UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION; THE CITY OF NEW YORK; and THE NEW YORK STATE DIVISION OF HUMAN RIGHTS, Plaintiffs, and THE HISPANIC SOCIETY and INDIVIDUAL NONWHITE LOCAL 28 MEMBERS, Plaintiff-Intervenors, - against - LOCAL 638 ETC.; LOCAL 28 OF THE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION *et al.*, Defendants.	71 Civ. 2877 (RLC)

CONSENT ORDER RESOLVING BACK PAY CLAIMS
FOR THE JANUARY 1, 1984 THROUGH MARCH 31, 1991 PERIOD

This Consent Order (this "Order") is entered into, by and between, on the one hand, the Plaintiff-Intervenors, for themselves and on behalf of a class of similarly situated individuals (the "Class"), the United States Equal Employment Opportunity Commission ("EEOC"), the New York State Division of Human Rights ("NYSDHR"), and the City of New York (collectively and together with the Class, "Plaintiffs"), and, on the other hand, Local 28 of the Sheet Metal Workers' International Association ("Local 28"), all, collectively, the "Parties."

BACKGROUND

WHEREAS, the above-captioned lawsuit was filed in 1971 in the United States District Court for the Southern District of New York (the "Court"), under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, alleging systemic race and national origin discrimination by Local 28 and others against black and Hispanic individuals (collectively "Nonwhites");

WHEREAS, in 1995, the Court held Local 28 in contempt of its prior orders and ordered remedies in 1995 and 1998, including, among others, payment of back pay to nonwhite Building Trades journeypersons who had a statistically significant hours disparity as compared to their white Building Trades journeyperson counterparts during the period January 1, 1984 to March 31, 1991, which remedies the Second Circuit ultimately affirmed with modifications in 1999;

WHEREAS, in October 2000, after conducting a hearing on Local 28's financial ability to afford the back pay remedy ordered in 1995 and 1998, the Court determined that Local 28 was financially sound and ordered it to pay certain amounts into a court-administered escrow account, Fund #604700 of the registry of the Clerk of the United States District Court for the Southern District of New York (the "Escrow"), for eventual payment of back pay to claimants for the period January 1, 1984 to March 31, 1991;

WHEREAS, as of August 8, 2007, the current balance of the Escrow, including principal payments and interest earned will be $5,722,990.71;

WHEREAS, the Parties have engaged in extensive litigation relative to the claims of individuals who may be entitled to back pay for the period January 1, 1984 to March

31, 1991, including a claims process; document, interrogatory, deposition and expert discovery on individual claims; and briefing of legal issues;

WHEREAS, there are 156 individuals (listed on Exhibit A hereto, to be filed under seal), who are "Eligible Back Pay Recipients" because they (*i*) are nonwhite current and former Building Trades journeyperson members of Local 28 who were found by the Court's statistics expert, Dr. Bernard R. Siskin, to have been underemployed during the period January 1, 1984 to March 31, 1991; (*ii*) submitted a claim form to the Special Master during the claim form process; and (*iii*) did not have their claims withdrawn at any point;

WHEREAS, in April 2005, this Court held Local 28 in contempt of its prior orders based in part on a finding that nonwhite Building Trades journeypersons had a statistically significant hours disparity as compared to their white Building Trades journeyperson counterparts during the period after March 31, 1991;

WHEREAS, Plaintiffs have conducted arm's length negotiations with Local 28 with respect to a compromise and negotiated resolution of the back pay claims of the Eligible Back Pay Recipients with a view to resolving those claims on a negotiated basis and achieving the best relief possible on those claims consistent with the interests of the Class;

WHEREAS, upon their investigation, research, formal discovery and analysis, Counsel for Plaintiffs have concluded that the terms and conditions of this Order are fair, reasonable and adequate as to the Class and in its best interest;

WHEREAS, the Parties seek full and final resolution of all matters concerning the back pay claims of the Eligible Back Pay Recipients for the period January 1, 1984 to March 31, 1991;

WHEREAS, the Parties seek to provide for continual funding of the Escrow for eventual payment of potential back pay claims for the period after March 31, 1991;

WHEREAS, in consideration of the covenants and undertakings set forth herein and intending to be legally bound thereby, the Plaintiffs and Local 28 agree to the terms of this Order;

WHEREAS, Eligible Back Pay Recipients, other members of the Class and other members of Local 28 have received legally sufficient notice of this Order and an opportunity to be heard and to object to the terms of this Order at a Fairness Hearing; and

WHEREAS, this Court, having considered the submissions of the Parties, Eligible Back Pay Recipients, other members of the Class and other members of Local 28 prior to the Fairness Hearing, and the arguments and evidence presented at the Fairness Hearing, and having determined that the terms of this Order are fair, reasonable and adequate;

NOW THEREFORE, it is hereby Ordered, Adjudged, and Decreed as follows:

ORDER

I. UNDEREMPLOYMENT COMPENSATION FOR THE JANUARY 1, 1984 THROUGH MARCH 31, 1991 PERIOD

A. Back Pay Account and Entitlement

1. Within five (5) business days after this Order is entered by the Court, Plaintiffs shall provide this Court with evidence that they have established an interest-

earning account at a federally insured financial institution to hold the monies to be deposited into the Back Pay Account ("Back Pay Account"). Details concerning the administration of the Back Pay Account are set forth in an Escrow Agreement and Distribution Order attached hereto as Exhibits B and C.

