashioning remedies.[31]

Inasmuch as the current collective bargaining agreement's no-discrimination clauses do not explicitly incorporate the remedies (or, in some circumstances, standards for establishing discrimination) contained in employment discrimination law, the Independent Reviewer is of the view that those clauses could be regarded as inferior to federal and state requirements by an arbitrator and thus inappropriate for the parties. This is particularly troublesome in a major city in the largest state in the Union. Accordingly, the parties should bargain a robust no-discrimination clause which replicates the availability of all remedies contained in employment discrimination law. Not only should the agreement comport with Title VII, but such disputes should be submitted to "particular arbitrators" who possess "special competence."[32] Such arbitrators should be not only competent but diverse, so as to reflect the views and knowledge obtained from the entire San Francisco area community.[33]

To be sure, grievance arbitration is neither perfect nor designed to require *all* the same procedural formality as full-fledged litigation. Nor does this report assert that it should. But as it stands, employees and unions report that the present absence of some forms of compensatory relief typically awarded in discrimination cases makes grievance arbitration an unappealing and rarely invoked alternative to internal EEO investigations, which many employees do not trust. Permitting arbitrators to award such relief would make grievance arbitration a more meaningful alternative to both the EEO investigation process and to litigation[34].

Second, SEIU has expressed concern about cases involving racial or sexual harassment in which both the complainant and the alleged harasser are represented by the union in the same bargaining unit. Under such circumstances, particularly where there is a dispute in testimony between the two different employees, employees fear they may not be able to obtain a fair hearing in arbitration. The Independent Reviewer is of the view that this scenario places the union is in a position of irreconcilable conflict.

That conflict can be remedied if the City and its unions bargain to include in their MOUs a provision for some form of third-party representation. This can take many forms. For instance, the MOU could provide that the unions provide separate union representatives for grievants who have conflicting testimony or interests.[35] Or the MOU could permit representation for the complainant by an outside counsel, social justice organizations, or some other form of representation in circumstances where the union itself has conflicting interests.[36] The decision to

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[30] MARTIN HILL, JR & ANTONY SINICROPI, REMEDIES IN ARBITRATION 490 (BNS Books 2d ed. 1991); In re *Kaiser Permanente Medical Care Program*, 89 BNA LA 841, 842 (Alleyne, Arb. 1987).
[31] *Safeway Stores, Inc*., 64 Lab. Arb. Reports 563 (Gould, 1974).
[32] *Gardner-Denver*, 415 U.S. at 60 n. 21.
[33]See Gould, *Labor Arbitration of Grievances Involving Racial Discrimination*, *supra* at 64-65.
[34] Of course, the parties are always free to request the arbitrator or hearing officers (in Civil Service Commission cases) to propose a settlement of the matter which, if agreed to by both or all parties, would constitute a knowing and voluntary binding waiver and resolution of the matter in dispute.
[35] *See, e.g.*, *Hellums v. Quaker Oats Co.*, 760 F.2d 202, 203-05 (8th Cir. 1985).
[36] *See, e.g.*, Marion Crain & Ken Matheny, *Labor's Identity Crisis*, 89 CAL. L. REV. 1767, 1845 (2001) (arguing that "role conflict for unions . . . could be alleviated by permitting other interested social justice organizations to

provide for this kind of third-party representation "depends entirely on the terms of the collective bargaining agreement negotiated by the union,"[37] and the Independent Reviewer has long held that this kind of remedy is appropriate.[38] In any event, given the large number of racial and sexual harassment cases in the City of San Francisco workforce, the appropriate response is to provide for third-party intervention so that employees will not be discouraged from using the important arbitral process.

Recommendation 2.1

The City and unions should bargain amendments to their existing no-discrimination contractual provisions so that they permit arbitrators to award compensatory damages for emotional distress, pain and suffering, and the like, as provided by federal law. The new agreements should also provide for the selection of competent and diverse arbitrators with special expertise in the employment discrimination arena.

Recommendation 2.2

The City and unions should bargain amendments to their existing no-discrimination contractual provisions so that they provide for the possibility of third-party representation, as described above, under appropriate circumstances, particularly cases involving harassment where two employees have contradictory versions of the facts or different testimony.

Finding 3

Many employees have lost faith in DHR's EEO investigation process, and it is critical that the City restore trust in the independence and neutrality of the investigative process.

Over the course of this review, the Independent Reviewer and his support staff have met or communicated with, among others, members of DHR's EEO team, labor unions, large department heads and HR officials, employee affinity organizations, and over one hundred individual employees. In those meetings, a clear majority of those interviewed—including both employees who have interacted with the EEO investigation process and with employees who help administer that process—have expressed serious frustration and even a loss of faith in

represent a worker or group of workers in arbitration or mediation"); Eileen Silverstein, *Union Decisions on Collective Bargaining Goals: A Proposal for Interest Group Participation*, 77 MICH. L. REV. 1485, 1515-16 & n.125 (1979) ("Both employers and unions have permitted representatives of protected minority groups to bargain over new contract terms and to appear in arbitration hearings.").

[37] Elizabeth M. Iglesias, *Structures of Subordination: Women of Color at the Intersection of Title VII and the NLRA. Not!*, 28 HARV. C.R.-C.L. REV. 395, 498 n.338 (1993).

[38] Gould, *Labor Arbitration of Grievances Involving Racial Discrimination*, *supra* at 60-64; *cf. Crenshaw v. Allied Chem. Corp.*, 387 F. Supp. 594, 600 (E.D. Va. 1975); Gould, *Black Workers in White Unions: Job Discrimination in the United States*, 207-242 (1977).

DHR's EEO investigations. This likely comes as no surprise, as employees have raised complaints about this process directly to DHR and to the City's Board of Supervisors at least since September of 2018, and likely long before then.

To illustrate the depth of this mistrust, some employees have suggested that the entire EEO investigation process should be transplanted from DHR to another body, such as the Office of Racial Equity or the Human Rights Commission. These concerns are rooted primarily in the current limitations of the EEO investigation process and the perception that EEO's location within DHR results in bias against complainants.

Additionally, a few structural aspects of the EEO complaint process likely contribute to employee mistrust of the independence of EEO investigations. For instance, EEO investigators and personnel are supposed to serve as neutral third-party fact-finders, representing neither the complainant nor the respondent. However, this neutrality may be compromised when EEO personnel (both at DHR and at the department level) respond to outside complaints from state and federal agencies. When City employees file complaints with the U.S. Equal Employment Opportunity Commission (EEOC) or the California Department of Fair Employment and Housing (DFEH), the City's EEO investigators are tasked with responding to the EEOC and DFEH on behalf of the City, even when the City's internal EEO investigation is still ongoing. Under such circumstances, the City's EEO investigators appear to be expected to serve simultaneously as neutral fact-finders, vis-à-vis the internal investigation, and as City advocates, vis-à-vis the outside agencies' investigations.[39] Once a complainant has gone to an outside agency, the City's EEO investigators are instructed in training materials to employ legal defenses to defend against the complaint's charges.[40] If investigators do find that an EEOC or DFEH complaint has merit, they are explicitly told not to report those findings to the EEOC or DFEH and instead bring them to the City Attorney.[41] That EEO personnel are engaged, under certain circumstances, in this kind of advocacy for the City creates a meaningful risk of role confusion on the part of EEO investigators and could erode trust in the integrity of the complaint process.

Relatedly, EEO investigators also play an advocacy role when complainants appeal DHR's EEO determinations to the Civil Service Commission (CSC). During those appeals, the EEO investigator who handled a given complaint drafts a report and presentation to persuade the CSC to uphold DHR's determination in the case.[42] Technically, the EEO investigator is not advocating for the City, but rather persuading the CSC to uphold the findings of a neutral investigation. Yet, this may be a distinction without a difference—the determination ultimately

[39] S.F. DEP'T HUM. RES., EEO INVESTIGATION PROCEDURES 104 (2020) ("Unlike our internal investigations where we EEO investigators remain neutral, responses to external changes allow you, the HR representative, to persuasively advocate on behalf of your department and the City.") It should be noted, there was some confusion on the part of the Independent Reviewer and staff whether these EEO Investigator Training slides applied to departmental human resources personnel only. If so, this would ostensibly leave EEO investigator independence intact, as EEO is separate from everyday HR processes. However, DHR EEO clarified that these slides are used to train DHR and departmental EEO investigators, that EEO investigators handle administrative complaints from DFEH and EEOC, and that it is possible for an EEO investigator handling an internal City complaint to also be responsible for handing external administrative complaints (when the complainant files simultaneously with the City EEO and DFEH or EEOC).

[40] Id. at 104-08.

