

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS (Boston)

No. 12-cv-10291-WGY

BRUCE SMITH, et al
Plaintiffs

vs.

CITY OF BOSTON,
Defendant

For Trial Before:
Judge William G. Young

Bench Trial

United States District Court
District of Massachusetts (Boston)
One Courthouse Way
Boston, Massachusetts 02210
Wednesday, January 7, 2015

REPORTER: RICHARD H. ROMANOW, RPR
Official Court Reporter
United States District Court
One Courthouse Way, Room 5510, Boston, MA 02210
bulldog@richromanow.com

A P P E A R A N C E S

1
2
3 HAROLD L. LICHTEN, ESQ.

BENJAMIN WEBER, ESQ.

4 Lichten & Liss-Riordan, P.C.
100 Cambridge Street, 20th Floor
5 Boston, MA 02114
Email: Hlichten@llrlaw.com

6 and

STEPHEN S. CHURCHILL, ESQ.

7 Fair Work, P.C.
192 South Street, Suite 450
8 Boston, MA 02111
Email: Steve@fairworklaw.com
9 For plaintiffs

10 GEOFFREY R. BOK, ESQ.

11 KAY H. HODGE, ESQ.

JOHN M. SIMON, ESQ.

12 Stoneman, Chandler & Miller
99 High Street
13 Boston, MA 02110
Email: Gbok@scmillp.com
14 For defendant

15

16

17

18

19

20

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

I N D E X

WITNESS DIRECT CROSS REDIRECT RECROSS

COMMISSIONER WILLIAM B. EVANS

 By Ms. Hodge: 4 81

 By Mr. Lichten: 47

CLOSING ARGUMENT BY MS. HODGE..... 89

CLOSING ARGUMENT BY MR. CHURCHILL..... 112

CLOSING ARGUMENT BY MR. LICHTEN..... 116

E X H I B I T S

EXHIBIT 84..... 5

EXHIBIT P..... 26

1 P R O C E E D I N G S

2 (Begins, 9:00 a.m.)

3 THE COURT: Good morning, counsel. I've been
4 provided with replacement Exhibits 80 through 83 and I
5 appreciate that. And we're all ready to go. And if
6 you'll swear the Commissioner.

7 (COMMISSIONER WILLIAM B. EVANS, sworn.)

8 THE COURT: Ms. Hodge, you may proceed.

9

10 *****

11 COMMISSIONER WILLIAM B. EVANS

12 *****

13

14 DIRECT EXAMINATION BY MS. HODGE:

15 Q. Would you please state your full name for the
16 record.

17 A. William B, as in "Brian," Evans, E-V-A-N-S.

18 Q. And by whom are you employed?

19 A. By the City of Boston Police Department.

20 Q. And what is your current position?

21 A. I'm the Commissioner for the City of Boston.

22 Q. And have you held other positions?

23 A. Yes.

24 MS. HODGE: And If I may approach?

25 THE COURT: Yes.

1 (Hands up.)

2 MS. HODGE: I'd like to mark this as an exhibit.

3 THE COURT: Any objection?

4 MR. LICHTEN: Not to it being marked, but I
5 haven't -- has it been moved into evidence?

6 THE COURT: Well, that's what I understood her to
7 say.

8 You want it in evidence?

9 MS. HODGE: Yes.

10 THE COURT: Any objection?

11 MR. LICHTEN: No.

12 THE COURT: It may be received into evidence and
13 the next number would be --

14 THE CLERK: I believe it's 84.

15 THE COURT: This is Exhibit 84 in evidence.

16 (Exhibit 84, marked.)

17 Q. Commissioner Evans, I put before you a document
18 which has now been marked and identified as Exhibit 84
19 and I ask you if you could identify it?

20 A. Yes, I can.

21 Q. And what is it?

22 A. It's my resume.

23 Q. And, um, does it accurately describe your history
24 at the Boston Police Department?

25 A. Yes, it does.

1 Q. And so when did you first join the police
2 department?

3 A. As a police officer in 1982, November of 1982,
4 November 1st.

5 THE COURT: Well, you've just put this in
6 evidence, so one can assume that I will read it. So
7 let's move on to things --

8 MS. HODGE: I will make that assumption, your
9 Honor, of course.

10 THE COURT: Fine.

11 Q. As Commissioner what criteria do you use in
12 determining who you will promote?

13 A. I promote often from a civil service list that's
14 provided for us.

15 MR. LICHTEN: Your Honor, I would object regarding
16 the timing. I believe Commissioner Evans just became
17 Commissioner in --

