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Boord v. Gonzales

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Boord v. Gonzales

Keywords

Boord, Gonzales, Attorney General, Department of Justice, 100-A1-7101X, Consent Decree, Disparate Impact, Hiring, Promotion, Other, Sex, Female, Employment Law, Title VII

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON FIELD OFFICE
1801 L Street, N.W., Suite 100
Washington, D.C. 20507

Patricia Boord,)	
)	
Class Agent,)	EEOC No. 100-A1-7101X
)	
v.)	Agency No. F-98-5242
)	
Alberto Gonzales,)	
Attorney General,)	
Department of Justice)	
)	
Respondent.)	

SETTLEMENT AGREEMENT

I. INTRODUCTION

In 1998, Patricia Boord filed an administrative class complaint of discrimination against the Department of Justice, Federal Bureau of Investigation (the “FBI” or “Agency”), alleging violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*

The Class Representative sought declaratory, injunctive and monetary relief on behalf of herself and the putative class of all otherwise qualified female professional Support staff at the GS-12 level and above, employed at FBI Headquarters and affiliated offices including Quantico, Newington and Clarksburg, who were rejected from or deterred from applying to managerial and administrative positions at the GS-14 or GS-15 levels requiring prior investigative experience. The complaint was forwarded to an acting Equal Employment Opportunity Commission (“EEOC”) Administrative Judge, and preliminarily certified as a class action. After a request from the Agency, the EEOC’s Office of Federal Operations denied reconsideration of the certification.

The parties voluntarily entered into mediation in 2001. Such initial mediation did not result in an executed settlement and the parties resumed litigation. The parties returned to mediation in late June 2005, following substantial discovery and exchange of expert reports, as well as issuance of a key order from the Commission refining the scope of their respective burdens on liability.

On July 26, 2005, in the spirit of compromise and desire for final resolution, the parties agreed to settle this matter.

In the absence of any admission of liability by the Agency, and in reliance on the representations, mutual promises, covenants, and obligations set out in this Settlement

Agreement, the Class and the Agency, through their undersigned Counsel of record, hereby stipulate and agree as follows:

II. GENERAL TERMS OF THE AGREEMENT

A. Definitions

For purposes of this Settlement Agreement and all exhibits, the terms in such documents shall have the meanings set forth below. All terms defined in the singular shall have the same meaning when used in the plural, and all terms defined in the plural shall have the same meaning when used in the singular.

1. Abuse of discretion means a failure to exercise sound, reasonable and legal discretion, indicating that there was a commission of error by the arbitrator. It does not imply bad faith or misconduct but means a conclusion that is against logic and effect of such facts as are presented at hearing, or an unjustified departure from considered precedents and settled judicial custom constituting an error of law.
2. ADR means alternative dispute resolution.
3. ADR Administrator means the entity and person mutually designated by the parties to effectuate and supervise administration of the mediation and arbitration phases of the Claims Process, including but not limited to oversight of all mediators and arbitrators.
4. Agency means the Department of Justice, Federal Bureau of Investigation (“FBI”).
5. Agency Counsel refers to designated attorney(s) from the FBI’s Office of the General Counsel.
6. Agent or Special Agent means an 1811 Series Law Enforcement Officer (“LEO”) under Office of Personnel Management (“OPM”) standards.
7. Basic Claim Form means the initial claim form served by Claimants on the Claims Administrator pursuant to Part IV.B.1 to initiate the Claims Process.
8. Claimant means any person who is eligible to make, and who has made, a claim in the Claims Process set forth in Part IV.
9. Claims Administrator means the person or entity mutually designated by the parties to provide notice to Class Members of the Settlement Agreement, related hearings and meetings, and initiation of the Claims Process, notice regarding request for review and forms, to receive service of Claim Forms and perform other administrative tasks in order to effectuate Phase I and part of Phase II of the Claims Process, including sending notice to Class Members of Claims Process

requirements and deadlines, and to assist the ADR Administrator with effectuating the remainder of Phase II and Phase III, if necessary.

10. Claims Process means the procedure for resolution of Eligible Claims as set forth in Part IV of this Agreement.
11. Class means all otherwise qualified female professional Support staff employed at any time from June 23, 1998 to Final Approval at FBI Headquarters and affiliated offices in the Washington, D.C. region (including Quantico and Newington in Virginia, and Clarksburg in West Virginia) at grades GS-12 and above, who applied, or were deterred from applying, for managerial and administrative positions at the GS-14 and GS-15 levels requiring prior investigative experience.
12. Class Representative refers to Patricia M. Boord.
13. Class Complaint refers to the formal administrative class complaint of discrimination filed by Patricia M. Boord on behalf of herself and all others similarly situated on September 25, 1998, as Agency Case No. F-98-5242, and pending before the EEOC, Washington Field Office, as EEOC Case No. 100-A1-7101X.
14. Class Claim means any individual Class Member or class-wide actual or potential sex discrimination claim, administrative charge, demand, grievance, complaint, right and cause of action of any kind, known or unknown, against the FBI for monetary, injunctive or equitable relief and/or for attorney's fees, arising from any events, acts, omissions, policies, practices, procedures, conditions or occurrences concerning non-promotion to, or application for, or deterrence from application to, managerial and administrative positions at the GS-14 and GS-15 levels with a requirement of prior investigative experience, from September 25, 1996 to Final Approval. This includes claims brought under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, or any other federal, state, or local statute, regulation, rule, order, ordinance or other authority of any nature prohibiting sex discrimination in employment, and brought in any arbitral, judicial or other forum.
15. Class Counsel refers to Maia Caplan and Jessica L. Parks of Kator Parks & Weiser, P.L.L.C., 1020 19th Street, N.W., Suite 350, Washington, D.C. 20036.
16. Class Member means any person fitting within the definition of the Class.
17. Comprehensive Claim Form means the second claim form served by a Claimant on the Claims Administrator in order to participate in the Claims Process, and which includes a list of the jobs from which a Claimant was rejected or deterred as set forth in Part IV.B.2.
18. Deterred Class Member or Claimant refers to Class Members meeting the criteria set forth in Part IV.A.3.a.

19. EEOC or Commission refers to the Equal Employment Opportunity Commission.
20. Effective Date means the first business day after the Settlement Agreement is finally approved by the presiding Administrative Judge and all appeals have been decided or the time for filing such appeals has expired.
21. Eligible Claim means all claims that meet the eligibility requirements for participating in the Claims Process set forth in Part IV.A.3 of the Settlement.
22. Fairness Hearing refers to a hearing by the presiding Administrative Judge to consider and determine whether to issue a final order and judgment approving the fairness, adequacy and reasonableness of the Settlement.
23. Final Approval refers to entry by the presiding Administrative Judge of the order granting final approval of the Settlement as fair, adequate and reasonable to the Class as a whole.
24. FBI Headquarters ("FBIHQ") refers to FBI Headquarters in Washington, D.C. and affiliated offices in the Washington, D.C. region, including Quantico and Newington in Virginia, and Clarksburg in West Virginia.
25. Law Enforcement Officer or LEO refers to a position satisfying the substantive prerequisites for LEO status wholly set forth in 5 C.F.R. § 842.802.
26. Neutral Expert refers to the expert jointly agreed on by the parties to conduct a review of Special Agent-only position designations at FBIHQ pursuant to Part III.B of the Agreement.
27. Mediation Representative refers to Maryvictoria Pyne.
28. Parties refers to the Class and the Agency, except that in Part IV, it refers to the FBI and respective Claimants.
29. Prior Investigative Experience refers to a requirement that an applicant to a position at FBIHQ be a Special Agent.
30. Settlement Agreement or Agreement means the proposed settlement embodied in this document, including all Exhibits annexed hereto.
31. Support refers to all employees at FBIHQ who are not Special Agents.
32. This Case refers to all proceedings relating to or arising from this Class Complaint, including, without limitation, any related informal administrative proceedings and settlement efforts that pre-dated the filing of this Class Complaint.

B. Jurisdiction

The parties agree that the Commission has jurisdiction over the parties and the subject matter of this action, including jurisdiction and authority to enforce the provisions of this Agreement and/or the Commission decision finally approving the Settlement Agreement and ordering the relief provided for therein, pursuant to 29 C.F.R. 1614 §§ 503 and 504. The Commission may enter all orders and judgments that may be necessary to implement and enforce the relief provided herein. The parties further agree that the United States District Court for the District of Columbia has jurisdiction over the parties and the subject matter of this action consistent with § 503, and may enter all orders and judgments that may be necessary to implement the decision of the Commission finally approving the Settlement Agreement and ordering the relief provided for herein.