[41] Id. at 107 ("**Do not respond if we have a finding. Consult with your City Attorney. Likely need to engage in mediation**.") (emphasis in original).

[42] Id. at 93.

emanates from the DHR Director, based on the Director's interpretation of the investigation. Defending that determination places the investigator on the side of the City and in opposition to the complainant, who now might reasonably question whether the investigator was ever truly neutral to begin with.

Independence and neutrality are paramount to the EEO process. Data provided by the CSC indicates that the CSC handles an average of approximately 23 EEO appeals annually and orders some further process (*e.g.*, re-opening an investigation or requesting some further department action) in 14% of those appeals.[43] And to its credit, a review of the CSC's hearings creates the impression that the CSC takes its review of DHR's EEO determinations seriously, notwithstanding what may be limitations in its remedies.

It may be that there are circumstances in which the CSC adequately addresses EEO matters. However, this does not change the existing breakdown of trust between many employees and the EEO process or that employment specialists might well enhance the process. If the City wishes to restore the public's trust in the EEO process, it should strongly consider reforms in the EEO appeals process that would inspire greater confidence in the minds of City employees. Among other things, these reforms might include providing employees with more information about the CSC and the appeals process at the outset and requiring that the newly appointed hearing officers provide written opinions explaining their reasoning for affirming or reversing DHR's EEO determinations.

Structurally, the City should consider the use of a diverse group of hearing officers with a specialty and demonstrated expertise in antidiscrimination law in EEO appeals and dispute resolution. The City has explained to the Independent Reviewer that hearing officers have been employed in special cases by the CSC in the past and that the CSC has the authority to appoint hearing officers for the purpose of conducting a full evidentiary hearing. Allowing an appellant to choose to appeal DHR's determination in cases, except where the application of law and fact is clear and the amount in controversy is inconsequential, to a specialized, independent hearing officer may demonstrate the City's commitment to truly independent oversight of DHR's determinations. (The Civil Service Commission, subsequent to public input from all interested parties, could devise more precise standards for such cases.)

Finally, the City has stated that the standard of review for the Commission is *de novo*, proceeding in an informal manner, and that DHR has generally presented its position at the hearings' commencement. We see no reason why the same standard of review and procedure should not continue with the advent of new hearing officers to resolve employment discrimination appeals to the Commission.

Recommendation 3.1

The City should revise its policies and trainings so that EEO investigators maintain neutrality at all times. EEO investigators should not be responsible for answering administrative complaints from the EEOC and DFEH, nor should they be charged with defending the DHR director's determinations before the Civil Service Commission. Instead, the City should

[43] Data drawn from Civil Service Commission Appeals Logs (2017-2020).

consider alternative arrangements that avoid the potential for role confusion and ensure the true neutrality of EEO investigators, such as maintaining a separate unit of EEO staff responsible for appeals and outside investigations.

Recommendation 3.2

At the outset of EEO investigations, the City should do more to articulate to employees the Civil Service Commission's role as an independent body that may hear appeals of DHR's EEO determinations. In particular, it should be made clear to employees that the Civil Service Commission is independent from DHR and that Commissioners are appointed directly by the Mayor.

Recommendation 3.3

The Civil Service Commission, on its own initiative, should establish and publicize a procedure by which employees appealing DHR's EEO determinations may request that a hearing officer with special expertise and demonstrated commitment to antidiscrimination law conduct the employee's appeal. The Commission could devise standards for cases which the Commission could handle itself, in accordance with the discussion in Finding 3, subsequent to public input from all relevant parties for the content of such standards. The appellant should be able to select from a slate of employment discrimination law experts with a background and demonstrated support for the principles of fair employment, as manifested by involvement in the field, writings, testimony, litigation, arbitration awards, or the like. These hearing officers should be empowered to conduct de novo review of DHR's conclusions, to take evidence and witness testimony, and to order relief, including departmental action. Additionally, these hearing officers should be required to provide written opinions setting forth the reasoning underlying their decisions. The standard of review is de novo.

Finding 4

DHR EEO has not resolved complaints in a timely and efficient fashion because of both the decentralized structure of the City's Human Resources system and an inefficient investigation process.

Current DHR policy mandates that EEO investigations take no longer than 180 days, which itself constitutes a considerable period of time for the resolution of critical employment conditions. In any event, according both to complainants and to employees responsible for handling EEO complaints, that deadline is often not adhered to, and it is not uncommon for complainants to wait a year or more for their cases to be resolved. This is borne out by the data DHR keeps on EEO complaints. For instance, with respect to EEO complaints of harassment on the basis of race (including ethnicity, color, ancestry, and national origin) since 2014, roughly one quarter of complaints were not closed within the 180 day period, and over two dozen remained open for over a year. Out of the approximately 130 of these complaints that were still

open as of December 2020[44], when the Independent Reviewer received this data, roughly 78% had been open longer than 180 days. This included complaints that, at least according to DHR's data, were initiated as long ago as 2015. By way of further illustration, 59 of the 160 racial harassment EEO complaints filed in calendar year 2019 remained open as of December 2020. Similar patterns exist for complaints alleging denial of promotion and denial of employment based on race.[45] This state of affairs creates a host of problems for complainants.

The investigatory delays prevent timely corrective action, which can leave workplace resentments unresolved and the offending conduct or atmosphere unchanged. Further, EEO investigators cannot guarantee complete confidentiality for the complainant, and investigating claims requires notifying the department in question and interviewing immediate supervisors and colleagues. Consequently, excessively prolonged investigations increase the possibility that the complainant could be subject to continued harassment, discrimination, or retaliation from the respondent, supervisors, or colleagues. Some employees reported that they believed they experienced and reported retaliation during the pendency of their EEO investigations but that the City took no interim remedial action (for instance, separating the complainant from an alleged harasser).

Additionally, DHR's reputation for long delays has eroded trust in the process. Labor leadership, employee infinity groups, and even City employees intimately familiar with the City's EEO processes have advised complainants to abandon the City's EEO process in favor of filing complaints with state and federal agencies.[46] Additionally, employees who have filed EEO complaints express frustration and exhaustion at having to face, in addition to the demands of their job, a seemingly interminable bureaucratic process that they feel seldom yields a satisfactory remedy for the alleged mistreatment they face at work.[47] Ultimately, the inefficiencies of the EEO complaint process has left many employees feeling that it is an ineffective tool for identifying discriminatory conduct, leaving some employees feeling they should turn elsewhere for relief, abandon claims, or simply remain silent.

Several issues contribute to DHR's inability to investigate complaints in a timely fashion. First, DHR does not have the technological capabilities to effectively track complaint investigation. Despite the availability of EEO case management software in the market, DHR does not have any sophisticated or automated method of tracking the number, status, progress, and outcomes of complaints.

[44] The 2020 record was weakened by virtue of the COVID-19 crisis and additional burdens for DHR addressing analytics and training matters.

[45] It may be that, in some of these cases, delays are caused by factors outside of DHR's control, such as employee leaves of absence or the like. The data provided to the Independent Reviewer does not specify the reasons for delays, however. And in any event, interviews with employees who conduct investigations confirm that EEO investigations drag on for reasons unrelated to such external factors.

[46] The prevalent perception among those interviewed that the City cannot efficiently resolve EEO complaints is itself a significant problem. How this perception translates to the actual filing of complaints is unclear. DHR reported to the Independent Reviewer that, from 2017-2020, there were 1,541 complaints filed through the City EEO process only, 111 complaints filed with both the City and an external state or federal agency, and 60 complaints filed exclusively with an outside agency.

[47] DHR reported to the Independent Reviewer that for FY 2020, the EEO unit closed 43.3% of complaints within 180 days.

Second, DHR lacks enforceable internal deadlines for the processing of complaints, which contributes to a lack of accountability and allows investigations to last for months or years. Although DHR does have informal internal benchmarks for completing various steps of the investigatory process, those benchmarks are often not adhered to, and there do not appear to be any consequences for delays. Moreover, employees are not made aware of the deadlines, whatever they may be.

Third, the investigation process itself overemphasizes formality in internal investigatory materials, which results in excessively long reports. For instance, EEO investigators are expected to memorialize their interviews with complainants, respondents, and witnesses in a meticulous and time-consuming manner, transcribing interview notes into polished prose often more than ten pages long. Additionally, much of the investigatory paperwork is redundant, repeating information that is evident from other materials. The end product of these investigations is often a document containing lengthy and repetitive factual exposition with hundreds of pages of appended exhibits. It requires a great deal of time to present and package this information, and it is not apparent why such a meticulously developed record is necessary for all complaints, given the wide range of cases in scope and complexity.