2. The Back Pay Account shall be funded in the amount of at least $6,200,000.00, as follows:

a. The Court shall direct the Clerk of this Court to transfer the amount of $ 6,171,246.28 from the Escrow to the Back Pay Account within ten (10) business days after this Order is entered by the Court.

b. Within ten (10) business days after this Order is entered by the Court, Local 28 shall transfer into the Back Pay Account sufficient funds (the "Balance Amount") so that the sum of the Balance Amount and the transfer pursuant to paragraph 2(a) above equals $6.2 million.

c. If Local 28 fails to pay the full Balance Amount within ten (10) business days after this Order is entered by the Court, Local 28 shall immediately be obligated to pay the difference between the amount actually paid and the amount due, plus a penalty of $1,000 per day for each day that any balance remains due.

3. The total amount of at least $6,200,000.00 transferred to the Back Pay Account (including any interest earned on the Back Pay Account) in accordance with

paragraph 2 above, shall be paid (in cash or other consideration as described herein, less applicable withholding, if any; less any costs, taxes or fees incurred in connection with the maintenance and administration of the Back Pay Account; and less certain other payments described in the Distribution Order attached hereto as Exhibit C) to "Back Pay Recipients" – i.e., those Eligible Back Pay Recipients (or their estates) who accept back pay compensation in cash or other consideration as described herein by executing a Release in the form attached hereto as Exhibit D.

4. Each Eligible Back Pay Recipient shall be presumptively entitled to an award (in cash or other consideration as described herein). The aggregated presumptive entitlements of those Eligible Back Pay Recipients who do not become Back Pay Recipients shall be applied in accordance with the terms of the Distribution Order attached hereto as Exhibit C.

B. Pension Credits

As represented by the Sheet Metal Workers' National Pension Fund ("NPF") in the letter attached hereto as Exhibit E:

5. Back Pay Recipients shall be entitled, at their sole discretion, to allocate any portion of the Back Pay to which they are entitled under this Order to the NPF in exchange for "Restored Credit" subject to the terms and conditions set forth below.

6. Back Pay Recipients electing to receive Restored Credit in return for allocating any portion of their Back Pay entitlement shall direct such allocation using an Election Form in the form attached hereto as Exhibit F.

7. For purposes of calculating Restored Credit, Back Pay Recipients will receive credit for one Hour of Work (as that term is defined in the Plan of Benefits established pursuant to the Agreement and Declaration of Trust establishing the Sheet Metal Workers' National Pension Fund entered on May 16, 1966, together with all subsequent amendments or reinstatements thereto, and all subsequent rules and regulations adopted thereunder (the "NPF Plan")) in exchange for allocating to the NPF an amount of Back Pay equal to the Contribution Rate for each such Hour of Work. "Contribution Rate" shall mean the amount which is, for any given year, the sum of the amounts payable by employers to the NPF per hour worked by Local 28 journeypersons, as specified in the collective bargaining agreement in effect during such year (and as may have been modified by allocations of wage package increases pursuant to the collective bargaining agreement during its term). A chart showing the hourly Contribution Rates for the NPF is attached as Exhibit G to this Order.

8. The Back Pay Recipient's monthly pension benefit will be calculated in accordance with Exhibit E to this Order.

9. The payment of Back Pay to the NPF, in accordance with a Back Pay Recipient's allocation, must be made directly from the Back Pay Account pursuant to the Back Pay Recipient's instructions contained in the Election Form attached hereto as Exhibit F.

10. The NPF has agreed to make reasonable efforts to advise Back Pay Recipients concerning their allocation options, including by being available by telephone to answer individualized questions.

11. For all purposes other than calculating a Back Pay Recipient's monthly pension benefit, the NPF has agreed to consider the Back Pay Recipient to have worked a number of Hours of Work in Covered Employment (as that term is defined in the NPF Plan) equal to the number of hours each Back Pay Recipient worked according to the NPF's records plus the Back Pay Recipient's "Additional Hours" (the sum of shortfall and suspension hours) in each "Underemployment Year," as shown on Exhibit H hereto, to be filed under seal. An "Underemployment Year" is any year in which a Back Pay Recipient has one (1) or more hours listed in the corresponding "Additional Hours" column on Exhibit H.

12. The amount of Restored Credit in a given year may not exceed the Pension Credit (as that term is defined in the NPF Plan) that a Back Pay Recipient would have earned had such Back Pay Recipient worked his or her total number of actual hours according to the NPF's records plus his or her "Additional Hours."