18 THE COURT: No, I understand that, and there's
19 something to that objection because -- there is
20 something to it because it's the 2008 examination that I
21 need to wrestle with. Now, I've made it clear, and
22 apparently without any substantive objection, that it's
23 important to the Court to understand what's happened
24 subsequent to 2008 and I'm interested in the promotional
25 examination that's being administered or has just been

1 administered. So I guess I'll sustain -- well, I'll
2 sustain it, but I am coming into this -- this is a
3 disparate impact case, so I'm coming into this with the
4 understanding that it -- it's not a discrimination
5 case, so everyone's on the up-and-up and I imagine he's
6 appointing for professionalism and, um, the people he
7 thinks will be the finest officers in the respective
8 positions within the constraints of the statutory and
9 regulatory framework.

10 And if I asked him I imagine he'd say "yes" to
11 that, is that right?

12 THE WITNESS: That's correct, your Honor.

13 THE COURT: All right.

14 MS. HODGE: Well, let me ask a slightly different
15 question.

16 Q. You became Commissioner in 2013?

17 A. Yes.

18 Q. And since that time have you made promotions off
19 of the civil service list?

20 A. Yes, I have.

21 Q. And which list have you made promotions off of?

22 A. I made it off the current list that's in effect
23 for sergeant, lieutenant, and captain.

24 Q. And that list is the list off the 2008 exam?

25 A. That's correct.

1 Q. And you are aware that there is a current exam,
2 um, taking place?

3 A. Yeah, that's correct.

4 Q. And that would be the 2004 -- what we've been
5 referring to as the 2014 exam?

6 A. Yes.

7 Q. Now, with regard to the 2013 exam and the kinds
8 of, um, actions you have had to take, have you had to
9 make any promotions regarding lieutenant?

10 A. Yes.

11 MR. LICHTEN: Objection, your Honor. She asked
12 about the 2013 exam, there is no such thing.

13 THE WITNESS: I meant to say 2008.

14 THE COURT: Well, I don't think it's nomenclature,
15 we understand there is an exam being administered now or
16 just finished, I guess, in 2014. We have testimony that
17 obviously the planning for that started in 2013. He's
18 still promoting off the 2008 list.

19 MR. LICHTEN: Yes, therefore the question is --

20 THE COURT: None of that's disputed.

21 MR. LICHTEN: Right.

22 THE COURT: I'm following.

23 MR. LICHTEN: Okay.

24 THE COURT: Go ahead.

25 Q. Okay. Now, with regard to the 2008 promotions,

1 have you made any promotions to lieutenant?

2 A. Yes.

3 Q. Okay. Off the 2008 exam?

4 A. Yes.

5 Q. And do you recall who you promoted?

6 A. Um --

7 MR. LICHTEN: Objection, relevancy.

8 THE COURT: No, I think not, I think we need to
9 know what's going on. She -- he may answer.

10 A. Yes, I recall. Yes.

11 Q. And could you describe -- could you name the
12 individuals?

13 A. Well, Lieutenant Torigian, Lieutenant Marwin Moss,
14 um, those are just two of the ones that I've made.

15 THE COURT: And again I've said I -- you've been
16 Commissioner since October of 2013 and if I'm following
17 you've appointed two lieutenants off the list?

18 THE WITNESS: Um, more, you know, I just can't
19 recall right now all their names. But I want to say
20 I've probably made about four, four or five.

21 THE COURT: All right, four or five lieutenants
22 off the list to fill vacancies and keep the Department
23 up to strength.

24 THE WITNESS: Yes, that's correct.

25 Q. And with regard to those appointments, um, how did

1 you select the individuals?

2 A. I selected them based on qualifications who I
3 thought was the best fit to assume those roles, um, we
4 looked at their work history, and I always took
5 diversity into effect to make sure I promoted.

6 THE COURT: Well, how much flexibility do you
7 have? You have the 2008 list. I've heard testimony you
8 have to appoint in rank order.

9 THE WITNESS: Right.

10 THE COURT: So now you're the Commissioner,
11 there's a vacancy in the position of lieutenant, you've
12 got your list?

13 THE WITNESS: Yes.

14 THE COURT: You know who the next one up on that
15 list is. So how do you bring to bear those things you
16 just told me?

17 THE WITNESS: Well, what happens, your Honor, is
18 I'm given a list of certain grades and a lot of them are
19 tied at certain grades.