Fourth, there are instances where the bureaucratic aspects of investigations are delegated from the EEO investigator responsible for a case to temporary employees, leading to further delays. In particular, delegating the writing of closure letters to temporary employees lessens the workload for investigators but leads to delays because those temporary employees must acquaint themselves with a detailed investigatory record before they draft the closure letter.

Fifth, HR, EEO, and employee-labor relations functions are decentralized throughout the City, often split between DHR and departments or even split within departments. The confusion and delays which have emerged from these separate layers of responsibility in the departments, in their exercise of EEO responsibility, and the authority of DHR, have contributed enormously to the inefficiencies and frustrations with the EEO machinery. Presently, an employee may initiate EEO complaints by contacting DHR or reporting the discriminatory conduct to departmental human resources representatives. Departmental representatives must immediately refer complaints which allege or appear to allege EEO violations to DHR and generally refrain from conducting any internal investigation. In departments that have their own EEO units, the departmental EEO representative conducts an intake interview and forwards the notes to a DHR EEO manager who determines whether the complaint falls within EEO jurisdiction.

This interplay between departmental HR offices and DHR leads to inefficiencies in complaint processing. At the outset, the initial reports or intake interviews alerting DHR EEO to complaints potentially warranting investigation vary in quality depending on the training of the departmental HR staff on the ground. Departments do not always employ consistent standards when evaluating whether or not a claim presents an inference of an EEO violation. And even when departmental staff are properly trained, this process often results in duplicative work, as department-level HR performs an initial intake, and DHR EEO investigators then follow up with a separate intake. Further delays ensue because DHR investigators must await responses to their Requests for Information (RFIs) to ascertain key information from departmental HR—namely contact information for potential witnesses, relevant departmental records, and personnel records. While departments gather this information, the investigatory process stalls at DHR.

Recommendation 4.1

DHR should create a policy whereby investigations must be concluded in 120 days or a lesser period of time. Employees must be made aware of these policies through e-mail communications, notice posting, and other appropriate means.

Recommendation 4.2

DHR should establish clear complaint processing benchmarks that facilitate completing investigations within the 120-day (or less) period. Those benchmarks should be made public, and the affected department and complainant should have visibility of the progress of the investigation. In other words, DHR should make the complaint process, timeline, and steps more transparent. DHR should provide an explanation to the department and complainant when benchmarks are not met. Extensions should be permitted only in rare and narrow circumstances.

Recommendation 4.3

DHR should reform its investigatory process to root out the inefficiencies and redundancies identified above. In particular, the standards for internal investigatory materials should aim to promote accuracy and efficiency, rather than undue formality and exhaustive detail. DHR should seriously reconsider the practice of transcribing interview notes into polished prose and instead should consider using raw transcripts cleaned up to the extent necessary to communicate content.

Recommendation 4.4

DHR should establish a process for providing preventive action and other interventions earlier in the process when it is clear that such a recommendation will be made at the end of the process. Oftentimes, an EEO complaint will undergo an extensive investigation only to conclude that the claim does not rise to the level of an EEO violation. But nevertheless, EEO will still find a violation of some other City policy, such as the respect policy. In such situations, it may be clear from the outset (or at least before the investigation's conclusion) that there has been a policy violation, and EEO should take immediate action when that is clear rather than waiting until the conclusion of the complaint process. And to the extent possible, cases like these should be routed to mediation before DHR commences a full-blown investigation, as recommended below.

Recommendation 4.5

DHR should establish a clearer and faster screening process for complaints that warrant some immediate action (e.g., serious harassment allegations or allegations involving risk of retaliation). Many employees report experiencing ongoing harassment or retaliation while their complaints are pending or have yet to be reviewed by DHR. It is insufficient and ineffective merely to inform the respondent or manager that retaliation is not permitted. DHR should formulate and implement a triage process to catch these complaints at the beginning and to take action to protect the complainant.

Recommendation 4.6

DHR should establish clear policies and guidance for investigators and HR representative to determine the urgency of the complaint and the degree of attention a complaint requires. This should include determining earlier on which complaints present simple facts that can be put on an expedited investigation track (e.g., a complaint regarding a single incident) and which complaints might be better resolved without a full-fledged investigation (e.g., by mandating training or by recommending mediation of the complaint before engaging in a full EEO investigation).

Recommendation 4.7

The City should invest in the technological infrastructure and software needed to create a system that provides for the centralized tracking of complaints, helping EEO managers maintain visibility on and accountability for the timely investigations. If possible, such a system should include a public portal that permits complainants to track the status of their complaints. And such software should minimize the duplication of data/information entry. For instance, to the extent possible, investigators should be able to input investigation information and notes directly into a complaint-management software system, rather than entering such information into a Word document or local file and then later copying that information into a database.

Recommendation 4.8

DHR should reconsider how best to utilize temporary support personnel to both support EEO investigators and ensure the timely resolution of complaints.

Recommendation 4.9

DHR should eliminate the separate layer of EEO intake at the departmental level, or what might be characterized as the preliminary investigative machinery, and all delegations of EEO personnel and functions performed by DHR should be rescinded so that DHR has complete and full authority in the EEO arena. Rather, DHR should house EEO investigators within all of the City's larger departments in order to facilitate greater familiarity with the departments' workings. These investigators should operate outside of the department chain of command, answering to DHR. But their presence in the departments would give EEO investigators better firsthand knowledge of the work environment on the ground and avoid the problem of EEO investigators relying primarily on departmental personnel gathering and compiling investigation information.

Recommendation 4.10

To streamline the EEO complaint process, DHR investigators should have direct access to departmental information—such as witness contact information and personnel records—so that submitting RFIs to departments is unnecessary.

Recommendation 4.11

DHR should continue to track, maintain, and publish in a timely manner data regarding EEO complaints, including rates of complaint by race and other demographics, rates of findings of discrimination by demographic, rates of complaint dismissal for lack of EEO jurisdiction by demographic, and rates of complaint dismissal on the merits by demographic. Additionally, DHR should continue track, maintain, and publish in a timely manner data regarding the

reason EEO complaints are ultimately dismissed, including expanding the reasons for dismissal to include reasons such as the conclusion that the complainant lacked credibility. Last, to the extent DHR does not already do so, DHR should track, maintain, and publish in a timely manner the length of time it takes to close its complaints and investigations in order to ensure accountability for delays.

Recommendation 4.12

In the course of implementing and responding to the findings and recommendations in this report, DHR should make its responses and plan of action public. Additionally, DHR should meet regularly with employee stakeholder groups, such as major unions and affinity groups, in order to provide status reports on the implementation of these recommendations.

Finding 5

Staffing levels of DHR EEO personnel are insufficient to handle the current volume of complaints.

From 2014-2020, the EEO division processed an average of 518.5 complaints a year.[48] Yet, to handle that number of complaints, there are currently 15 EEO investigators (although there are authorizations for a total of 18 investigator positions). For a city that employs approximately 35,000 workers, this amounts to well over 2,000 employees per EEO investigator, assuming a contingent of 18 investigators. Even with more streamlined procedures, such a ratio will likely contribute to a backlog of complaints. It was the resounding consensus of employees and department leadership alike that EEO requires more staff to properly handle the current number of complaints.

Recommendation 5.1

The City must expand the EEO staff to effectively and expeditiously process the current volume of complaints.

Finding 6

The Department of Human Resources should review and update its procedures for investigating EEO complaints.

The touchstone manual for the EEO investigator is DHR's *Investigator Handbook*, which summarizes the City's EEO policies and describes the procedures by which EEO complaints are

[48] Based on data provided the Independent Reviewer by DHR.

investigated. However, the *Investigator Handbook* is now between 10 and 20 years old and has been described by EEO investigators as "dated." More importantly, the age of the *Investigator Handbook* means that it does not reflect existing DHR policy or guidance to investigators on the process for handling and resolving EEO complaints. The result is that changes to internal complaint-handling practices and policies is communicated in an *ad hoc* manner, for example, by emails from DHR leadership (sometimes not even to all EEO investigators) or in large DHR meetings. EEO investigators and personnel voiced frustration that this method of announcing internal changes can create confusion and ambiguity about the limits of EEO jurisdiction, leading to a lack of uniformity when determining which EEO complaints warrant investigation or fall within EEO jurisdiction.

For instance, sometime last year, DHR changed its policy for investigating EEO harassment claims; in a break from past practice, DHR decided that harassment claims that allege violations of the City's EEO policy should be investigated even in cases that might not meet the legal "severe and pervasive" standard. However, to the Independent Reviewer's knowledge, this change to EEO investigation jurisdiction was not incorporated into investigator training or reference materials, and employees expressed confusion about how to carry out this policy change without more guidance materials.[49] The existing manual also contains instruction about programs that no longer exist, for instance, an alternative dispute resolution that DHR discontinued some years ago. One purpose of maintaining and *Investigator Handbook* is to have a centralized, authoritative place where employees can look for up-to-date guidance, policy, and instruction. The absence of an up-to-date and central repository for investigatory practices creates a risk of inconsistency, confusion, and delay in investigations.