C. Annuity

13. As represented by the Local 28 Annuity Fund in the letter attached hereto as Exhibit I, Back Pay Recipients shall be entitled, at their sole discretion, to allocate up to 25% of the Back Pay to which they are entitled under this Order to the Local 28 Annuity Fund using the Election Form attached hereto as Exhibit F. The payment of Back Pay to a Back Pay Recipient's Annuity Fund account, in accordance with a Back Pay Recipient's allocation, must be made directly from the Back Pay Account pursuant to

the Back Pay Recipient's instructions contained in the Election Form attached hereto as Exhibit F.

D. **Re-Initiation**

14. Local 28 shall permit re-initiation with full membership rights, without any payment of back dues, fines or penalties, to any Back Pay Recipient who was suspended or terminated for nonpayment of dues at any time during the period January 1, 1984 through March 31, 1991. Back Pay Recipients may apply for such re-initiation using the form attached hereto as Exhibit J, which shall be mailed to Eligible Back Pay Recipients within thirty (30) days after this Order is entered by the Court.

II. CONTINUING PAYMENTS TO THE ESCROW

15. Local 28 shall continue to contribute to the Escrow as set forth below for the purpose of funding eventual back pay awards to potential claimants for the period after March 31, 1991.

16. Local 28 will pay on a quarterly basis commencing on November 15, 2007 for the quarter beginning July 1, 2007, and thereafter forty-five (45) days after the close of each quarter (each, an "Hourly Contribution Date"), at least fifteen (15) cents for each hour worked by Building Trades journeypersons and apprentices for which assessments are received by Local 28 ("Hourly Contribution").

a. In the event the Parties reach, and the Court approves, a settlement of the back pay claims of potential claimants for the period after March 31, 1991 (a "Future Settlement"), Local 28 will continue to

pay at least fifteen (15) cents for each hour worked by Building Trades journeypersons and apprentices for which assessments are received by Local 28 until the total agreed-upon Future Settlement amount is reached.

b. If, however, an Hourly Contribution of fifteen (15) cents is deemed to be insufficient to pay the full amount of such Future Settlement within five (5) years (applying the assumption that the total hours worked in each year following the year in which such Future Settlement is approved is equal to the average total annual hours over the three years prior to the year in which such Future Settlement is submitted for approval), then Local 28 shall pay an Hourly Contribution of whatever amount is deemed to be necessary to ensure that such Future Settlement will be paid in full within five (5) years (applying the same assumption).

17. On each Hourly Contribution Date, Local 28's Financial Secretary will deliver to Plaintiffs, by certified mail and facsimile, a declaration, in the form attached hereto as Exhibit K, stating that the Hourly Contribution is based on true and accurate information concerning assessments received by Local 28 during the quarter preceding such Hourly Contribution Date. Hours worked for which no assessment is received shall not be included in any calculation of Hourly Contribution. If any assessments are received late, the late-received assessments will be included in the calculation of the Hourly Contribution for the quarter in which the assessments are received.

18. Plaintiffs will have the right, within three (3) months of an Hourly Contribution Date, and at their expense, to audit all documents and records relevant to calculation of the Hourly Contribution. For purposes of such audit, Local 28 will take all necessary steps to ensure that Plaintiffs have full access to all relevant documents and records within Local 28's possession, custody or control on notice of fifteen (15) business days.

19. Should there be a dispute between the Parties as to the calculation of the Hourly Contribution, such dispute shall be submitted to the Court. Should the Court determine that Local 28's calculation of the Hourly Contribution was too low, Local 28 shall pay the difference between the Hourly Contribution actually paid and the Hourly Contribution due according to the Court's ruling. If the Court finds that Local 28 knowingly or recklessly underpaid any Hourly Contribution, Local 28 shall also pay Plaintiffs' reasonable costs and expenses, including attorneys' fees, incurred in connection with such dispute and in conducting the audit described in paragraph 18.

III. OPPORTUNITY FOR UNION AND CLASS MEMBERS TO OBJECT TO PROPOSED ORDER

20. Simultaneous with submission of this Order, the Parties are submitting to the Court a proposed Order for Notice and Fairness Hearing governing notice and related issues.

Dated: New York, New York
August 9, 2007

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By: _____
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By: _____
JOSHUA RUBIN (JR-8160)

Attorneys for Plaintiff City of New York

Approved, this __ day of _____, 2007:

_____
David Raff, Special Master

SO ORDERED, this __ day of _____, 2007:

_____
Robert L. Carter
United States District Judge

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Attorneys for Plaintiff City of New York

Approved, this __ day of _____, 2007:

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David Raff, Special Master

SO ORDERED, this __ day of _____, 2007:

_____
Robert L. Carter
United States District Judge

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Approved, this 9th day of August, 2007:

David Raff, Special Master

SO ORDERED, this 7th day of January, 2008:

Robert L. Carter
United States District Judge

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