C. Effective Date and Term of Agreement

This Agreement shall be effective and binding on the parties for four (4) years following the Effective Date, except that as provided in Part III.A.2 of this Agreement, if the injunctive relief provided for herein shall not be completed in a timely manner, including the review of the Neutral Expert in Part III.A.2 of the Agreement, the term of the Agreement shall be extended commensurately. At the close of the term, the Agreement shall expire and be without force and effect, except as noted below with respect to releases/bars and confidentiality provisions. The confidentiality provisions, releases and bars on claims shall survive expiration of the Agreement.

D. Definition of the Class for Settlement Purposes

The class is defined as “[a]ll otherwise qualified female professional support staff employed at any time from June 23, 1998 to Final Approval at FBI headquarters and affiliated offices in the Washington, D.C. region (including Quantico and Newington in Virginia and Clarksburg in West Virginia) at grades GS-12 and above who applied, or were deterred from applying, for managerial and administrative positions at the GS-14 and GS-15 levels requiring prior investigative experience.”

E. Release/ Bar of Claims

Except as otherwise provided for under the Claims Process in Part IV of this Agreement and the Fees provisions in Part IX, the provisions of this Agreement shall resolve finally and forever bar hereafter any and all Class Claims of the Class Representative and Class Members, which any of them, their representatives, agents, heirs, assigns, executors, administrators, or successors, may have, may have had, or in the future may have against the Agency, including any alleged continuing violations after Final Approval insofar as any claims arise from or relate to events that occurred prior to the Final Approval. The Class Representative and Class Members shall further be barred from submitting evidence concerning any Class Claim in any proceeding, other than the Claims Process under this Agreement, in support of any claim.

Inasmuch as the Claims Process set forth in Part IV of this Agreement provides the exclusive means of resolving Class Claims, any Class Member who fails to participate in the Claims Process shall forego any possibility of relief for such claims. The Settlement Agreement may be pled as a full and complete defense to any subsequent litigation, other than pursuant to the Claims Process, involving any person or party that arises out of the claims released and discharged here.

F. Denial of Liability

The parties enter into this Agreement voluntarily and agree that it does not constitute an admission concerning the merits of any position taken by any party to this litigation, nor of any liability by the Agency for the violation of any law, statute, regulation, or policy. Neither this Settlement Agreement nor any order approving the Agreement to resolve the Class Complaint is or shall be construed as an admission by the Agency of the truth of any allegation or the validity of any claim asserted in the Class Complaint, or of the Agency's liability therefore, nor as a concession or an admission of any fault or omission of any act or failure to act.

In the event that the Agreement is not finally approved, or the Agreement is deemed null and void, nothing herein shall be deemed to waive any of the Class's claims or the Agency's objections and defenses. In either event, the Agreement, all communications in furtherance of the resolution of the Class Complaint, and all communications made or submitted in connection with the Fairness Hearing, shall not be deemed or construed to be an admission by any party of any fact, matter, or proposition.

G. Computation of Time

In computing any period of time prescribed or allowed under this Settlement Agreement, the period of time shall be computed in terms of calendar days, unless otherwise noted.

H. Notice of Proposed Settlement and Fairness Hearing

Within thirty (30) days from the execution of this Settlement Agreement, or as soon as practicable thereafter, the Claims Administrator shall serve via certified mail, return receipt requested, a copy of the Notice of Proposed Settlement and Fairness Hearing, attached at Exhibit A, and the Settlement Agreement, to all known members of the Class.

As specified in the Notice of Proposed Settlement and Fairness Hearing, in advance of the Fairness Hearing, the parties shall hold informative sessions at each FBIHQ site, to present the terms of the Settlement to Class Members and answer questions. Agency Counsel may participate in a brief joint presentation to the Class at each session, followed by a private meeting in which Class Counsel shall communicate with the audience of Class Members exclusively.

I. Privacy Act

It is the understanding of Agency and Class Counsel that all reasonable discovery sought and information to be exchanged under the Claims Process and the Position Review process by the Neutral Expert set forth in Parts III.B and IV respectively, shall fall under the “Routine Use” exception to the Privacy Act. Given the materiality of discovery and information exchange to the Claims Process and to the review and monitoring of position designations, a pattern of determinations by a third party, or a determination by the Agency with respect to requests for information from the Neutral Expert, inhibiting access to information may, at the election of Class Counsel, nullify the Claims Process and/or the Position Review process rendering the Settlement void pursuant to Part XI of this Agreement. In the event of any challenge to its reliance on the Routine Use exception, the Agency shall expeditiously notify Class Counsel and use its best efforts to establish the exception’s applicability.

III. EQUITABLE RELIEF

A. General Provisions

1. Preamble

The purpose of these equitable measures is to ensure that both Agent and Support employees at FBIHQ occupy positions with appropriate classifications and that positions reserved for Agent employees be consistent with the legal standards for law enforcement officers. They are intended to benefit all FBIHQ employees by promoting fairness, consistency, and objectivity in the administration of employment practices.

2. Target Dates

The parties recognize the importance of timely implementation of the equitable relief provided under this Settlement Agreement. The schedule set forth in this Agreement is based on the parties’ current best estimates of the time required for such implementation. The Agency shall make good faith efforts to meet the schedule, and both parties shall impress on the Neutral Expert the need to meet the deadlines set forth herein.

The parties recognize, however, that notwithstanding the FBI's good faith efforts, it may become necessary to extend the implementation schedule for some elements of the equitable relief. The FBI agrees to provide reasonable advance notice to Class Counsel in the event that it is unable to meet an aspect of the implementation schedule, and the parties agree to cooperate in good faith in seeking to agree on necessary changes to the implementation schedule. If the parties are unable to reach agreement, and the extension contemplated by the FBI on any item, in conjunction with any prior extension for that item, exceeds thirty (30%) of the total time permitted under this Agreement for that item, Class Counsel may bring the matter to the EEOC's attention for resolution pursuant to Part VII of this Agreement. Any delay in meeting implementation target dates under this Agreement, whether the subject of an appeal or not, shall at a minimum automatically delay the expiration of the Agreement by the identical length of time, and Class Counsel shall be entitled to a commensurate pro rata increase in attorneys fees from the Agency for any work performed during the extension as set forth in Part IX.

B. Position Review

1. Background

The Class recognizes that the FBI is in the process of reviewing all Agent-only positions at FBIHQ with a view to ensuring the accuracy of Agent-only position designations and maximizing its personnel potential. The FBI expects to complete its review in September 2005.

2. Review by Joint Neutral Expert; Scope and Payment

The parties have agreed that Kathleen Lundquist of Applied Psychological Techniques shall serve as a "Neutral Expert" and conduct a review of the Agency's decisions for Agent-only positions at FBIHQ. Specifically, the joint Neutral Expert shall review the decisions: (1) reached by the FBI internal review panel on Special Agent position designations (hereafter "Agency review panel"), which review shall encompass all current Agent-only positions at FBIHQ; (2) on Agent-only positions or anticipated and/or announced positions brought to her attention by Class Members either directly or via Class Counsel; and (3) on positions that are announced or otherwise become available and/or are filled during the term of the Agreement. The Neutral Expert shall be entitled to review positions, individually or by grouping, as she deems appropriate and in any order that she deems appropriate. The Agency shall be responsible for paying the Neutral Expert's fees and expenses, and shall do so in a timely manner following submission of invoices as set forth in Part IX.

If Kathleen Lundquist should be unable or unwilling at any time to perform any of the functions delegated to her in this Agreement to include obtaining the necessary security clearances, or if Class Counsel and the Agency mutually agree to terminate the appointment of Kathleen Lundquist or any successor, they shall appoint a mutually agreed on replacement. In no event may the Neutral Expert be terminated

except by mutual agreement of Class Counsel and the Agency or by her voluntary resignation, except in the event that she materially breaches the terms of her service contract with the Agency by failing to fulfill her responsibilities for reasons other than the substantive outcome of her review.

3. Class Member Input

Within 15 days of the Effective Date, the Claims Administrator shall distribute to the Class Members a form describing the Neutral Expert's Position Review function, and a "Request for Review" form, to be devised by Class Counsel with the consent of the Agency, which agreement shall not be unreasonably withheld. The Request for Review form shall provide individual Class Members with a means for identifying to the Neutral Expert, with succinct explanation, Agent-only positions or impending positions that they believe are inappropriately classified. The Class Member may be aware of such position(s) through a variety of means including, but not limited to, a formal vacancy announcement, hands-on experience in their division, or informal notice that an Agent will be joining their work unit. Class Members may also provide supplemental documentation and/or be interviewed by the Neutral Expert.