Recommendation 6.1

DHR should immediately update the Investigator Handbook to provide investigators and other HR personnel clear, current guidance about relevant EEO policies and the processes and standards used to investigate EEO complaints.

Recommendation 6.2

In the future, when changes to investigation policy, EEO jurisdiction, or complaint processes are announced, those changes should be immediately incorporated into an updated investigation manual and circulated to all DHR investigators. To the extent complaint process

[49] Amongst the important decisions to have emerged since the Handbook are *Bostock v. Clayton County*, 140 S.Ct. 1731 (2020) (holding that discrimination against a homosexual or transgender individual is sex-based discrimination in violation of Title VII); *EEOC v. Abercrombie*, 575 U.S. 768 (2015) (wearing of headscarf deemed religious practice requiring accommodation under Title VII); *Crawford v. Nashville*, 555 U.S. 271 (2009) (employee speaking about sexual harassment in response to questions asked protected against retaliation for such speech); *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009) (articulating standard of proof in age discrimination cases); *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006) (protection against retaliation outside the workplace); *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005) (retaliation prohibited even though unaddressed by the statute); *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003) (mixed motive liability may be established through circumstantial evidence); *Thompson v. North American Stainless, LP*, 567 F.3d 804 (6th Cir. 2010) (anti-retaliation protections applicable to third-party reprisals); *Harris v. City of Santa Monica*, 56 Cal. 4th 203 (Cal. 2013) (where the same action would have taken place in the absence of the impermissible motivating factor).

and policy changes will also mean changes to departmental activities, DHR should involve departmental HR in the policy-making process or at least keep departmental HR informed of proposed changes.

Recommendation 6.3

Once DHR has updated its Investigation Handbook and clarified substantive standards for EEO jurisdiction, DHR should also communicate to employees what criteria must be met to qualify for EEO jurisdiction. Employees do not have a clear understanding of how DHR EEO decides which complaints present an inference of discrimination and which do not. Its standards for making these decisions should be transparent.

Finding 7

A wide variety of employment issues which fall outside of EEO jurisdiction could be properly addressed to the new Peer Mediation Program or other alternative dispute resolution procedures. In order to address problems that do not rise to the level of an EEO violation, the City should closely study and publicize the new pilot mediation process. If the program appears successful, the City should adopt and expand it permanently. Mediation will likely be the most effective forum for a wide variety of complaints which have arisen involving "microaggressions" such as bullying, lack of civility, and unpleasantness in the workplace, which the City should be committed to rooting out, alongside of EEO.

In the past, the City employed Alternative Dispute Resolution (ADR) programs to mediate workplace conflicts, allowing for parties to mutually resolve disagreements and remedy low-level misconduct. For a time, those programs were discontinued, but pilot programs have recently emerged that offer employees an avenue to proactively confront workplace problems ill-suited for the EEO complaint or grievance-arbitration machinery. In particular, DHR's Diversity, Equity, and Inclusion office has begun piloting a mediation program for DPH, MTA, SFO, and Sheriff's Office employees. The program is voluntary and does not replace or deprive employees of their rights to pursue an EEO complaint of file a grievance. That said, the program does provide employees with an alternative path that can potentially resolve workplace conduct in a constructive and efficient manner.

The ADR program also allows for employees to address workplace misconduct that the EEO complaint and grievance-arbitration processes leave unresolved. By allowing for mediation even after the parties have engaged in the other processes, ADR programs can provide prospective measures that restore harmony in the workplace, regardless of the outcome of the EEO complaint or grievance.

An effective mediation program will help address serious problems that are currently not resolved by the EEO process or even the arbitration process which has within its ambit a full landscape of grievances both meritorious and non-meritorious.[50] Many employees bring EEO complaints to address workplace behaviors that do not meet the legal standards characterizing EEO jurisdiction and antidiscrimination law in general. Yet, the allegations in these complaints reveal conduct that contributes to animosity in the workplace, violates important City workplace policies, and may in subtler ways harm employees of color. To the frustration of these complainants, many EEO complaints are administratively closed for lack of jurisdiction, leaving employees without a means to address and resolve unwanted conduct by their colleagues or supervisors.

Additionally, the City's inability to address workplace conflict adequately allows resentments to fester, ultimately leading to a greater number of complaints. Without a mechanism that allows for disrespected or mistreated employees to be heard, employees often feel they have no other option but to endure the time-consuming EEO process or take their complaints straight to the EEOC or DFEH, which also involves a long, often unsuccessful investigation. The absence of alternative dispute resolution mechanisms results in a backlog of EEO cases, most of which are administratively closed without rectifying the problems that the employees raise.

Many of these issues directly affect Black employees. Allegations of implicit bias, microaggressions, bullying, and a lack of cultural competency on the part of management or colleagues may not meet the legal standard required for a prima facie case of discrimination, but left unresolved, these issues contribute to a work environment that harms Black employees and others in the work force.

Recommendation 7.1

The City should make available to all employees ADR programs that facilitate the resolution of workplace conflict and provide an opportunity to constructively remedy violations of City policies that do not rise to the level of an EEO violation. ADR programs should also be made available to employees who have already concluded the EEO complaint or grievance process so that issues left unresolved by those processes can be addressed at that point if necessary.

Recommendation 7.2

The election to use an ADR program should not prevent employees from availing themselves of the EEO complaint or grievance-arbitration processes. To that end, engaging in an ADR program should also toll the City's limitations period for filing an EEO complaint or grievance. Along the same lines, employees should be allowed to file a grievance or EEO complaint and then pause those processes if they wish to engage in an ADR program.

Recommendation 7.3

[50] *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564, 568 n.6 (1960) ("The objection that equity will not order a party to do a useless act is outweighed by the cathartic value of arbitrating even a frivolous grievance . . . .")

The City should publicize the new ADR programs and encourage their use. Additionally, employees should be permitted to bring a union representative or other chosen representative with them to any mediations.

Recommendation 7.4

In order to address the rising tide of EEO complaints at its source, the City must invest in more training and supervision of managers and supervisors. Many EEO complaints are the result of failures by front-line supervisors and managers to address harmful workplace dynamics early on and to mediate potential conflicts between employees. To that end, DHR should implement more frequent, regular training for managers and supervisors aimed at addressing workplace conflict, rather than asking managers simply to offload employee disputes on the EEO process. Additionally,like the police early intervention system[51], managers must be held accountable when a high number of EEO complaints flow from their direct reports, and DHR should track the sources of EEO complaints in order to identify managers and supervisors who should undergo more coaching on team management.

Finding 8

Departments are presently under no obligation to enforce the corrective action recommended by DHR against respondent employees, and there is no transparent method of tracking whether departments adequately discipline or retrain respondent employees.

At the conclusion of an EEO investigation, the Director of Human Resources may recommend corrective action for a department to implement against the respondent employee. However, the departments are not bound by DHR's recommendations and may choose to disregard it. For instance, one department has a practice of disregarding DHR recommended actions in response to policy violations. This can result in respondent employees continuing to engage in discriminatory or unprofessional conduct without ever being subject to meaningful corrective action.

Even when departments are amenable to implementing the corrective action recommended by DHR, those actions are not publicly tracked. DHR investigators follow up with departments, but there does not appear to be a way to hold departments accountable for failing to discipline employees that violate city policy.

Additionally, the recommended corrective action in some cases does not meaningfully rectify the inappropriate conduct. In cases that reveal unprofessional or disrespectful conduct that does not rise to the level of an EEO violation, the only remedy DHR recommends is for departments to issue the applicable policy to the offending employee and to require the employee's review and signature. This form of corrective action is of limited utility, as offending

[51] DGO 3.19 Early Intervention System. https://www.sanfranciscopolice.org/your-sfpd/policies/general-orders

employees neither face consequences for their actions nor undergo additional training to prevent future offenses.

Recommendation 8.1

The corrective action recommendations of the Director of Human Resources should be specific and binding, and departments should be required to implement them. DHR should track and record departments' corrective actions in response to EEO investigations and should consider publicly posting departments' rates of compliance with EEO recommendations in order to provide greater accountability.

Recommendation 8.2

DHR should develop more forms of corrective action that permit a greater intervention than the issuance of city policy for offending employees' signatures. This should include both a greater emphasis on mandatory training for employees, managers, and supervisors who have violated city policies and also an openness to discipline, including removal, of the offending supervisor or management person, particularly when the respondent presents an ongoing threat to the complainant.