20 THE COURT: Oh, tied.

21 THE WITNESS: Yes, tied. So currently I have
22 about 6 tied at the grade of 84, so I look over that
23 list. And, you know, and I've been on the job for 32
24 years and I know my personnel real well. I know who has
25 the great work history and how they fit. Like

1 Lieutenant Torigian, I just put him in Mattapan. He was
2 great in that position as a sergeant. And so when I
3 looked on the list and seen him, clearly he jumped out
4 to me that he's a natural fit to stay in that position
5 as lieutenant because the community loved him and he did
6 a great job. So out of those 6, although I only had one
7 to pick at that time, I went right to Lieutenant
8 Torigian because I know his work ethic and I know he's
9 great at what he does. So out of those 84, I chose him
10 first.

11 THE COURT: I follow and thank you.

12 Just so I'm clear, if you had one who had scored
13 85, you -- as you understand the law, you would have had
14 to pick that person?

15 THE WITNESS: Correct.

16 THE COURT: But because you had 6, we'll say, tied
17 at 84, you selected now Lieutenant Torigian for all the
18 particularized reasons you just gave me?

19 THE WITNESS: That's correct.

20 THE COURT: So now he's a lieutenant?

21 THE WITNESS: Yes.

22 THE COURT: And the next time you have a vacancy
23 you've got 5 of them tied at 84 and so on.

24 THE WITNESS: And I've just made two beyond him.
25 Lieutenant Marwin Moss, who's an African American male,

1 and another lieutenant I just made -- which I'm sorry I
2 just can't remember his name right now. But so I made
3 two after him, again, on the same basis. As opposed to
4 the other three candidates, I found them to be better
5 suited for the position I need. And also I took
6 diversity into effect to make sure Lieutenant Marwin
7 Moss is a top notch sergeant, that he got that position.

8 THE COURT: All right.

9 Q. And with regard to -- are there any positions for
10 which you can select individuals to fill without going
11 to the civil service list?

12 A. Yes, there is.

13 Q. And what are they?

14 A. That's my chief of department, that's my
15 superintendents, and that's my deputy superintendents.

16 Q. And approximately how many of those individuals?

17 A. I have 21 currently.

18 Q. 21. And is there a term that you use to describe
19 them?

20 A. Um, my "command staff."

21 Q. And of the 21, um, what criteria did you use, the
22 same criteria you described for tie groups?

23 A. Yes. I mean I pick -- diversity was key,
24 experience was key. I think the average age of all our
25 years on the job are about 26 years. So between their

1 demonstrated work history, their experience, as well as
2 diversity, they all came into effect on who I chose.

3 Q. And how many of those appointments are minority?

4 A. Um, 48 percent, basically 10 of the 21.

5 Q. And have you made any appointments at the
6 captain's level?

7 A. Yes, I have.

8 Q. And what list are they off?

9 A. They're off the 2008.

10 Q. And prior to your arrival how many captains were
11 minority?

12 A. None, when I got there, under Commissioner Davis.

13 Q. And how many have -- and what appointments have
14 you made?

15 A. Um, I've put two captains into positions in
16 downtown, an Asian captain, a Latino captain in Jamaica
17 Plain, and I just made Lieutenant Hussain, um, who's an
18 African American Muslim male, I put him in charge of
19 Mattapan. So for the first time ever we have three
20 minorities running police districts, 3 out of the 11.

21 Q. And that's an assignment, the districts?

22 A. Yes.

23 Q. Now, I'm going to ask you to focus now on the job
24 responsibilities, the job duties, what lieutenants do.
25 Could you briefly describe what a lieutenant's job is

1 within the Boston Police Department?

2 A. Yes, a lieutenant is -- basically runs the command
3 of the police district especially when the captain is
4 not around. His responsibilities include reading the
5 roll calls, inspecting the men and women to make sure
6 they are fit to go out. His main responsibility also is
7 to make sure they're well-trained, they're knowledgeable
8 in all rules and regulations, they're knowledgeable in
9 all the rules, the case law, and just basically
10 interprets anything that -- as far as rule changes and
11 what not. He also is responsible for the safekeeping of
12 the station and that includes the facilities to make
13 sure there's proper fuel at the station for the cars, to
14 make sure the station, you know, is well-plowed, to make
15 sure the sidewalks are clean of snow. He has a
16 magnitude of responsibilities. But probably the most
17 important responsibility besides making sure the
18 officers are knowledgeable is keeping safe custody of
19 the prisoners.

20 It's his responsibility to make sure that he
21 inspects them or he assigns someone to inspect them
22 every 15 minutes. He's responsible for their safe
23 custody. He's also responsible to make sure, when
24 they're brought in, that the officer has probable cause
25 and the arrest is duly noted in the incident report, and

1 he's also responsible to make sure the criminal
2 complaints establish the probable cause that's necessary
3 to file that complaint.