In addition to the initial mailing, the Request for Review form shall be made available to Class Members throughout the term of the Agreement by way of website. Forms shall be timely if they are postmarked at least 30 days prior to expiration of the Agreement. Forms and identities of Class Members who filed the forms are presumed to be confidential and the Neutral Expert shall not share such form or identity with the FBI unless the Class Member expressly consents by checking the non-confidential box on the form. The Request for Review form shall contain contact information for Class Counsel in the event the Class Member does not believe the request was pursued or wishes to confirm pursuit.

4. Information to be Provided

- a. **Review of Panel Decisions.** Within 30 days of the Effective Date, the Agency shall make available to the Neutral Expert all documentation and records relating to its formal position review. In the event that the September deadline is not met and the internal agency review is ongoing, the Agency shall provide documentation for all completed reviews, and promptly forward or otherwise make available the remaining documentation as it becomes available. The Neutral Expert may request any additional information, *i.e.*, information not considered by the Agency panel, that she deems appropriate for the conduct of her review. The Agency shall provide responsive information within 15 days of any request by the Neutral Expert, which request shall be communicated in writing to Agency Counsel. The Neutral Expert may interview FBI personnel and may, where directly related to her mission, seek to communicate with other government personnel, former personnel, or contractors, in conjunction with her review.

- b. **Review of Positions Identified by Class Members.** The Neutral Expert shall be entitled to review Requests for Review and any supplemental information provided by Class Members in conjunction with her review of Agent-only positions. She may consult directly with Class Members, and interview other government personnel, former personnel, or contractors where directly related to her mission. She may also request additional information from the Agency, which shall be provided to the Neutral Expert within 15 days of her request if she deems it appropriate for the conduct of her review. Requests for additional information, if any, shall be communicated in writing by the Neutral Expert to Agency Counsel.
- c. **Review of Positions Announced and/or Filled Throughout Term of Agreement.** Within 5 days of the earliest of announcing, filling or in any manner creating and/or staffing any new Agent-only position at FBIHQ, the Agency shall forward to the Neutral Expert all documentation relating to its review and/or approval of the Agent-only designation. If she deems it appropriate for her review, the Expert may request any additional information, including, but not limited to, interviews with current personnel, other government personnel, former Agency personnel, or contractors, and the Agency shall make such information available to her within 15 days of the Request. Requests for additional information, if any, shall be communicated in writing by the Expert to Agency Counsel.
- d. All communications in this subpart B shall comply with all Agency procedures applicable to the proper communication, handling and safeguarding of classified information.

5. Standard for Review; Relevant Evidence

The standard of review for creating or maintaining Special Agent-only position designations is whether the position meets the substantive criteria wholly set forth in the law enforcement officer (LEO) retirement regulation at 5 C.F.R. § 842.802 (2005) (*e.g.*, the position's primary duties are the direct supervision of law enforcement officers involved in a primary law enforcement position or the position is administrative, that is, an executive, managerial, technical, semiprofessional, or professional position for which experience in a primary law enforcement position is a mandatory prerequisite). All such decisions shall be made on the basis of actual duties performed.

6. Timetables, Joint Meetings and Periodic Reports

Within 30 days of receiving the Agency review panel materials, the Neutral Expert shall have commenced her review and provided the parties with her initial strategy, with timetables, for reviewing panel determinations. Such initial strategy is subject to change if the Neutral Expert determines that amendment of the plan is advisable to the success of her function and provides prompt notice of any substantial changes to Class Counsel and the Agency. It is anticipated that the Neutral Expert shall

complete her review of the Agency review panel's decisions within nine (9) months of the Effective Date. Her work with respect to new positions or impending positions, or with respect to Class Member Requests for Review shall be ongoing throughout the term of the Agreement and completed in a prompt manner.

The Expert shall meet jointly with Class Counsel and Agency Counsel on a monthly basis throughout her review of the Agency review panel decisions, and on a quarterly basis throughout the remainder of the Agreement's term. The parties and the Neutral Expert shall attempt in good faith to schedule mutually agreeable times. In the event the parties are unable to do so, however, the default date for any month shall be the first Tuesday at 10 a.m. at FBI DC Headquarters facility.

At least one week in advance of each monthly meeting, the Neutral Expert shall serve Class Counsel and the Agency Counsel with a report of her work since the prior report and a comprehensive description of her findings including, but not limited to, a listing of position designations reviewed and designations deemed to be improper and/or questionable. Such reports shall also include a running table of positions reviewed to date and whether such designations were deemed appropriate or not, as well as a table of known positions yet to be reviewed. Such report shall be handled as confidential within the Agency, with persons apprised of particular position reviews and/or decisions emanating from a Request for Review only on a need-to-know basis and only in the event a position must be redesignated.

Except for the contracting process, Class Counsel shall be entitled to participate in any communications between the Neutral Expert and the Agency and, the Agency shall be entitled to participate in any communications between the Neutral expert and Class Counsel. If Class Counsel is absent from any such communication because of unavailability or otherwise, the Neutral Expert shall accurately summarize the content of such communication for Class Counsel within 48 hours thereafter, and the same with respect to the Agency. Class Counsel shall be entitled on request to the Neutral Expert to review all records provided to the Neutral Expert by the Agency.

7. Disagreement as to Designations

- a. In the event that the Neutral Expert disagrees with the conclusion of the Agency review panel on a position designation and/or otherwise determines that a position designation or proposed Special Agent position designation is not or may not be proper under the LEO standard set forth in subpart 5 above, she shall so notify Class Counsel and the Agency in writing promptly (in no case later than the following joint meeting) and provide an explanation. If Class Counsel believes the position designation is improper, she is entitled to petition the Director. A final decision on any individual position designation shall be made by the Director pursuant to the LEO standard set forth in subpart 5 within forty-five (45) days of receiving a petition from Class Counsel. Such decision may not be delegated.

- b. Nothing in the foregoing precludes Class Counsel from challenging under the Enforcement Provisions of this Agreement a pattern of position designations that the Class contends are erroneous under subpart 5 above.

8. Conversion of Improperly Designated Positions

If a position is converted to a non-Agent position as determined by the Agency review panel or pursuant to the process above, such conversion will occur within 120 days of the decision to convert or the Effective Date, whichever is later. Further, within one year from the date of decision to convert or the Effective Date, whichever is later, the converted position will be designated a professional Support position. Should the Agent incumbent elect not to vacate the converted position at the end of the one-year period, the Agent incumbent will not accrue any further creditable time toward the Agent's LEO retirement or be entitled to availability pay for service in the converted position. Nothing in the foregoing prevents the Agency from detailing Agent or professional support personnel on a temporary basis to an assignment in those offices where conversions have occurred to ensure that the essential mission and functions of the FBI continues to be accomplished while any outstanding administrative tasks prerequisite to installing a Support selectee are completed.

C. Non-Retaliation

1. Primary Objective

The parties agree to the following measures in order to ensure to the extent reasonably possible that Class Members and other employees are not retaliated against for their activities relating to this Settlement and litigation.

2. Director's Memorandum

No later than five (5) days after the Effective Date, the Director of the FBI shall issue and commence enforcing the Director's Memorandum, attached hereto as Exhibit B, which notifies FBIHQ supervisors and managers of the Director's support for the Settlement and of his zero tolerance policy on retaliation against employees for their participation in reasonable activities related to the Settlement and litigation.

3. Review of Promotions and Selections

For all competitive Support selections to GS-14 and GS-15 positions at FBIHQ, the selecting Division shall forward the selectee's name to the Assistant Director, Administrative Services Division (AD-ASD). The AD-ASD shall complete a check of FBI records for any pending or past disciplinary action against or investigation(s) of the selectee for alleged equal employment opportunity violations during the past thirty-six (36) months, or a longer period if the Agency determines it relevant. If the selectee has such a record, the AD-ASD shall consult with the Office of the General Counsel, and thereafter make an assessment independent of the selecting Division as to whether it will impact on the ability of the selectee to perform the duties of the job

for which the employee was selected. The AD-ASD may reject any candidate on the foregoing basis. In the event that the AD-ASD rejects a selectee on this basis, she shall notify the Division Career Board and advise it to select another candidate from the vacancy package. Similar provisions already exist governing Special Agent promotions and shall continue in force for the term of this Agreement.

4. Access to Class Counsel

The Notice of Final Approval and the Basic and the Comprehensive Claim Forms shall carry a notice, and Agency EEO personnel shall promptly advise those with relevant inquiries, that Class Members who believe they have been retaliated against for activities relating to the Settlement and litigation, including participation in the Review Process or the Claims Process, may, in addition to their statutory protections and processes, contact Class Counsel for advice and that such advice and possible representation may be supplied at no cost to the Class Member.