Recommendation 8.3

DHR and City departments should ensure greater accountability of managers and supervisors, for instance, by tracking the rate of EEO complaints arising from particular supervisors' cohorts and direct reports, where warranted.

Finding 9

The outcomes of EEO investigations are frequently determined by investigators' conclusions about the credibility of complainants and respondents, but the City's criteria for making these credibility determinations are not consistently or objectively administered. The complaint process is also made unnecessarily adversarial by virtue of DHR's requests that departments preemptively respond to the complainant's allegations.

First, DHR EEO must formulate standards for making germane credibility determinations.

EEO investigations, by their nature, frequently require investigators to make judgments about the credibility of the parties and the witnesses in a case. The parties' stories often conflict, and investigators must, to some extent, rely on conclusions about the credibility of each side's telling of the facts.

However, based on employee interviews and investigation records provided to the Independent Review team, which the Reviewer presumes to be representative, a large number of employees believe that these credibility determinations are not being made in an evenhanded manner. DHR's investigator handbook devotes about a half a page to factors relevant to determining credibility, including corroboration or lack thereof, demeanor, motive to lie, and logic/consistency of the story. And DHR's investigator training slide presentation provides one slide covering credibility determinations, listing substantially similar factors. However, DHR does not appear to apply its standards for determining credibility in a consistent or objective manner. This pattern has contributed to the belief among many employees that, when it comes to EEO investigations, it is always their word against employer interests, and the employer always wins.

For example, one complainant who alleged a discriminatory termination was determined not to be credible after investigators concluded he had a "motive to lie" in order to regain employment following his termination. Another complainant was not deemed credible because she had a motive to lie to avoid discipline. To be sure, motive to lie is itself a valid and commonly used factor for determining credibility. But the facts relied on in these examples—termination and discipline—are often part and parcel of the adverse actions that form the basis of discrimination claims. That is, almost any complainant could be deemed to have a "motive to lie" if they complained after an adverse action (as they frequently do) because they would be "motivated" to avoid that adverse action, even though the adverse action was allegedly discriminatory. This method of determining credibility could be used to discount the credibility of every complainant who believes he or she has faced a wrongful adverse action. At the same time, investigation records show that DHR has not found a motive to lie in other circumstances that could support that conclusion (for instance, when a respondent's supporting witnesses were alleged to be longtime friends with the respondent). In other words, though a "motive to lie" is a proper factor for determining credibility, DHR's investigation records suggest that that factor may not be applied consistently or evenhandedly in all cases.

DHR investigators also frequently determine that parties are not credible because of "inconsistencies" in their stories. But this criterion for credibility does not seem to be consistently applied. Sometimes investigators rule out testimony because of relatively minor inconsistencies, which may or may not have a real bearing on the important facts. At other times, investigators credit testimony despite inconsistencies by concluding that the consistencies were not "contradictory." None of the materials addressing the factors for making credibility determinations address the line between "inconsistent" and "contradictory" statements.

DHR's EEO investigators are clearly thoughtful about their credibility determinations. But without more guidance and training regarding best practices for making credibility determinations, the existing system leaves room for unconscious bias and inconsistency.

Second, investigation documents provided to the Independent Review team show that, in addition to requesting documents and witness information, DHR frequently asks departments to provide substantive "responses" to complainants' allegations. This can result in departmental HR providing adversarial "answers" that may skew DHR's subsequent review of factual materials and witness testimony in a manner inconsistent with DHR's independent and neutral investigation of complaints. The risks that these responses may skew investigations would no doubt be diminished by the presence of DHR investigators in the various departments, as the

DHR investigator in the department would be empowered simply to seek the facts rather than the department's official gloss on those facts.

Recommendation 9.1

DHR should reconsider the dispositive role that credibility determinations presently appear to play in the outcome of some cases. In some cases, it may be difficult or impossible to rule testimony in or out solely or primarily based on the credibility of witnesses. Either both parties may be equally credible, for instance, or neither party may be credible.

Recommendation 9.2

DHR should establish objective and consistent criteria for determining the credibility of parties and witnesses and should provide investigators with more guidance and training on how to properly make credibility determinations. There are circumstances where credibility determinations are vital. Credibility determinations frequently are required where there is a conflict in statements. But attributing a motive to lie to a complainant because the complainant has been terminated would automatically undermine the credibility of any employee who believes his or her termination was due to discrimination. Similarly, some employees believe that EEO investigators are inconsistent when they conclude that parties are not credible due to "inconsistencies" in their stories. DHR's training materials and handbook should be supplemented to provide greater guidance on the application of these standards.

Recommendation 9.3

DHR should cease the practice of asking departments for "responses" to complainants' allegations when transmitting requests for information to the departments, as these departmental responses create an unnecessarily adversarial atmosphere for the independent investigation and risk skewing the investigation at an early stage.

Finding 10

DHR's close-out letters to complainants are sometimes written in a way that sometimes has the effect of devaluing the complainants by blaming them for adverse actions.

Many close-out letters to complainants inform employees that EEO found that they were not credible or that they were not as credible as the respondent.[52] Relatedly, close-out letters sometimes justify DHR's findings by citing and recounting the complainant's own shortcomings or poor work performance. These letters can have the effect of unnecessarily frustrating employees who have waited many months for the resolution of a complaint.

Recommendation 10.1

If possible, DHR should revise its determination letters in order to avoid dwelling on employees' purported shortcomings To the extent that DHR viewpoints are rooted in employee shortcomings, the preference should be counseling rather than a detailed discussion in the report itself.

[52] The Independent Reviewer notes that, as an arbitrator and public official, he has frequently made credibility determinations without directly articulating a conclusion about who is telling the truth and who is not.

II. Recruitment, Hiring, and Advancement

Finding 11

The City has room to expand its efforts to recruit under-represented employees through community organizations such as the NAACP, Urban League, and others.

In October 2018, the Civil Service Commission amended its rules to allow for the de-identification of applicant information during the "post-referral selection process"—the point of the hiring process where applicants on the eligible list are invited to interview for the final position. These amendments were part of an effort to eliminate the possibility of implicit bias preventing meritorious applicants from moving forward in the hiring process.

The effectiveness of these measures has been unclear. In January 2020, DHR concluded that de-identification had contributed to "an increase in diverse representation as well as more candidates being included in the interview process."[53] However, several stakeholders have voiced skepticism, saying that the evidence is ambiguous on whether de-identification has improved diversity in hiring and that it hinders efforts by hiring managers who would like to emphasize diversity. We have no evidence that de-identification has furthered diversity.

The academic research in this area is also inconclusive. Where employers have implemented diversity and affirmative action initiatives, it appears that de-identification can have a detrimental effect on minority candidates by negating those initiatives.[54] When affirmative action is lacking, though, de-identification has been correlated with an increase in call-back rates for minority candidates.[55] Whether securing a more diverse interview pool results in greater diversity in hiring is also unclear.[56]

Setting aside de-identification, however, this independent investigation showed that San Francisco has room for improvement in its recruitment of Black employees. Whatever the rates

[53] Anna Biesbas, *Report on the Status of De-Identification for Classification-Based Testing Recruitments*, DHR, Jan. 22, 2020.
[54] See, e.g., Luc Behagel et al., *Unintended Effects of Anonymous Resumes*, 7(3) AMERICAN ECONOMIC JOURNAL: APPLIED ECONOMICS, 1, 3 (2015), https://www.aeaweb.org/articles?id=10.1257/app.20140185.
[55] See Krause et al., *Anonymous Job Applications in Europe*, (Inst. for the Study of Labor (IZA), Discussion Paper No. 7096) (Dec. 2012), http://ftp.iza.org/dp7096.pdf; Martin Bøg and Erik Kranendonk, *Labor Market Discrimination of Minorities? Yes, But not in Job Offers.* MPRA Paper, (2011), https://ideas.repec.org/p/pra/mprapa/33332.html; cf. Government of Canada, *Name Blind Recruitment Project—Final Report*, Ottawa: Government of Canada (2018), https://www.canada.ca/en/public-service-commission/services/publications/Name-blind-recruitment-pilot-project.html#toc_6 (showing that name-blind recruitment had no statistically significant effect on rate at which minority candidates were "screened in" to the next stage of hiring process but did significantly decrease the rate for majority candidates).
[56] Olof Åslund and Oskar Skans, *Do Anonymous Application Procedures Level the Playing Field*, 65(1) INDUSTRIAL AND LABOR RELATIONS REVIEW Sweden 82, 93 (2012) (finding that anonymizing applications led to better hiring outcomes for women but not for non-Western immigrants).

of demographic representation citywide, under-representation is particularly acute at higher-ranking managerial levels.[57] The Independent Reviewer was advised in March by representatives of the City dealing with community organizations that the list of community organization "will expand so that now we're asking organizations . . . NAACP, Urban League . . . fraternities, sororities will be added . . . at this point NAACP and those organizations that cater to Black and Brown jobseekers, we're currently adding those because we don't have them yet." (emphasis supplied).