4 He also is responsible for reading every police
5 report, making sure all the elements of the crime are
6 there and he properly codes that incident report
7 according to the category it is deemed. So he does the
8 coding of every crime and then he okays the police
9 officer's report. He has to make sure that the report
10 is accurate, clear, and legible.

11 So he has a lot of responsibility in running the
12 day-to-day operations of the police district.

13 Q. Does he have any responsibility for interfacing
14 with the public?

15 A. Very limited. You know, if the captain's not
16 around he might fill in at a community meeting. But for
17 the most part the lieutenant's position is sitting at
18 the desk, reading reports, advising the officers on
19 matters regarding warrants, arrests, probable cause
20 issues, um, giving officers advice, but for the most
21 part the lieutenant doesn't leave the station because
22 again he's ultimately responsible for the prisoners'
23 well being and that's a tremendous responsibility.

24 Q. And when a member of the public wants to file a
25 complaint, where do they go?

1 A. They come into the police district.

2 Q. And with whom would they speak?

3 A. Initially to the officer at the front desk who
4 then would refer them to the duty supervisor lieutenant
5 who was sitting at the desk.

6 Q. And you have to your right a series of books which
7 are there and I am going to ask you, sir, if you would
8 please, um, turn to Tab 23.

9 A. (Turns.)

10 THE COURT: You say "Tab 23," but you are
11 referring to the exhibits?

12 MS. HODGE: Exhibit 23.

13 THE COURT: Yeah, fine.

14 A. Yes.

15 Q. And are you familiar with the first document --
16 there are two documents in Exhibit 23. Are you familiar
17 with the first document?

18 A. Yes, I am.

19 Q. And it's called a "rule"?

20 A. That's correct.

21 Q. It's a published rule within the Department?

22 A. Yes.

23 Q. And could you describe what it is?

24 A. It's basically a Boston Police Department rules
25 and procedures, it's Rule 105, and it basically

1 describes the duties and responsibilities of a police
2 lieutenant. Also it's Rule 106, which also describes
3 the role of the duty supervisor, which is the
4 lieutenant.

5 Q. And is this description accurate, um -- does this
6 description accurately describe the duties and
7 responsibilities of a lieutenant's duties and
8 responsibilities?

9 A. It does.

10 Q. Now, with regard to the organizational structure,
11 if you will, of the Boston Police Department, um, would
12 you look at Exhibit 46.

13 A. (Looks.) Yes, I have it.

14 Q. And I'm going to ask you to look at Section 3.

15 A. (Turns.) Yes.

16 Q. And under "Police Commissioner sworn:" there are a
17 list of positions.

18 Is that list of positions accurate currently?

19 A. Yes.

20 Q. And so the lieutenant, um, position is one of
21 those listed?

22 A. Yes.

23 Q. And I believe you indicated that there were some
24 positions that comprise your, quote, "command staff."
25 Could you describe what those positions are in relation

1 to the list contained in Exhibit Number 43? 46, excuse
2 me.

3 A. Yes, again the superintendent in chief, the
4 superintendents, the deputy superintendents, and the
5 captains who run all our districts.

6 Q. All right. Is the lieutenant a part of that same
7 command staff?

8 A. Well, they're not considered command staff,
9 they're district -- they run -- duty supervisors, they
10 run the stations, but they're not part of the command
11 staff.

12 Q. And what is the relationship between a lieutenant
13 and a sergeant?

14 A. Um, the lieutenant's responsibility is basically
15 overseeing the sergeant to make sure that again he's
16 fulfilling all his responsibilities under the rules and
17 regulations that he is responsible for doing. But for
18 the most part the sergeants are out on the street
19 supervising the men and women of this department, the
20 lieutenant, for the most part, stays inside.

21 Q. And are there particular, um -- would a
22 lieutenant -- what types of cases would a lieutenant
23 have any -- um, receive in the station house or in the
24 district?