The Agency shall pay to Class Counsel the fees for such consultation and subsequent representation provided that the annual limit on the attorneys fees set forth in Part IX has not been exceeded, and for fees up to the point the Class Member files a formal complaint, if any, with the Agency's EEO office. If the Class Member files a formal complaint, the Class Member may be entitled to recover attorney fees from the Agency as provided by law for services performed post-official complaint filing if she prevails on the complaint. Nothing in the foregoing is intended to abridge Class Counsel's right to decline representation on any claim at her discretion, or to discontinue representation consistent with ethical obligations.

IV. INDIVIDUAL CLAIMS PROCESS

A. General Provisions

1. Purpose to Establish Exclusive Resolution Process

The Class and the Agency agree to establish and implement a Claims Process ("CP") as the exclusive means for resolving Eligible Claims by individual Class Members for monetary and job relief. Only Eligible Claims, and no other claims, may be resolved through the CP. Any Eligible Claim not submitted for resolution through the CP within the time limitation and substantially in the manner and form provided in this Part shall be fully and irrevocably discharged and released and may not be maintained in any other forum of whatsoever kind or nature.

2. No Bar to Class Resolution

Nothing in the CP is intended to preclude the Class and the Agency from settling at any time all Class Claims for monetary and job relief in a global fashion pursuant to the procedures set forth in 29 C.F.R. § 1614.204.

3. Eligible Claims and Limitations on Individual Participation

a. Generally

Claims eligible for participation in the CP are limited to claims of Class Members concerning (1) a GS-14 or GS-15 job at Headquarters, Quantico, Newington or Clarksburg (2) between June 24, 1996 and Final Approval (3) that the Claimant was either rejected from or deterred from applying to (4) because such job had a requirement of prior investigative experience (Special Agent status), and (5) the Claimant was otherwise qualified to apply for the job, *i.e.*, she achieved a “meets expectations” or equivalent performance level for the preceding year, had adequate time in grade, and was of a sufficient grade level. For purposes of the CP, “deterred” means that a Claimant was deterred or discouraged from applying for a job because she believed that given the prior investigative requirement, it would be futile or pointless to apply. It is not necessary that she had a specific job in mind at the time; she could have been deterred from applying to all jobs with a prior investigative experience requirement (Special Agent status). If the latter is the case, she may determine in hindsight which specific jobs she was qualified for and to which she would have applied.

b. Prior Determinations

Claims for which a final decision on the merits has been rendered by an EEOC Administrative Judge, the Department of Justice Complaint Adjudication Office, or any court, quasi-judicial or administrative body, or claims that are the subject of a valid settlement, are not Eligible Claims and may not be pursued in the CP.

4. Limitations on Relief

Relief under the CP includes relief available under Title VII, 42 U.S.C. § 2000e *et seq.* and the Civil Rights Act of 1991, 42 U.S.C. § 1981a *et seq.*, including promotion, placement in a position, back pay, including lost overtime, if any, front pay, interest, compensatory damages and attorney fees.

5. Appointment and Payment of Administrators and Other CP Professionals

a. The Claims Administrator

The Claims Administrator shall be a person or entity mutually designated by the Class Counsel and the Agency to perform administrative tasks necessary to effectuate Phase I and part of Phase II of the CP (in addition to those duties set forth in Part II.H of this Agreement governing notice). Its responsibilities in the CP shall include, but are not limited to, distributing to Class Members the Notice of Final Approval of the Settlement, Effective Date of Settlement, and Initiation of the Claims Process, Basic Claim Form and the Comprehensive Claim Form, and other notices relating to CP requirements and/or processes. It shall also collect and preliminarily process claims and data from Claimants, thereafter forwarding them to Class Counsel, the Agency, and the ADR Administrator, as well as notifying the ADR Administrator of late claims, as specified in subparts B 1 & 2 below. As necessary, the Claims Administrator also shall assist the ADR Administrator with administrative functions relating to the remainder of Phase II and Phase III of the CP.

Class Counsel and the Agency have agreed to appoint Poorman-Douglas Corporation (“PDC”) to serve as the Claims Administrator. If PDC should be unable or unwilling at any time to perform any of the functions delegated to it, or if Class Counsel and the Agency mutually agree to terminate the appointment of PDC or any successor, they shall appoint a mutually agreed on replacement. In no event may the Claims Administrator be terminated except by mutual agreement of Class Counsel and the Agency or its voluntary resignation, except in the event that the Administrator materially breaches the terms of its service contract with the Agency by failing to fulfill its responsibilities for reasons unrelated to the substantive outcome of claims. The Agency shall be responsible for paying all reasonable fees and expenses of the Claims Administrator, whether relating to the CP or notice responsibilities generally.

b. The ADR Administrator

The ADR Administrator shall be the person or entity responsible for effectuating Phase II, Part IV.B.2.d forward, and Phase III, of the CP. The ADR Administrator’s responsibilities shall include, but are not limited to, selecting, coordinating, supervising and contracting with mediators and arbitrators, subject to Class Counsel and the Agency’s review as set forth in subpart c below, and the scheduling and oversight of all mediations and hearings. The ADR Administrator shall also pay the mediators and arbitrators’ fees and expenses, and bill the Agency for reimbursement thereof. Finally, the ADR Administrator shall be responsible for ruling on any arbitration appeals, as well as rendering decisions on the eligibility of untimely claims.

Class Counsel and the Agency have agreed to appoint Michael Lewis of JAMS to serve as the ADR Administrator. If Michael Lewis should be unable or unwilling

at any time to perform any of the functions delegated to him, or if Class Counsel and the Agency mutually agree to terminate the appointment of Michael Lewis or any successor, they shall appoint a mutually agreed on replacement. In no event may the ADR Administrator be terminated except by mutual agreement of Class Counsel and the Agency or his voluntary resignation, except in the event that the Administrator materially breaches the terms of his service contract with the Agency by failing to fulfill his responsibilities for reasons unrelated to the substantive outcome of claims. The Agency shall be responsible for paying all reasonable fees and expenses of the ADR Administrator.

c. Mediators and Arbitrators

The ADR Administrator shall recommend to Class Counsel and the Agency individuals for participation in a pool of mediators and of arbitrators, from which the Administrator can make case assignments. Only mediators and arbitrators approved by both Class Counsel and the Agency may join the respective neutral pools, although approval may not be unreasonably withheld. Thereafter, they may only be removed by mutual agreement of Class Counsel and the Agency, or by the ADR Administrator if he deems it appropriate, unless by voluntary resignation. A neutral may be a member of both pools, however, in no case shall a neutral arbitrate a case with which he/she had any prior mediation involvement. Arbitrators must possess a law degree. Except for travel expenses, fees and expenses of mediators and arbitrators are considered a legitimate contract expense incurred pursuant to the Agency's contract with the ADR administrator and shall be paid by the Agency as such.

In the event that Class Counsel and the Agency cannot agree on a pool of mediators and/or arbitrators notwithstanding the recommendations of the ADR Administrator, either party may pursue the Enforcement Provisions set forth at Part VII on the basis that the withholding of approval is unreasonable.

6. Confidentiality

Negotiation and mediation communications made during either Phase I or II of the CP, including mediation statements, and information contained on the Basic Claim Form, are not admissible in Phase III arbitration hearings for any purpose.

7. Modifications to CP Procedures

Class Counsel and the Agency shall have the right to modify globally the CP procedures and rules, including but not limited to time limitations, by mutual written agreement. The parties in any individual proceeding under the CP shall have the right to modify the procedures and rules for that individual proceeding by mutual written agreement.

8. Representation and Class Counsel Receipt of Decisions

Claimants are entitled to legal representation in the Claims Process. As set forth in Part IX, the Agency shall pay fees to Class Counsel to represent Claimants during the initial claims processing, negotiation and mediation phases of the CP. With respect to Phase III arbitration hearings, Counsel shall seek fees on behalf of Claimants they represent. If a Claimant settles or prevails at any stage in the CP, a portion of the award may also go to Class Counsel pursuant to the terms of Counsel's contingency retainer. A Claimant may make her own arrangements to retain alternate counsel, or represent herself, and in the former instance, shall be entitled to fees from the Agency commensurate with those authorized for Class Counsel. Claimants shall make their election of representation on the Comprehensive Claim Form, described in Part IV.B.2 below. Nothing in the foregoing is intended to abridge Class Counsels' right to decline representation on any claim at its discretion, or to discontinue representation consistent with its ethical obligations.