The Independent Reviewer has no information at present indicating that these organizations have been added.

Recommendation 11.1

The City should promptly engage civil rights and community organizations representing under-representative communities who can both publicize and promote the availability of job opportunities.

Recommendation 11.2

DHR should continue to monitor and report on an annual basis the effects of de-identification on the hiring process and reevaluate it so as to determine its efficacy, if any.

Finding 12

The City's could amend Administrative Code Chapter 12X to allow travel to restricted states for purposes of recruiting for City employment candidates from Historically Black Colleges and Universities.

As the February 22, 2021 memorandum from City administrator Carmen Chu outlines, San Francisco has enacted through its Board of Supervisors a ban on travel to states with anti-LGBT and abortion-restrictive laws. This has resulted in the ban of travel for the purpose of recruitment to Historically Black Colleges in much of the Deep South. There is no provision for waivers under the travel ban,[58] and some City departments reported to the Independent Reviewer that this travel ban has hindered efforts to recruit from Historically Black Colleges. Essentially,

[57] For instance, the Department of Public Health's Racial Equity Action Plan notes "the predominance of BIPOC employees in lower paid job classes" and explains that "Black/African American[] employees are concentrated in either lower paid clerical and service jobs or higher paid management jobs with less distribution in between, dragging median salaries below other major ethnic/racial groups at SFDPH." S.F. DEPARTMENT OF PUBLIC HEALTH RACIAL EQUITY ACTION PLAN 12 (2020), https://bit.ly/3tMwQWX; *see also* S.F. PUB. UTIL. COMM'N RACIAL EQUITY ACTION PLAN 12 (2020), https://bit.ly/3gU9Kev ("Black and Latinx employees are underrepresented in the higher-paying Professional and Managerial classes.").

[58] *See* S.F. ADMIN. CODE § 12A.5 (2021).

this puts the City at a disadvantage in recruiting talented Black American students to be employed in San Francisco, particularly at a time when the Black population in San Francisco has declined considerably and the need to recruit beyond City borders is more pressing. The City has the authority to amend the relevant ordinance and to waive the ban for such purposes.

Recommendation 12.1

The City should amend Chapter 12X which prohibits the City from funding travel to states which have anti-LGBT and abortion laws, to create an exemption to the ban on travel for the purpose of recruiting Black students from Historically Black Colleges and Universities. This amendment is important to the establishment of a more diverse workforce in San Francisco.

Finding 13

City investments in the continuing education and career progression of its incumbent workforce have room for improvement, especially with respect to well-paying jobs in the skilled trades.

Through a wide variety of programs and initiatives, the City has undertaken to train and employ people who have been marginalized, unemployed, and previously incarcerated, both in San Francisco itself as well as in adjacent counties such as San Mateo and Marin. *See* Sadie Gribbon, *City Celebrates Expansion of Job Training Program*, S.F. EXAM'R (Feb. 28, 2018, 12:00 AM), https://www.sfexaminer.com/news/city-celebrates-expansion-of-job-training-program/. This kind of training, designed to improve income and occupational opportunities, is aimed at unskilled, "at risk" workers. The San Francisco Office of Economic and Workplace Development has similarly promoted programs such as City EMT, devised to provide job training for youth between 18-24 with the object of obtaining job placement in the City's Fire Department or contracted ambulance services. City Drive, again aimed at marginalized individuals, has promoted contacts and opportunities in trucking. Joe Rodriguez, *First Class of Laid-Off Chariot Drivers Graduate Muni Operator Training*, S.F. EXAM'R (May 31, 2019, 10:00 PM), https://www.sfexaminer.com/the-city/first-class-of-laid-off-chariot-drivers-graduate-muni-operator-training/.

These programs all appear to be aimed at those who are not presently employed on the City work force or adequately elsewhere in the private sector. Thus, they are important and praiseworthy initiatives. But the same attention has not been provided by the City to its own City workforce. As the City's 2020 Annual Workforce Report notes, the percentage of Black workers in the permanent civil service (PCS) is approximately half that of white workers.[59] Moreover, amongst permanent exempt jobs (PEX) which pay approximately more than one-and-one-half

[59] It is true that the available labor market in San Francisco would be relevant to employment discrimination litigation. But that is not what this report is about. Rather, it seeks to promote more inclusion and retard or reverse the Black exodus from San Francisco. *See The Unfinished Agenda*, *supra.*

times the rate paid to permanent civil service and include many department leadership and other high-level positions, the same pattern of exclusion persists. The Report noted: "Black employees have lower-paying jobs, are less likely to be promoted, and are disciplined, and fired more frequently. Until we address these disparities in the experience of our Black employees, we cannot achieve our vision of an inclusive and welcoming workforce for everyone." S.F. DEP'T HUM. RES., 2020 ANNUAL WORKFORCE REPORT 1 (2020), https://sfdhr.org/sites/default/files/documents/Reports/annual-workforce-report-2020.pdf.

One of a number of important first steps is to provide a pathway from lower-paying, relatively unskilled jobs into the skilled trades and managerial positions. The City advises the Independent Reviewer that it has negotiated more diversity in apprenticeship and training[60]. This demonstrates that the City is well positioned to take the initiative in pressing relevant labor union partners to agree to reforms. The idea that only the unions can change patterns is outdated.

Another such program has already been undertaken for machinists in conjunction with Local 1414 of the International Association of Machinists, vis-à-vis job opportunities in the Bayview area. *See* San Francisco Joint Apprenticeship Committee: Policies & Expectations, Automotive & Maintenance Machinist Apprenticeship Program, Apprenticeship SF. But aside from this, the fact is that Black workers are substantially excluded from a number of the high-paying skilled trades jobs. The City and relevant unions must bargain alternative or supplemental paths leading to journeyman status for incumbent workers, perhaps providing for longer periods of training.

The need is vital. For instance, only 2.5% of electricians employed by the City are Black. The same pattern exists for sheetmetal workers, where, of 23 workers in this classification, only one is Black. Of 20 arborist technicians, only one is Black. Even amongst plumbers where Black employees constitute 8% of the total workforce, the Independent Reviewer and staff encountered complaints and frustration voiced by Black workers in the Department of Public Works, where laborers work near to plumbers, frequently assist them, as well as perform some of their functions, are denied mobility into this vital craft. This phenomenon is true throughout the United States, in both the private as well as public sectors. See, e.g., San Francisco Public Utilities Commission Water System Improvement Program Jurisdictional Accord: Laborers Local Union 261 and United Association Local Union 38 (Mar. 7, 2008). These patterns contrast with some of the lower level, relatively unskilled jobs, such as general laborers or transit car cleaners, where Black employees constitute generally ten or more times the percentage of those in the more skilled, well-paying positions.

Recommendation 13.1

The City must invest both in the incumbent workforce, provide tuition assistance at institutions such as community colleges so that such workers, if interested, can improve their work capabilities and prepare to enter apprentice programs, and it must offer other forms of assistance to workers who seek to obtain better job mobility leading where appropriate to journeyman status. The City must also explicitly state a public policy favoring preference into the skilled trades and other comparable work for the relatively unskilled and semiskilled

[60] See Crafts MOU, section I.M., paragraphs 81-84. https://sfdhr.org/memoranda-understanding

workforce, provide such workers with credit for exposure to skilled jobs already obtained, and involve itself in and promote (previously promised) scrutiny of the relevant craft union apprenticeship programs, their practices and policies.

Finding 14

Current Civil Service Rules and departmental policies provide wide latitude to hiring managers in selecting interview panelists, potentially allowing implicit bias and favoritism to undermine the fairness of the hiring process.

In addition to exams (for Permanent Civil Service positions), minimum qualifications, and eligible lists, almost all departments reported that interviews are a standard part of the hiring process, subject only to rare exceptions. Regardless whether the vacant position is categorized as a Permanent Civil Service (PCS) or Exempt position, hiring managers use interviews to make a final choice from a field of qualified candidates. Consequently, an impartial interview process is critical to ensuring that hiring decisions are fair and equitable.

However, some employees report a belief that hiring managers may unduly sway the interview process through their choice of interview panelists, frequently to the detriment under-represented applicants. In essence, the charge is that hiring managers may still select friends, close colleagues, subordinates, repeat-panelists, or other employees whose decisions are foreseeable to the hiring manager for the panels. Because of these relationships, the interview panel effects the wishes of the hiring manager by proxy, issuing positive evaluations for candidates likely to be highly esteemed by the hiring manager, or for the kinds of candidates with whom the hiring manager is comfortable working.