25 THE COURT: I didn't understand the question.

1 What types of cases --

2 Q. What type of cases would come, in the first
3 instance, to a lieutenant in the station house?

4 A. Well, there's a lot of things that come to him.
5 You know, when I was a lieutenant -- you know, I was a
6 lieutenant for five years and I know there's a lot of
7 responsibility around emergency restraining orders. If
8 a woman was to come in, after hours when the courts are
9 closed, and would require an emergency restraining
10 order, that would be one of his big responsibilities.
11 The Jenkins rule as far as making sure people, you know,
12 are bailed properly, that's one of his responsibilities.
13 You know, notifying, you know, the captain on any major
14 incident that happens on shift, that's his
15 responsibility. But the most important thing he can do
16 is being knowledgeable of all the rules, all the
17 regulations, to make sure that if someone is improperly
18 arrested, you know, that all the elements of the case
19 are there, both in the criminal complaint as well as in
20 the 1-1 report. So he oversees basically the final
21 product of what the officers bring forward to the
22 station.

23 Q. How -- you've mentioned sort of knowledge of the
24 rules and regulations. Well, how important is knowledge
25 of the laws and rules and regulations for a lieutenant?

1 A. I've always said, you know, "knowledge is power"
2 and it's -- for any position, you know, it's so
3 important. Because prisoners are being brought forward
4 and to know the elements of crimes, to make sure the
5 probable cause is there. To know when exigency exists
6 to get a search warrant. You know, it's so important.
7 You know, he has to know because he has young officers
8 out there, he has sergeants who sometimes aren't up on
9 the law the way they should be, and with today's
10 litigation and liability out there it's so important
11 that all my supervisors know the law frontwards,
12 backwards, and any which way because they can get one of
13 our officers hurt as well as invade on people's personal
14 liberties. You know, I don't want officers to be
15 getting bad advice from their sergeant and also from the
16 lieutenant. He's the most senior guy and he has to be
17 knowledgeable in all aspects of the law.

18 Q. What if any knowledge do you have of the 2008
19 lieutenant's exam?

20 A. I participated in it, actually helping, um, devise
21 that exam. I was a subject matter expert.

22 Q. And do you recall who the other subject matter
23 experts were?

24 A. Yes, Captain Genevieve King, Captain Mark Hayes,
25 and Captain Purvis Ryan.

1 Q. And were any of them minority?

2 A. Yeah, Captain Purvis Ryan.

3 Q. And what is his minority status?

4 A. African American male.

5 Q. And what was your role and responsibility with
6 regard -- as an SME with regard to the 2008 exam?

7 A. We were selected to help draw up that exam, help
8 choose the books, help choose the materials, help choose
9 the sections that we wanted that material drawn for, and
10 ultimately to choose the questions.

11 Q. And with regard to -- I'm going to direct your
12 attention to -- well, could you just describe to the
13 Court what you did with regard to the readings, the
14 reading list that has to be published?

15 A. Well, again we delved into the books, we delved
16 into the rules and regulations, and based on my
17 experience as a captain and as a lieutenant and a
18 sergeant, we all, um, dug into the most important
19 responsibilities that we thought were necessary. We put
20 down and highlighted those aspects of the job and then
21 we basically dwindled down the subject matter until we
22 got to these questions.

23 Q. I'm going to direct your attention to Exhibit
24 Number 53.

25 A. (Looks.) Okay.

1 Q. And this exhibit reflects various meetings that
2 began, it gives her the summary of meetings that started
3 on March of 2008. Do you recall participating in any of
4 those meetings?

5 A. Yes.

6 Q. And it describes putting, you know, allowing books
7 to stay and taking books out of previous reading lists?

8 A. That's correct.

9 Q. And is that what you essentially did?

10 A. Yes.

11 Q. Now, I'm going to direct your attention to Exhibit
12 Number 1.

13 A. (Looks.) Yes.

14 Q. Okay. And in particular to the bottom of the
15 first page. These are the rules and regulations that a
16 candidate for lieutenant was -- or a candidate was asked
17 to read?

18 A. That's correct.

19 Q. And were those the rules and regulations you were
20 referring to in your previous testimony?

21 A. Yes.

22 Q. And you mention a number of sources or a number of
23 books.

24 And are these just articles or are they really books?

25 A. These are all -- these are all books that required

1 reading.

2 Q. I'm going to now --

3 MS. HODGE: I'm going to ask that a set of
4 documents, your Honor, be marked for identification and
5 request an opportunity to approach the witness?

6 THE COURT: Of course you may.

7 (Hands up.)

8 Q. Commissioner, I put before you a set of documents,
9 um, there are three of them, and I'm going to ask you if
10 this set of three documents bear any relationship to
11 Exhibit 1?

12 A. Yes.

13 Q. And can you just describe them so we can follow
14 it.

15 A. Yeah, these three books, the "Iannone Police
16 Supervision" book, as well as, you know, the "Swanson"
17 books on criminal investigation and police
18 administration, those are three of the books that we
19 chose to be on the 2008 exam.