Class Counsel, whether or not serving as counsel to a particular Claimant, shall receive a copy of any settlement or order in the CP. In the event of a settlement, the Agency shall serve a copy of the agreement on Class Counsel (as well as the ADR Administrator) within five (5) days of settlement. In the event of an arbitration decision and order, the arbitrator shall serve Class Counsel in the same manner that it serves the parties to the arbitration.

B. Procedures for Filing a Claim

1. Phase I of the CP

a. Notice of Final Approval and Initiation of CP, and Service of the Basic Claim Form

Within fifteen (15) days of the Effective Date, or as promptly thereafter as practicable, the Claims Administrator shall send each Class Member, by certified mail return receipt requested, the Notice of Final Approval of Settlement, Effective Date of Settlement, and Initiation of the Claims Process ("Notice of CP"), and the Basic Claim Form, attached hereto as Exhibits C and D, respectively.

The Notice of CP shall specify dates and times for meetings to be held on-site at FBI DC Headquarters facility, and also Clarksburg, Newington and Quantico, to explain the CP to Class Members. Only Class Members shall be permitted to attend. Both Agency Counsel and Class Counsel may be present at a joint presentation. Class Counsel shall also have substantial opportunity at such sessions to meet independently with Class Members. Class and Agency Counsel shall agree to a schedule of such meetings no later than five (5) days following the Effective Date, such agreement not to be unreasonably withheld. The meetings shall be held no later than thirty-five (35) days following the Effective Date.

b. Access to Former Vacancy Announcements

Contemporaneous with serving the Notice of CP, the Agency shall provide the Class and Class Counsel with access to position vacancy announcements, or position descriptions in the event of no vacancy announcement, for all FBIHQ managerial and administrative positions at the GS-14 and GS-15 levels that were filled with Special Agents at any time from June 24, 1996 to Final Approval. Access shall be through a secured Internet site (indicated in the Notice of CP) and in a readily searchable format (so that a Claimant may conduct key word searches across the entire body of announcements). Class Counsel shall have the ability to download all data from this site. The position database shall include fields agreed to by both counsel bearing in mind the beneficial functioning of the Claims Process, such agreement not to be unreasonably withheld. Special arrangements shall be made for any Class Member demonstrating an inability to access the Internet or need for reasonable accommodation.

c. Filing of the Basic Claim Form

Within fifty (50) days from receipt of the Notice of Final Approval and Initiation of the Claims Process, any Class Member who wishes to participate in the CP must postmark and mail the Basic Claim Form to the Claims Administrator at the address set forth on the Claim Form. A Class member is deemed to have received such Notice if a member of her household or a designated agent receives it.

d. Processing of Basic Claim Forms by the Claims Administrator

Within fifteen (15) days following receipt of timely Basic Claim Forms, the Claims Administrator shall distribute copies of all Claim Forms to Class Counsel, Agency Counsel, and to the ADR Administrator, along with a database collectively summarizing the encompassed information, including but not limited to name, Social Security Number, contact information, and dates of employment. Agency Counsel shall handle the individual forms in a confidential manner. In addition to hard copy, the claim forms and database shall be made accessible by the Administrator to counsel online via a secure website. The Claims Administrator shall consult with counsel and include in the database all fields reasonably deemed advisable by counsel for beneficial operation of the Claims Process. Communications from Agency Counsel on the identity of Class Members filing Basic Claim Forms, including sharing of identifying information in the electronic database, shall be restricted to those FBI personnel who in the determination of Agency Counsel are necessary to implement these provisions and they too shall be so advised and restricted. There is a presumption that it is not necessary to share the identity of actual claimants.

Copies of any late Claim Forms shall be expeditiously forwarded to the ADR Administrator, as well as Class Counsel and Agency Counsel. The Claims Administrator shall maintain a separate database of late claims and forward this to the ADR Administrator, who shall update and redistribute the claims database after rendering “untimely” determinations per subpart e below.

The substantive content of the Basic Claim Form shall not be reviewed by the ADR Administrator, or any mediators or arbitrators with whom it has contracted, for purposes of a merits determination in the arbitration phase of the CP.

e. Determinations on Untimely Claim Forms

Failure to file either the Basic Claim Form, or Comprehensive Claim Form as described in subpart 2 below, within the time periods prescribed in this Part waives the Claimant's right to participate in the CP, absent a showing of good cause.

A showing of good cause requires the Claimant to provide evidence that, despite due diligence, she was prevented by circumstances beyond her control from timely filing a claim. Such evidence may include delayed receipt of the relevant notice, proof of incapacitation by illness, or unavailability due to military service.

Following notice from the Claims Administrator of a late claim, the ADR Administrator shall expeditiously contact the Claimant through Class Counsel, or if they have elected alternate representation, their counsel, to request information relevant to establishing good cause. The ADR Administrator shall set reasonable deadlines for such submissions according to the circumstances, bearing in mind efficiency as a key principle of the CP. Following receipt of such information, the ADR Administrator shall promptly render a brief decision as to whether good cause has been shown, and forward it to the Claimant, Class Counsel, other counsel if relevant, and Agency Counsel. Such decision shall be final.

f. Notice and Mailing of Comprehensive Claim Form

Within twenty (20) days of receipt of the Basic Claim Forms, the Claims Administrator shall send to all Class Members who filed a Basic Claim Form, via certified mail return receipt requested, the Comprehensive Claim Form, attached hereto as Exhibit E, with instructions for filing.

g. Period for Global Resolution

Following receipt from the Claims Administrator of the Basic Claim Forms and database, Class Counsel and the Agency shall have forty-five (45) days to discuss global resolution of the Eligible Claims, and may if mutually agreed involve a mediator.

If the Class and the Agency reach a global resolution, they shall pursue final approval from the EEOC of such class settlement pursuant to 29 C.F.R. § 1614.204. In the absence of a global settlement, all claims shall proceed to Phase II of the CP.

2. Phase II of the CP

a. Filing of the Comprehensive Claim Form

Within sixty (60) days of its receipt, a Claimant must mail (and have postmarked) the Comprehensive Claim Form to the Claims Administrator at the address set forth on the Form. The Claimant shall include, if practicable, information on specific position(s) that she believes she was rejected from or deterred from applying to because of a prior investigative experience requirement. The Claimant shall also indicate her representation election on the Form, that is, whether she wishes to be represented by Class Counsel, make her own arrangements for alternate representation, or proceed *pro se*. If she intends to proceed with alternate counsel, such counsel must then promptly enter her or his appearance with the ADR Administrator at the address provided on the Comprehensive Claim Form. Class Counsel, if selected, shall not have to formally enter an appearance. Class Counsel may assist Class Members in completing the forms.

Receipt of the Comprehensive Claims Form and late claims shall be defined and handled in the same manner as Basic Claim Forms, and as set forth in subparts B.1 c & e above, except that communications about the identity of Class Members filing Comprehensive Claim Forms may be shared with personnel as necessary to carry out the CP. Such personnel shall be advised by Agency Counsel as to the sensitivity of the information and the non-retaliation provisions of this Agreement and Title VII.

b. Processing of the Comprehensive Claim Forms by the Claims Administrator

Within fifteen (15) days following receipt of timely Comprehensive Claim Forms, the Claims Administrator shall distribute copies of all Forms to Class Counsel, Agency Counsel, and to the ADR Administrator, along with a database collectively summarizing the encompassed information as well as that relating to the Basic Claim Form (using the ADR Administrator's updated Basic Claim Form database encompassing determinations on late claims). As set forth above, such database shall be accessible in an online format.

Copies of any late Claim Forms shall be expeditiously forwarded to the ADR Administrator, as well as Class Counsel and Agency Counsel. The ADR Administrator shall update the database following and indicating determinations on late claims, and any entry of appearance for counsel, and shall distribute such updated databases to Class and Agency Counsel, as well as the Claims Administrator.

c. Staggered Processing of Claims through Remainder of CP

In order to handle claims in the most efficient manner, they shall be processed in groups of approximately twenty-five (25) throughout the remaining stages of the CP—that is, information exchange, negotiation, mediation (collectively the remainder of Phase II) and arbitration (Phase III).

Within twenty (20) days of receipt of the Comprehensive Claim Forms and database from the Claims Administrator, Class Counsel, in consultation with the Agency and the ADR Administrator, shall assign claims into groups for processing, and in conjunction with Agency Counsel, shall set a schedule for completion of each remaining stage. The groups shall proceed sequentially through the stages: as one group concludes stage one and proceeds to stage two, the following group shall commence stage one, etc. Information exchange and negotiation shall jointly constitute the first stage, mediation the second, and arbitration the third.