Empirically evaluating the truth of this perception is perhaps impossible due to a lack of data regarding the demographic information of applicants and panelists, and the City should gather data on these points in order to better track interview panel trends. But, notwithstanding existing implicit bias training, no rigorous statistical analysis is necessary to see that hiring managers possess a substantial amount of discretion in shaping the interview process, and because "[w]e naturally gravitate toward like-minded individuals,"[61] it is also clear that hiring manager discretion in shaping interview panels can have a powerful impact on the panel's decisions. Hiring managers formulate interview questions, choose panelists, and even serve on interview panels. In some circumstances, including exempt appointments that may be highly sought after, they also have the authority to hire the candidate of their choice, notwithstanding the opinion of the panel.

To be sure, this discretion is not unlimited. The City's Civil Service Rules require that the City "make every effort to ensure representation of women and minorities" on panels. S.F. CIV.

[61] Marilyn Cavicchia, *Is There Bias in Your Hiring Process? Removing It Takes Diligence, Self-Awareness*, 40 ABA BAR LEADER, no. 6, July-August 2016, https://www.americanbar.org/groups/bar_services/publications/bar_leader/2015-16/july-august/is-there-bias-in-your-hiring-process/; cf. *Rowe v. General Motors*, 457 F.2d 348 (5th Cir. 1972).

SERV. R. 111.1.2 (2021); *see also* R. 113.1.2 (requiring, *inter alia*, a diverse interview panel and non-discriminatory selection procedures). The Rules also require uniform standards for civil service examinations and prohibit panelists from rating candidates with whom they have a strong personal association. *Id.* R. 111.14.1. HR personnel screen interview questions for job-relatedness and potential bias, and they evaluate the diversity of the panel. In some departments, these Human Resources personnel directly consult with hiring managers, advising them on how to formulate fair questions and select diverse panelists. There are also measures taken to vet the panelists themselves. City policy dictates that panelists must complete "Fairness in Hiring" and "Implicit Bias" training. Panelists are also asked to self-report any conflicts of interest—namely, personal relationships they might have with interview candidates. Additionally, departments restrict the pool of interview panelists to employees who hold a job classification level equal to, or higher than, the position being applied for. In some departments, further restrictions might apply to panelists serving in Exempt classifications. On the back end, candidates may also request that the Civil Service Commission inspect the hiring process for consistency with applicable rules.

In practice, however, the effectiveness of these checks on potential bias is unclear, even if they appear meaningful in theory. For instance, there are allegations that panel diversity is merely nominal because hiring managers repeatedly choose the same minority and non-minority colleagues, with whom the managers are friendly and whose hiring tendencies the managers know, to serve as panelists. It is unclear whether the human resources specialists who screen interview questions for bias are always trained EEO personnel, beyond a narrow inquiry into job relatedness as opposed to broader expertise into job bias. Many employees also believe that human resources specialists are essentially there to assist the hiring managers rather than act as a check on favoritism or unconscious bias. And there does not appear to be a uniform policy about when hiring managers draft interview questions, leaving open the possibility that hiring managers might wait until they know the identities of the interview candidates and then engineer the questions to maximize the chances for their preferred candidate.

The core problem is (1) lack of transparency about the process; (2) the lack of some important structural limits on the hiring manager's influence over the interview process. Some of the "best practices" employed by various departments do advocate for structural changes to the panel—such as requiring panelists from outside of the hiring manager's division or department where practicable. These policies should be encouraged.

Recommendation 14.1

The hiring manager should abide by the hiring recommendation of the interview panel barring compelling reasons not to do so. At the interview stage, all candidates possess the required qualifications for the position. Input from the hiring manager at this stage does not always discern which candidate is best, and a hiring panel staffed by disinterested parties can best ensure that bias or favoritism doesn't play a role in the final hiring decision.

Recommendation 14.2

Best practices, such as using panelists from outside of the division, department, or City, where possible, should be used to the extent practicable. While the hiring manager may still serve on

the interview panel, employees who are direct subordinates to the hiring manager, whatever their classification as a PEX/TEX/PCS employee, should be excluded where necessary and possible and other measures should be initiated to balance between the need for specialized knowledge and independence of the panel.

Recommendation 14.3

Where practicable, there should be a limit on how often individuals can serve on hiring panels each year. This rotation policy will help foster a diversity of viewpoints on hiring panels and will reduce the likelihood that hiring managers will repeatedly select the same panelists after learning their hiring preferences. In the case of specialized positions for which a limited pool of employees are qualified to evaluate, exceptions to this policy may be appropriate.

Recommendation 14.4

Properly trained Human Resources personnel must use relevant EEOC standards relating to subjective criteria to certify proposed interview questions prior to the hiring manager knowing the identities of the interview candidates.

Recommendation 14.5

The present practice through which departments track the demographics of interview candidates to identify whether the hiring process has a disparate impact on any demographic groups should continue.

Recommendation 14.6

DHR and the City departments should begin tracking data regarding the make-up of interview panels. That should include, for instance, tracking the demographics of panelists, the frequency with which individuals serve on panels, the classification (PEX/TEX/PCS) of panelists, and the like. DHR should examine this data in light of hiring decisions to determine what panel structures lead to disparate impacts in hiring and/or promotions.

Finding 15

The City lacks a uniform policy on acting assignments.

Many employees report confusion and a systemic lack of guidance when it comes to City career paths, career pipelines, and plans for advancement. In interviews with the Independent Review team, employees report that managers and supervisors do not take a proactive interest in employee advancement. Employees who seek to transition from a temporary exempt position or a permanent exempt position into a permanent civil service role feel that they are not given adequate information about the civil service exam process. And employees who are in permanent civil service roles often find themselves at functionally the same step in the career ladder for years, if not decades. Employees struggle to navigate the City's complicated system of classifications and receive insufficient guidance from supervisors and department leadership on how to advance to more senior classifications.

One effective way to help move more employees into leadership positions or to advance in their careers is to use acting assignments to help position employees to progress in their careers. Acting assignments both give employees experience in more senior positions and also set employees up to be competitive applicants for the permanent position. However, the City does not have a consistent policy respecting the selection of employees for acting assignments. Each department crafts its own acting assignment policy or practice, sometimes under constraints set by MOUs, and to the extent the department has written the policy down, these policies vary widely. For example, some departments give most of the discretion for selecting acting managers to some upper-level manager, perhaps with nominal HR supervision. Others rotate acting duties among qualified employees. Still others engage in a competitive process. As the City's Human Resources authority, DHR should determine which of these methods of selecting employees for acting assignments is most equitable and should ensure that the City has a uniform policy for choosing employees for acting assignments.

Recommendation 15.1

DHR must do more to acquaint prospective employees or exempt employees with the civil service examination process. These efforts should include, but should not be limited to, the administration of practice tests where feasible, preparation guides and manuals (these are available for some departments or positions, but not many), information sessions to provide information, dates, and advice to prospective applicants, and the like.

Recommendation 15.2

In addition to upskilling more employees into trade jobs, as discussed elsewhere, DHR and the City departments should craft and communicate clear pathways for employee advancement so that employees do not find themselves stuck for years at the same rung of the career ladder. This should include, for instance, ensuring regular meetings with managers/supervisors to help employees plan their careers, expanding mentorship opportunities, making available organizational charts that clearly spell out pathways for advancement within various sub-departments, teams, and work areas, and the like.

Recommendation 15.3

DHR should encourage and, to the extent it has power, require all departments to adopt a uniform system for handling acting managerial and supervisory assignments. Optimally, such a policy will involve a competitive process and/or will permit rotation that exposes more employees to acting duties. Such a policy should avoid excessive managerial discretion that currently dictates the process for filling acting roles in many departments. Managerial discretion in this area results in increased risks of implicit bias or nepotism.

Finding 16

The City lacks a uniform policy regarding how non-civil-service jobs are posted and filled.

A substantial chunk of the City's workforce includes exempt employees, and some of these positions include leadership roles and other highly valued jobs. However, City departments report various methods of filling these roles. Some, but not all, employ the same process that they use for hiring civil service jobs, including extensive panel interviews and scoring. Others have more simplified processes for exempt positions. Likewise, not all departments consistently post exempt positions publicly for competitive process. There may be some instances in which competitive process is unnecessary, infeasible, or unwanted (for instance, high-level policymaking employees), but this is not always the case.

Recommendation 16.1

DHR and the City departments should implement a uniform written policy for the process that governs filling exempt positions. This should include posting and a structured interview process unless there are compelling reasons not to have such a process, and the policy should clearly delineate when it is appropriate not to have a structured interview process for filling exempt positions.