20 Q. And they are listed on Page 2 of Exhibit 1, which
21 is the notice?

22 A. That's correct.

23 Q. Now, with regard to these documents, what, um --
24 let's just take the Iannone for an example, what is this
25 exhibit that's in front of you or this document that's

1 in front of you?

2 A. It's the supervision of police personnel book and,
3 you know, we've used that for --

4 MR. LICHTEN: Objection, the question is what is
5 it? He's identified --

6 THE COURT: All right, there's no need to argue,
7 the objection is sustained at this point.

8 Q. Well, what's contained in this document?

9 MR. LICHTEN: Objection, hearsay.

10 THE COURT: Well, what's contained in it? It
11 speaks for itself. Now, if you --

12 Q. Do you know where this came from?

13 A. Yes.

14 Q. And could you describe where it came from?

15 A. Well, this was a book that we chose for the exam
16 and it covers a lot of topics that we --

17 MR. LICHTEN: Objection, he answered the question.

18 THE COURT: No, no, I'm going to let him finish.
19 Go ahead. You can finish.

20 A. This Iannone book had been involved in testing
21 before, when I got promoted to sergeant and lieutenant,
22 and I think it's probably the most important book. So a
23 lot of concepts of my role even today, a lot of the
24 concepts in this book I hold near and dear to me. So
25 this is an excellent book for supervisor.

1 THE COURT: Well, the document you've been given
2 is not the book, it's the table of contents of a book.

3 THE WITNESS: Right, that's correct. I'm sorry
4 about that.

5 THE COURT: And then if I thumb through it, about
6 halfway through here there appears to be the table of
7 contents of another book.

8 THE WITNESS: Yeah, there's three books there.

9 THE COURT: Oh, there's three?

10 THE WITNESS: Right.

11 THE COURT: So you've got the table of contents of
12 three books and these are books that were used -- yes,
13 the third is entitled "Criminal Investigation"?

14 THE WITNESS: Right.

15 THE COURT: And the third or rather these three
16 books are books from which questions were drawn and
17 which you expected applicants to review to get ready for
18 this examination?

19 THE WITNESS: That's correct.

20 THE COURT: And as one of these subject matter
21 experts, you at least think these are authoritative
22 books in preparing a police officer to assume greater
23 responsibility?

24 THE WITNESS: Based on my years of experience, I
25 use them right up until today.

1 THE COURT: You use them and think they ought to
2 be used?

3 THE WITNESS: Yes, there are great concepts in
4 there.

5 THE COURT: All right.

6 Q. I mean, Commissioner, do you have any of these
7 books in your office?

8 A. I basically have them all in my notes. When I
9 studied all of these I wrote them down, all the
10 principles verbatim, and I have a stack of notebooks
11 this high that covers all these books.

12 Q. I just think that the --

13 MS. HODGE: I would move these to be marked for
14 identification inasmuch as he's testified from them.

15 THE COURT: Yes, they certainly may be marked for
16 identification. They'll be marked O for
17 identification -- no, P for identification, in the
18 aggregate.

19 MS. HODGE: Thank you.

20 THE COURT: P for identification.

21 (Exhibit P, marked.)

22 Q. Now, I notice that Exhibit Number 1 is the
23 original reading list. I'm going to ask you to turn to
24 Exhibit Number 17.

25 A. (Turns.)

1 Q. And is that just the amended version of Exhibit 1?

2 A. Yes.

3 Q. Why does the reading list -- I mean the tables of
4 contents indicate a broad range of subjects covered, but
5 you only have an exam of 100 questions?

6 A. Right.

7 Q. Why is that?

8 MR. LICHTEN: Objection. Foundation.

9 THE COURT: No, he's participated. I think that
10 goes to the weight.

11 You may answer, if you know.

12 THE WITNESS: Yes.

13 A. Because it covers all kinds of, um, you know,
14 topics that's important for a supervisor to know, like
15 the Iannone book, it talks about concepts of leadership,
16 when to be an autocratic leader, when to be a democratic
17 leader, or laissez faire. It talks about issues around
18 counseling people who might -- an officer who might have
19 a drinking problem, how to approach that officer. You
20 know, I always remember those concepts. You don't --
21 you know, the book clearly says you don't confront him
22 and tell him "You have a drinking problem," you engage
23 him, you let him discover his own issue, and you lead
24 him to a solution where he knows what the issue is. And
25 so there's a lot of great concepts in there on

1 counseling officers, on leaders, on how to be a
2 supervisor.