Class and Agency Counsel shall use their best efforts to schedule the processing of claims as promptly as practicable. If they are unable to reach agreement, following consultation with Counsel, the ADR Administrator may set target dates for processing.

The ADR Administrator, with the assistance of the Claims Administrator if needed, shall be responsible for notifying each Claimant of their respective schedules and impending deadlines sufficiently in advance for them to prepare and meet CP requirements. Group one shall be given at least fifteen (15) days notice prior to their entry into stage one.

d. Exchange of Information

No later than thirty (30) days following commencement of stage one, the Claimant and the FBI shall exchange information relating to the claims. The FBI shall produce the selection packages for positions identified in the individual claims, including vacancy announcements, application forms of all who applied, selectee information including but not limited to earnings data, identification of all individuals involved in the decision making process, written summaries of Career Board deliberations, written summaries of Special Agent Mid-level Management Selection (“SAMMS”) Board deliberations, and a notice if the decision was at the Director’s level. In the event there is no selection package for a challenged position that was filled with a Special Agent, the Agency shall produce relevant documentation on the personnel action. The Claimant shall provide information relevant to Class membership, qualifications, availability for selection, interest, and deterrence.

e. Negotiation

For a period of thirty (30) days following the exchange, the parties shall attempt to resolve claims informally by negotiation. The FBI has the discretion to make a written offer to a Claimant, who has thirty (30) days from receipt to accept or reject it. No settlement communications, including any written offers, may be introduced into evidence at the arbitration hearing should a claim not resolve prior to that point. Within five (5) days of any settlement, the Agency shall forward a copy of the agreement to the ADR Administrator (and to Class Counsel if alternate counsel represented the Claimant).

f. Mediation

All claims not resolved through negotiation shall proceed to individual mediations. Mediation shall transpire over a period of ninety (90) days, during which the parties shall meet to discuss resolution with a neutral mediator appointed from the pool of mediators by the ADR Administrator. Mediation sessions for each group shall begin within thirty (30) days of completion of the negotiation stage. All sessions shall take place in Washington, D.C. There may be more than one session on any given claim. The parties shall make good faith efforts to resolve claims.

At least five (5) days prior to their mediation session, the parties shall submit a statement of position to the mediator and opposing counsel, not to exceed ten (10) pages in length double-spaced with one-inch margins, exclusive of exhibits. Either party may additionally provide information on its negotiating position confidentially to the mediator. While no discovery is mandated, the parties may voluntarily supply additional information to facilitate the mediation.

All parties to the mediation are covered by the confidentiality provisions set forth in Part VIII of this Agreement, and additionally shall be required to execute a mediation confidentiality agreement consistent with Exhibit F on entry into the mediation stage (prior to exchange of the mediation statements). No mediation communication, including the mediation statement, may be disclosed or introduced at an arbitration hearing, or in any other tribunal, if the claim is not resolved in mediation. The ADR Administrator shall serve and collect executed mediation confidentiality statements in advance of the information exchange deadline.

3. Phase III of the CP - Arbitration

a. Assignment of Arbitrator

Following completion of mediation, all claims not previously resolved shall enter arbitration in conjunction with other unresolved claims, if any, from their group. The ADR Administrator shall appoint an arbitrator from the pool of arbitrators. The parties shall sign an individual arbitration agreement, in the form attached hereto as Exhibit G, prior to commencement of the arbitration process.

b. Scheduling Hearing

Following consultation with and agreement of the parties, not to be unreasonably withheld, the arbitrator shall set a hearing date, with the intent that the arbitration be completed within one hundred (100) days following commencement of Phase III processing. Postponement of an arbitration may be stipulated by the parties, or failing a stipulation, may be ordered by the arbitrator where the requesting party demonstrates that circumstances beyond her control make proceeding with the arbitration as scheduled unduly burdensome.

Claims for arbitration may be consolidated for hearing if they involve common positions, witnesses, claims for relief, or the parties otherwise agree that consolidation would be efficient. In the event that the parties disagree regarding consolidation, the ADR Administrator shall have authority to order consolidation if such order would foster efficient resolution of the claims.

c. Exchange of Statement of Claim and Witness Lists

Within thirty (30) days following initiation of the arbitration stage, the Claimant shall provide to the arbitrator and Agency Counsel a: statement of the claim and relief requested; list of witnesses with a summary of expected testimony and facts to be established by each; and a list of trial exhibits, except for demonstrative aids. Within 15 (fifteen) days of receipt thereof, the Agency shall provide to the arbitrator and Claimant a: statement of defenses; list of trial exhibits; and list of witnesses with a summary of expected testimony and facts to be established by each. Except for good cause shown, trial exhibits shall be limited to information previously exchanged pursuant to subpart B.2.d above.

d. Discovery

Within thirty (30) days following the completion of the exchange under subpart c above, the parties may conduct depositions. Each party may conduct up to a maximum of three depositions per job claim, with each deposition not to exceed three hours in length. Additional discovery, and extensions, may be permitted at the discretion of the arbitrator. Disputes concerning discovery, if any, shall be resolved by the arbitrator.

e. Pre-Hearing Submissions and Conference

Following discovery, and at least twenty-one (21) days prior to the hearing, the parties shall provide to the arbitrator and opposing party a statement of law. Only on a showing of good cause may a party make additions at this stage to the witness or exhibit lists previously exchanged pursuant to subpart c above. Neither party may submit dispositive motions.

At least fourteen (14) days before the hearing, the arbitrator shall hold a pre-hearing conference with the parties to approve witnesses and decide any matters that are outstanding before the hearing.

f. Conduct of Hearing, Governing Law, Evidentiary Standards, and Witnesses

The assigned arbitrator shall have the authority to regulate the conduct of the hearing, limit the number of witnesses where testimony would be repetitious or irrelevant, and receive into evidence that which is relevant and probative consistent with the terms of this Part.

Each party shall be responsible for ensuring attendance of its witnesses, except that the Agency shall provide for the attendance at the hearing of all employee-witnesses approved by the arbitrator. Witnesses may be examined by telephone, on a showing that the witness is unavailable for live testimony or that attendance at the hearing would create extreme hardship or undue expense as determined by the arbitrator. At least fifteen (15) days before hearing, barring extenuating circumstances, a party expecting to use telephone testimony shall notify the other party and the arbitrator that such testimony will be necessary.

With respect to evidence for purposes of compensatory damages, a Claimant who carries her initial burden of proof under subpart J may be awarded compensatory damages even if other forms of relief are denied.

g. Length of Hearing

Hearings on individual claims shall be limited to two days. For good cause, the arbitrator has the discretion to extend the hearing, including for complex hearings in which a Claimant challenges numerous positions. Each party shall be allotted seven hours in which to present its case and offer argument, rebuttal, and objections. Where multiple position challenges are consolidated in a single hearing, the arbitrator shall determine the time allotted to the proceeding, consistent with the intent of the parties that these proceedings foster the efficient resolution of claims.

h. Hearing Record

The hearing shall be recorded on audiotape. All documents submitted to and accepted by the arbitrator shall be made part of the record of the hearing, to be maintained by the ADR Administrator pending completion of the CP process.

i. Post-Hearing Briefs

The arbitrator may at her discretion direct the filing of post-hearing briefs. However, in any hearing in which the Claimant seeks more than \$100,000 in relief, any party shall have the right to submit a post-hearing brief. Any post-hearing brief shall not exceed ten (10) pages in length and must be filed no later

than ten (10) days after the hearing. Filing should be simultaneous by the parties. Either party may file one rebuttal brief, not to exceed five pages single-spaced with one-inch margins, within five days after filing of the first brief.

j. Burdens of Proof

The Claimant shall have the initial burden of proving by a preponderance of the evidence that: she is a class member; she has been affected by the policy of limiting certain GS-14 and GS-15 jobs to persons with Special Agent status; she would have applied for an affected position but for the Special Agent requirement (or was deterred from applying for an affected position because of the requirement); and she was qualified to apply for a position in the absence of the Special Agent requirement. Alternatively to demonstrating that she would have applied, she may show that she applied and was rejected. If the Claimant establishes her initial burden, the burden shifts to the FBI to prove, by clear and convincing evidence, that the job in issue was properly designated as a law enforcement officer position because it satisfied the substantive prerequisites wholly set forth at 5 C.F.R. § 842.802 (*i.e.*, the position's primary duties are the direct supervision of law enforcement officers involved in a primary law enforcement position or the position is administrative, that is, an executive, managerial, technical, semiprofessional, or professional position for which experience in a primary law enforcement position is a mandatory prerequisite for carrying out the duties of the job). Such showing must be made on the basis of actual duties performed. If this is not shown, the burden remains with the FBI to prove, by clear and convincing evidence, that Claimant would not have been selected.