Recommendation 16.2

In the event Recommendation 16.1 is not adopted, then at the very least DHR should track and publicize which departments conform to the Civil Service Commission's best practices for structuring the exempt hiring process.

III. Discipline and Corrective Action

Finding 17

Black employees, as well as other employees of color, are disciplined at disproportionately high rates.

Thanks to DHR's efforts in recent years to collect and track departmental level disciplinary data,[62] the City is well aware of the disproportional rates of discipline for Black employees and other employees of color. The data provided to the Independent Review team by DHR was controlled by the City for variations across departments, income level, level of discipline, and union membership, yet racial disparities in discipline persisted. For instance, DHR's 2020 Annual Workforce Report found that "Black and Hispanic workers often receive a higher level of scrutiny in the workplace, leading to more corrective action and discipline, and eventually a higher rate of terminations as compared to their White and Asian counterparts."[63]

Part of this discrepancy is due to the types of positions that Black workers currently occupy. For instance, in MTA, Black workers are disproportionately employed at the transit operator level. These roles are subject to greater regulation and objective metrics and rules. This makes discipline for minor infractions more likely among these job classes compared to other kinds of work (for instance, administrative or professional roles) in which the need for corrective action is more subjective.

But the problem may go beyond simply job classifications. Black employees face disproportionate punishment even in the job clusters within which they are employed.[64] This indicates that the problem is not simply one of job classifications alone. Although DHR has formulated best practices and checklists for departments' use of discipline, performance improvement plans, and probationary extensions, DHR presently has no means of tracking departments' compliance with or adoption of these best practices.

Recommendation 17.1

[62] See S.F. DEP'T HUM. RES., CORRECTIVE ACTION AND DISCIPLINE BY RACE/ETHNICITY AND GENDER (2019), https://sfdhr.org/sites/default/files/documents/Resources/Corrective-Action-and-Discipline-by-Race-Ethnicity-and-Gender.pdf. DHR also noted that its efforts to collect and analyze corrective action data have been hampered by inconsistent compliance by departments with DHR's data requests.
[63] S.F. DEP'T HUM. RES., 2020 ANNUAL WORKFORCE REPORT 11-13 (2020), https://sfdhr.org/sites/default/files/documents/Reports/annual-workforce-report-2020.pdf.
[64] See, e.g., SFMTA RACIAL EQUITY ACTION PLAN 40 (2020), https://bit.ly/2S5uLIG (noting that in Fiscal Year 2020 "African American and Black people comprise[d] 32 percent of the Transit Division, [yet] they represent more than 50 percent of discipline cases charged" in that division).

DHR should track and report on its Citywide Workforce Demographics page the rates of discipline and types of discipline by race.

Recommendation 17.2

All City departments should track and regularly report to DHR corrective action and discipline data. To the extent that DHR cannot require compliance with disciplinary data requests, DHR should publish a list of which City departments fail to comply.

Recommendation 17.3

DHR and the City departments should track the frequency with which managers and supervisors discipline their workers, including tracking demographics of corrective actions implemented by each manager or supervisor. DHR and City departments should intervene with training for managers who are responsible for disproportionate discipline or corrective actions, as well as employees and unions for the purpose of both training and discussion about the responsible factors.

Recommendation 17.4

DHR should take a lead in establishing standardized disciplinary procedures and standards that apply to all miscellaneous employees and should ensure their equitable enforcement. For instance, DHR reported in its 2020 Annual Workforce Report that departments such as MTA and HSA were developing such standards, including, for instance, checklists to ensure all procedures are followed equitably. DHR should require such procedures city-wide. Relatedly, City departments should follow DHR's best practices and checklists regarding discipline, performance improvement plans, and probationary extensions, balancing considerations idiosyncratic or unique to the department . DHR should track departments' compliance with these best practices and should publish a list of which departments have not adopted those best practices or practices substantially similar to them.

Finding 18

Black employees are disproportionately subjected to probationary and medical releases.

Many employees, managers, and department leaders reported that Black employees are disproportionately released from employment due to medical separation and probationary release. The statistics from departmental racial equity action plans provide proof that this is the case.[65]

[65] *See, e.g.*, SFMTA RACIAL EQUITY ACTION PLAN 40-42 (2020), https://bit.ly/2S5uLIG; S.F. PUB. UTIL. COMM'N RACIAL EQUITY ACTION PLAN 82-83 (2020), https://bit.ly/3gU9Kev; CITY OF S.F. DEP'T OF HUM. RES., CORRECTIVE ACTION AND DISCIPLINE BY RACE/ETHNICITY AND GENDER 4 (2019); *see also* SEIU 1021, ADDRESSING SYSTEMIC RACISM AT THE CITY & COUNTY OF SAN FRANCISCO 11 (2018), https://bit.ly/3uNu5WQ.

One factor contributing to probationary releases is a lack of proper training, mentorship, and investment from departments, managers, and supervisors for probationary employees. Many employees and department leaders reported that expectations for employees on probation are not clearly communicated. Additionally, employees working in probationary periods are not given the mentorship or training that they need to succeed. Rather, both employees and department leaders expressed the view that these employees are thrown into their jobs and expected to "sink or swim." As a result, employees make understandable, easily corrected mistakes that result in their release.

Black employees are also more frequently released for medical reasons. Of the 33 medical releases in 2020, Black employees accounted for 13 of them (39.39%).[66] This was consistent with historical data.[67] While it is difficult to definitively explain why Black employees face disproportionate rates of medical separations, it is a trend that warrants further monitoring.

Recommendation 18.1

DHR must review the current trends in probationary and medical releases to identify racial disparities. DHR should release on its Workforce Demographics page data showing the demographic composition of releases by type.

Recommendation 18.2

DHR and the City's departments must establish firmer standards and expectations for managers and supervisors with respect to training, mentoring, and releasing employees who are in probationary periods. In particular, supervisors and managers must receive more serious and comprehensive training about their responsibility for helping and ensuring the success of their new employees so that employees and department leaders no longer report a "sink or swim" mentality.

Finding 19

The City has recently created a number of new offices and positions to address racial equity and diversity, equity, and inclusion. The City must invest more resources in these bodies.

The City has recently made some positive steps in the direction of racial equity. For instance, the establishment of the Office of Racial Equity should help to keep City departments accountable when it comes to the City's commitment to racial equity. DHR and City departments have also invested in employees responsible for promoting diversity, equity, and inclusion. Such

[66] Data provided by DHR.
[67] SEIU 1021, ADDRESSING SYSTEMIC RACISM AT THE CITY & COUNTY OF SAN FRANCISCO (2018) at 11 (available at https://sfgov.legistar.com/View.ashx?M=F&ID=6812897&GUID=6651E032-980F-4CD9-A93A-E976D9160770) (showing that from 2014-2018 Black employees accounted for 38% of medical separations).

initiatives will hopefully help the City to continue identifying areas where improvement is needed and how to make such improvements a reality.

However, many of these departments and roles are currently understaffed. The Office of Racial Equity, for instance, has only two or three full-time employees. For a City with approximately 35,000 employees, it is unrealistic to expect these kinds of efforts to succeed without more investment.

Recommendation 19

The City should continue to identify areas where the Office of Racial Equity and diversity, equity, and inclusion personnel can play a key role and should expand the staff and resources for these initiatives.

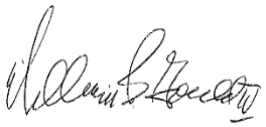
IV. Conclusion

The much-needed process of internal examination of equal employment opportunity has begun. Through considerable Black representation at the higher echelons of department heads and managerial staff, the City has clearly demonstrated that it can be done. Moreover, as noted above, the City has already undertaken diversity initiatives with the craft unions. It has shown that it can meet the moment in implementing Recommendation 13.1. This Independent Reviewer report is another step in the process.

The Independent Reviewer proposes to the Mayor and her staff that the Recommendations articulated be considered seriously and implemented. In essence, the proposals here and findings made in support of them lay out a road map for the future, one which will see San Francisco put its foot on the gas to eradicate past and present inequities so that Blacks are (1) drawn, once again, to this City and its opportunities and (2) are well represented throughout its entire workforce.

Now comes the hard part. The Independent Reviewer has proposed much to be done. Though W.E.B. DuBois saw the Twentieth Century as the century containing the "problem of the color line"[68], an issue hardly unique to the United States, San Francisco is confronted with the same challenge in different forms in the century which unfolds. This is that new "reckoning".

Respectfully submitted,



William B. Gould IV
Independent Reviewer
June 15, 2021

[68] W.E.B. Du Bois, *The Souls of Black Folk.* (1903)