3 One of the ones I always remember is -- and this
4 book stresses it, is you never criticize an officer in
5 public. You know, you praise in public, you criticize
6 in private. There's also a concept over
7 "snooper-vision," they call it in here, you know, how
8 you selectively go over certain incidents. So a lot of
9 concepts in this book I adhere to continuously even in
10 my current role.

11 And so these books cover all kinds of topics on
12 leadership, counseling, interpersonal relations,
13 communications, which are so important for any role as a
14 supervisor.

15 Q. And in light of your -- in light of that
16 testimony, do you believe that that's true of
17 lieutenants today?

18 A. Yes, I do.

19 Q. Okay. Now, when you assisted in the development
20 of the examination as a subject matter expert, were you
21 limited in what topics to cover?

22 A. We were not limited, you know, any subject in this
23 book was fair.

24 Q. But you knew that there was a limit of 100
25 questions?

1 A. Oh, that is correct.

2 Q. So therefore you would --

3 A. We would have to --

4 Q. Prioritize?

5 A. Yes, prioritize the subjects that we thought was
6 so important for the lieutenant to know.

7 Q. Now, we've had a lot of testimony here about
8 knowledge, skills, and abilities, and about tasks.
9 Did you, as a subject matter expert, did that play any
10 role in evaluating and giving weights and importance to
11 knowledge, skills, and abilities and tasks?

12 MR. LICHTEN: Objection to the form of the
13 question, your Honor. I have no idea what it means.

14 THE COURT: It's compound. I'll sustain it. She
15 can break it down.

16 Q. With regard to knowledge, skills, and abilities,
17 what if any role did you play with regard to evaluating
18 which would be on the exam?

19 A. I rated the importance of each one.

20 Q. And what about tasks?

21 A. Yes.

22 Q. It's not "yes," what did you do?

23 THE COURT: Well, "Yes" seemed to be an adequate
24 answer for me, that's one of the things he rated.

25 A. I evaluated which tasks that the lieutenant

1 performed, such as guarding prisoners and interpreting
2 laws, issues like that are very important for the role.

3 Q. And I'm going to direct your attention to Exhibit
4 Number 55 and 56.

5 A. (Looks.) Okay, I've got it.

6 Q. And there's been prior testimony that the subject
7 matter experts evaluated a series of tasks as well as
8 KSAs, or knowledge, skills, and abilities, and I note on
9 this particular document, which is Exhibit Number 55,
10 that there is an SME with the initials "WE"?

11 A. Yes.

12 Q. And do you happen to know who that refers to?

13 A. That's me, "William Evans."

14 Q. Okay. And next to that to the left there is "GK"?

15 A. That's "Genevieve King," Captain King.

16 Q. And next to that?

17 A. That's Captain "Purvis Ryan."

18 Q. And next to that?

19 A. Captain "Mark Hayes."

20 Q. And you recall specifically going through an
21 exercise like this, but not necessarily on this compiled
22 list?

23 A. Yes, I remember.

24 Q. Okay. Do you recall how you did it?

25 A. Yeah, we were sitting in an office up at 1

1 Ashburton Place in the Civil Service Office and
2 meticulously we went down every task, every ability,
3 and, you know, we rated them based on the position of
4 lieutenant, the importance of the position.

5 Q. And as you completed that task, what was the next
6 step in the process?

7 A. The next step was Civil Service compiled a list of
8 questions based on, um, how we rated the different
9 responsibilities of the lieutenant and they put together
10 the 100, um, questions for the exam.

11 Q. And what was your role then with the 100
12 questions?

13 A. We reviewed -- the committee reviewed, um, the
14 exams to make sure it was an accurate reflection of the
15 knowledge, skills, and abilities that we thought were
16 necessary for the job of lieutenant and, um, we gave our
17 approval to the exam.

18 Q. And I'm going to direct your attention to, um,
19 Exhibit Number 57.

20 A. (Turns.) Okay.

21 Q. Were you ever -- you didn't prepare this document?

22 A. No, I didn't.

23 Q. Okay. Were you ever given this document by HRD?

24 A. Not that I recall.

25 Q. Okay. But if you would look at the document,

1 please, did you engage -- did you individually, and with
2 your peers, engage in any process as described?

3 A. Yes.

4 Q. And what was that process?

5 A. That was to identify the specific topics and areas
6 that we wanted this exam to focus on.

7 Q. All right. And now I'm going to direct your
8 attention to Exhibit Number 60.

9 A. (Turns.) I have it.

10 Q. And what role, um -- and if you look in Exhibit
11 Number 60, um, the first few pages are an outline. And
12 if you can review that.