k. Decision

The arbitrator shall issue a written decision within thirty (30) days after completion of the hearing. The decision shall set forth the evidence considered and provide a sufficiently detailed statement of the reasons for the conclusion. The arbitrator's decision shall be final and binding except in the case of appeals pursuant to subpart m below, in which case the ADR Administrator's decision shall be final and binding. The decision shall notify all parties of the procedures and standards for an appeal.

l. Implementation of the Arbitrator's Decision

The Agency shall have forty-five (45) days from receipt of the arbitrator's decision to implement an award of monetary relief. Should placement in a position be ordered as relief, placement shall be implemented as soon as the position sought, or a comparable position, is available.

m. Appeal

Within thirty (30) days of receiving the Arbitrator's decision, either party may appeal the decision to the ADR Administrator by mailing (with timely postmark) a written notice specifying grounds for the appeal to the ADR Administrator and the other party at the addresses set forth in the Arbitrator's decision. Such appeal shall be adjudicated pursuant to the abuse of discretion standard. The appellant shall be responsible for the cost of transcribing the audiotape, and for submission of the transcript and the audiotape to the Administrator and opposing party within twenty (20) days of serving the appeal notice. If the ADR Administrator determines that the appeal is frivolous, he has the discretion to assess costs against the appellant. In the event of an appeal, all orders of relief shall be stayed pending the appeal's resolution. The ADR Administrator's decision shall be final and binding.

V. CLASS REPRESENTATIVE AND MEDIATION REPRESENTATIVE AWARDS

In recognition of their special service to the Class, the Class Representative and Mediation Representative shall, without having to pursue claims in the Claims Process, each receive an award consisting of back pay (50%), interest (25%), and compensatory damages (25%) as follows. Class Representative Patricia Boord shall receive One Hundred Fifty Thousand Dollars (\$150,000.00). Mediation Representative Maryvictoria Pyne shall receive One Hundred Thousand Thirty Dollars (\$130,000.00) and a full promotion to the GS-15 level, retroactive five years. The Agency shall make such payments, less lawful deductions, to the Class Representative and Mediation Representative within thirty (30) days of the Effective Date, and in the latter case, shall implement the promotion within forty-five (45) days of the Effective Date. Such awards shall constitute complete relief for the Class Representative and Mediation Representative, and neither shall thereafter be eligible to participate in the Claims Process or is otherwise entitled to receive back pay or compensatory damages.

VI. MONITORING

A. Monitoring

1. Provision of Documents and Information

The Agency shall provide directly to Class Counsel prompt notice of the Agency review panel's decisions and decisions by the Director pursuant to Part III.B.7, if any.

Additionally, the Agency shall make available to Class Counsel on request all documents and information reasonably necessary to ensure compliance with the Agreement, including but not limited to any reorganization plans and other records that affect the Position Review process. Requests for additional information, if any, shall be made in writing to Agency Counsel, who shall produce such information within fifteen (15) days of the request.

2. Quarterly Meetings

Class Counsel and Agency Counsel shall, independent of the meetings with the Neutral Expert pursuant to Part III.B, meet every three months during the first year of the Agreement, and semiannually thereafter. Two Class Representatives are entitled to attend each meeting, but may be recused for employee-specific discussions. Any information obtained by Class Counsel or participating Class Representatives during these meetings shall be treated as confidential and shall not be used for any purpose except for purposes of implementing and enforcing this Agreement.

VII. ENFORCEMENT PROVISIONS

A. General Provisions

1. Parts Subject to Enforcement

All parts of this Agreement are subject to these Enforcement Provisions, whether or not explicitly referenced in such parts; except that the Enforcement Provisions may not be used to challenge a decision concerning an individual position designation, *see* Part III.B.5. Furthermore, these provisions shall be expedited for fees and expenses disputes as set forth under Part IX.

2. Good Faith

The parties shall attempt in good faith to resolve any and all disputes without outside intervention concerning interpretation of or compliance with this Agreement.

B. Procedures

1. Notice of Alleged Violation

The party seeking compliance with a provision of this Agreement shall serve on opposing Counsel written notice that describes with particularity the term(s) of the Agreement that are alleged to have been violated, the specific errors or omissions that are in violation, and the corrective action sought. If requested, the party seeking compliance shall provide opposing Counsel with any information and materials that are available to the party seeking compliance in support of the allegation of noncompliance. This process shall satisfy the regulatory requirement of presentation to the Agency pursuant to 29 C.F.R. § 1614.504(a) (2005).

2. Informal Resolution

Counsel for both parties shall first use their best efforts to informally resolve the allegation, including through discussion at quarterly meetings. If informal attempts do not resolve the matter, Counsel may agree to refer the allegation to mediation.

3. Petition to EEOC

If informal attempts including mediation do not resolve the allegation of noncompliance within 35 days after presentation, the party seeking compliance may bring a petition before the Commission for enforcement of the Commission's decision finally approving the Settlement Agreement and order the relief provided herein pursuant to 29 C.F.R. § 1614.503, or alternatively, a petition for compliance with the settlement agreement pursuant to 29 C.F.R. § 1614.504.

4. Order of the Commission

If the Commission determines that the Agency is not in compliance, it may order such compliance. In such instance, the Agency shall be responsible for payment of reasonable attorneys' fees and costs incurred by Class Counsel in pursuit of compliance.

5. Civil Action

In the event that the Commission is unable to obtain full compliance by the breaching party, if any, the petitioning party may pursue compliance by filing a civil action for enforcement of the Commission decision finally approving the Settlement Agreement and ordering the relief provided herein pursuant to § 1614.503(g).

VIII. CONFIDENTIALITY AND RETURN OF DOCUMENTS

A. Receipt and Handling of Confidential Information

Class Counsel acknowledge that during the course of this litigation they have received, and may hereafter receive under this Agreement, confidential information regarding the Agency and its operations and personnel, including without limitation, personnel files, internal memoranda, personnel plans, programs, policies and procedures, mission statements, organizational charts, cost code data, computerized data and other information. Agency Counsel acknowledge that they have received confidential information regarding the Class Representative, and may hereafter receive under this Agreement in connection with the Claims Process, confidential information regarding individual Class Members. With respect to this information, the parties, their retained experts, their consultants and their attorneys shall continue to be bound by the terms of the confidentiality agreement that they entered into during the course of mediation, throughout the term of this Agreement and thereafter. The parties, their counsel, and their experts and consultants and others retained by them hereby agree not to disclose any confidential information that may be received from the Agency or Class Members during the term of the Agreement. Counsel shall be responsible for advising their experts, outside consultants, and any other individual acting for or on behalf of them, of the confidentiality provisions of this Agreement and shall require that each such individual sign a confidentiality agreement in a form similar to the form that was used in connection with the mediation in this case, and shall promptly provide a copy of such agreement to opposing counsel. Nothing in this provision is intended to render confidential information that is otherwise available to the parties.

B. Return of Confidential Information

The Class agrees that all documents, raw data, statistical reports or other confidential information, whether in electronic or hard copy format, original or copy, to which they, their expert(s), and agents have been given access during the course of the litigation will be destroyed or returned to the Agency not later than sixty (60) days following expiration of the Agreement.

C. Use of Confidential Information

The Class, its experts and agents, may retain the confidential information described above during the term of this Agreement solely for the purposes of implementing and monitoring compliance with this Agreement, for enforcement purposes, and in pursuing claims under the Claims Process.

IX. FEES AND COSTS

In addition to the individual awards under the Claims Process and the awards to the Class Representative and Mediation Representative, the Agency shall be responsible for payment of the fees and expenses outlined below.

A. Class Counsel

1. Entitlement to Reasonable Fees and Expenses

Class Counsel are entitled to receive from the Agency reasonable attorneys' fees and costs, including expert witness fees, that are generated in connection with the filing of this action and implementation and enforcement of the Settlement Agreement and/or Final Approval decision pursuant to 29 C.F.R. § 1614.501 (c) (2005). For purposes of this Part, where payment of actual fees and expenses is specified, such fees and expenses are presumptively reasonable. The Agency's payments are intended to constitute payments toward Class Counsel's fees, and are not intended to nor shall preclude Class Counsel from additionally retaining a percentage of any Class Member award pursuant to its retainer. Invoices for such fees and expenses shall be itemized, and the amount of attorneys' fees shall equal the number of reasonable hours expended multiplied by a reasonable rate. The parties acknowledge and agree that a significant portion of the work to be performed will be completed by a senior counsel, that is counsel with in excess of eleven years of experience. The *Laffey* matrix shall serve as evidence of the prevailing market rate. Class Counsel shall serve such invoices both by facsimile and first class mail on Agency Counsel. Except in the case of an objection, the Agency shall render complete payment to Class Counsel within sixty (60) days of receipt of any invoice. Such time limitation shall not be subject to the extension under Part III.A.7, or any other Part of this Agreement, in recognition of the critical function receipt of such fees plays in Class Counsel's ability to carry out its functions under the Settlement, and in particular the Claims Process.

2. Challenges to Fees

Except with respect to fees and expenses through Final Approval, subpart 3 below, and fees and expenses for Phase III of the Claims Process, subpart 7.c below, within thirty (30) days of receipt of any invoice for fees and expenses, the Agency may in good faith object to a portion of the fees as unreasonable by serving written notice on Class Counsel of such objection and its bases. Thereafter, the parties shall expedite the Enforcement Process under Part VII of this Agreement as follows. They shall first attempt to resolve their dispute informally. In the event such negotiations have not brought resolution within fifteen (15) days after receipt of the Agency's objection, the Class may file a petition for enforcement of the Commission's decision approving the Settlement Agreement, and/or of the Settlement Agreement itself, including for complete payment of reasonable fees and expenses for seeking such enforcement. Within one week of receipt of a petition to enforce relating to fees, if any, the Agency shall make partial payment of at least sixty-five percent (65%) of the fee amount. Any additional amounts shall thereafter be paid in accordance with the ensuing Commission decision.

3. Litigation through Final Approval

Within forty-five (45) days from the Final Approval of this Agreement, the FBI shall make a payment to Class Counsel of actual fees and expenses incurred through Final Approval in full satisfaction of its liability for Class Counsels' fees and expenses incurred through such date.

4. Appeals

Within forty-five (45) days following the Effective Date, Class Counsel shall submit to the Agency for complete payment its reasonable fees and expenses relating to any appeals or objections to the Settlement.

5. Monitoring and Implementation

All invoices for reasonable fees and expenses of Class Counsel, subject to the following caps, relating to monitoring and implementation (but not Enforcement) of the Agreement shall be submitted to the Agency for complete payment every ninety (90) days including for work performed by outside experts and agents. The caps are as follows: during the first year of the Agreement (FY1), fees shall not exceed One Hundred and Seventy-Five Thousand Dollars (\$175,000); during FY2, fees shall not exceed One Hundred Thousand Dollars (\$100,000), except if the Neutral Expert's review of the decisions of the Agency review panel is not completed or Class Counsel is required to perform work with respect to the Neutral Expert's review, then Class Counsel shall be entitled to additional fees at the prorated (by month) amount of \$175,000 per year; during FY3 fees shall not exceed Seventy-Five Thousand Dollars (\$75,000); and during FY4 fees shall not exceed Fifty Thousand Dollars (\$50,000). Examples of fees and expenses for monitoring and implementation include, but are not limited to, work performed relating to the Neutral Expert's Position Review, meetings, consultations with Class Members over concerns of retaliation or non-compliance, and work relating to effectuating the Claims Process (as opposed to review of claim forms and representation of individual Claimants, which is covered pursuant to subpart 7).

6. Enforcement

In the event that the Class is a prevailing party in any enforcement action brought pursuant to Part VII, they shall be entitled to reasonable fees and expenses as provided for under Title VII.

7. The Claims Process

a. Phase I

Every ninety (90) days, Class Counsel shall submit to the Agency for complete payment all reasonable fees and expenses relating to Phase I of the Claims Process.

b. Phase II

Every ninety (90) days, Class Counsel shall submit to the Agency for complete payment all fees and expenses relating to Phase II of the Claims Process, subject to the following limitations. Class Counsel shall be entitled to receive one hundred percent (100%) of their reasonable Phase II fees and expenses relating to any claim that was resolved either through negotiation or mediation. In the event that a claim is not resolved in negotiation or mediation, however, Class Counsel shall be entitled to a payment of sixty-five percent (65%) of their actual Phase II fees and expenses. Thereafter, if the Claimant prevails or settles in Phase III, Class Counsel shall be retroactively entitled to receive the remaining thirty-five (35%) of their reasonable Phase II attorneys' fees and expenses, plus any Phase III fees and expenses provided for below. Any such payment of residual Phase II fees shall be made within sixty (60) days of the claim's resolution. A Claimant, if any, who elects representation by alternate counsel shall be entitled to fees subject to the limitations within this section.

c. Phase III

Within sixty (60) days of an arbitrator's decision under Phase III of the Claims Process where a Claimant is the prevailing party, counsel shall petition the arbitrator for reasonable attorney's fees and expenses. Counsel shall serve a copy of such petition on Agency Counsel. The Agency may file an objection to such petition within thirty (30) days of its receipt. Within ninety (90) days of the decision on the merits, or within thirty (30) days of receipt of a timely objection, if any, the arbitrator shall issue a decision and order on the petition. The Agency shall comply with such order within sixty (60) days, except that either party may file an appeal of a fee award pursuant to the provisions of the Claims Process.

D. Other Professionals

1. The Claims Process

The Agency shall be responsible for the timely payment of all fees and expenses of other professionals involved in the Claims Process, including the Claims Administrator and the ADR Administrator (including mediators and arbitrators fees and expenses), except that it shall not be responsible for payment of any travel-related expenses. Because the ADR Administrator shall contract directly with mediators and arbitrators, the Administrator shall make actual payment to them, entitling it to bill

the Agency as a single contractor for its services and the services of all mediators and arbitrators in the CP. Administrators shall include expenses relating to the preparation and service of all notices necessary to effectuate the CP.

2. Notice of Settlement and Other Events

The Agency shall be responsible for all costs, including all reasonable fees and expenses of the Claims Administrator and ADR Administrator, relating to effectuating all notices necessary to carry out the provisions of the Settlement.

3. Neutral Expert

The Agency shall be responsible for all costs, including all reasonable fees and expenses, of the Neutral Expert relating to her work under Part III.B of the Agreement.

E. Miscellaneous Implementation Expenses

The Agency shall be responsible for all reasonable fees and expenses necessary to implement the measures mandated by this Agreement.

X. TAX LIABILITES

All monetary awards and relief under the Settlement subject the recipient to tax liabilities. The Agency shall be responsible for withholding from such awards and paying all required federal, state and local employee withholdings, in addition to paying the employer share of any liabilities. The recipient, however, shall be solely responsible for payment of any employee liabilities in excess of the amounts withheld and is responsible for obtaining individual tax advice.

XI. SEVERABILITY

Except as set forth below, if any term or provision of this Agreement, or the application thereof to any person or circumstances, is held to any extent to be invalid or unenforceable, the remainder of this Agreement, or the application of such term or provision to persons or circumstances other than those as to which it is held to be invalid or unenforceable, shall not be affected thereby, and each term and provision of this Agreement shall be valid and enforceable to the fullest extent permitted by law.

XII. GOVERNING LAW; ENTIRE AGREEMENT; COUNTERPARTS

The parties agree that the validity, construction and enforcement of this Agreement shall be governed by federal law.

This Agreement, including the Exhibits hereto, contains the entire agreement and understanding of the parties with respect to the Settlement of this litigation, superseding any and all proposals and representations. Except as specifically provided for in this Settlement,

this Settlement may not be amended or modified except with the express written consent of the parties and the Commission. It may be executed in one or more counterparts and each executed copy will be deemed an original that shall be binding on all parties.

.../...

All parties to this Settlement acknowledge that this Settlement is final and binding in all respects.

AGREED:
For the Class:

Date

Patricia M. Boord
Class Representative

Date

Maia Caplan, Esq.
Kator, Parks & Weiser, P.L.L.C.
1020 19th Street, N.W., Suite 350
Washington, D.C. 20036-3804
Class Counsel

Date

Jessica L. Parks, Esq.
Kator, Parks & Weiser, P.L.L.C.
1020 19th Street, N.W., Suite 350
Washington, D.C. 20036-3804
Class Counsel

For the Federal Bureau of Investigation:

Date

Robert S. Mueller, III
Director
Federal Bureau of Investigation
925 Pennsylvania Avenue, N.W.
Washington, D.C. 20535

Date

Valerie E. Caproni
General Counsel
Federal Bureau of Investigation
925 Pennsylvania Avenue, N.W.
Washington, D.C. 20535