13 Is this consistent with your memory of your conclusions
14 that you drew as an SME for this examination?

15 A. Yes.

16 Q. And then I'm going to direct your attention to
17 about five pages in.

18 A. (Turns.)

19 Q. It appears that there is a, um -- it says "Item
20 Selection Diary"?

21 A. Yeah.

22 Q. And do you know what that refers to?

23 A. Um, maybe you could clarify on that, I'm not
24 really sure.

25 Q. Okay. To your knowledge are questions called

1 "Items"?

2 A. No.

3 MR. LICHTEN: Your Honor, he's asked whether he
4 could identify the document and he says he can't
5 identify it.

6 THE COURT: Please, if I want argument, I'll
7 invite it. The objection's overruled. He's given us
8 his unfamiliarity and she may now ask a question.

9 Q. With regard to -- did you attend a meeting at
10 which you reviewed the questions?

11 A. Yes.

12 Q. Okay. And was there someone there from HRD who
13 was there to sort of --

14 A. Throughout the whole process, yes.

15 Q. And finally, um, two pages later --

16 A. Yeah.

17 Q. -- there are a series of, um, sort of compilations
18 again as to whether something was difficult, it was
19 readable, and how much it was used. Do you recall being
20 asked to make that assessment or participate in that
21 assessment?

22 A. Yes.

23 Q. (Pause.) Now, with regard to some of these
24 ratings you and your other SMEs differed in your
25 opinions?

1 A. Yes.

2 Q. Can you describe why?

3 A. Well, you know, I've always been in patrol in my
4 responsibilities on the job and some of them obviously
5 were in a detective role, so, you know, we had different
6 opinions sometimes of what we thought was the most
7 important. You know, Captain Genevieve King was in
8 detectives for a longer time, so a lot of her effort
9 focused up on the role of, let's say, lieutenant
10 detective. But, you know, we all sometimes would --
11 sometimes would differ a little bit, not for the most
12 part a whole lot, but just on, um, what we thought was a
13 priority.

14 Q. And to your knowledge was there consensus at least
15 for the exam itself?

16 A. Yes, by the end we worked together and highlighted
17 the priorities.

18 Q. All right. Now, with regard to the questions
19 themselves specifically, did you go question by
20 question?

21 A. Yes.

22 Q. What did you do?

23 A. Basically we read over them as to whether they
24 were clearly job-related, whether we thought they were
25 important to the task, and, um, we basically said it was

1 a good question.

2 Q. Did you look for questions that merely required
3 memorization of facts?

4 A. No.

5 Q. Okay. And can you describe what you looked for?

6 A. Well, we looked for issues regarding, um, what to
7 do in certain situations and I believe, you know, um --

8 Q. How did you do that? Please explain.

9 A. Well, there's sort of questioning on say a problem
10 employee, how to deal with the problem employee, what do
11 you do? Do you transfer him? One of the questions was
12 like, "Is that the solution now or is that the last
13 thing you want to do?" "Do you want to call him in?"
14 "Do you want to counsel him and give him where he can
15 improve and then obviously follow up to see if he's
16 improved?" And so we try to build in situational
17 analyses where we basically get some reasoning and
18 basically find out whether they are up on the skills
19 necessary to do that position.

20 Q. Did the 2008 exam test the knowledge, skills, and
21 abilities for a lieutenant on the job?

22 A. It absolutely did.

23 Q. And how much of the job? I mean it's always hard,
24 but in terms of that this was a test of what people do
25 and understood, so how much of the job do you believe

1 that the test tested?

2 A. Um, all of the job. I think it was all
3 job-related, I think it hit on the points that we
4 thought important, I think all the knowledge, skills,
5 and abilities that we had it touch. And again I can't
6 say enough about this position, knowledge is power.
7 People will follow and they'll basically look up to you
8 if you know the job. It's so important. And so, um, I
9 thought this test covered every aspect, whether it's
10 interpersonal relations, communications, problem
11 employees, law, criminal investigations, criminal
12 procedure, rules and regulations, it was all in there.

13 Q. And there has been testimony that many of the exam
14 questions, in fact approximately 80, um, on the
15 lieutenant's exam was the same as on the sergeant's
16 exam. Do you know why that is?

17 A. Because there's basic responsibilities to the job,
18 um, the criminal procedures, the rules and regulations,
19 um, are applicable to both ranks.

20 Q. And --

21 THE COURT: But it's fair to say, isn't it,
22 looking at the exam, that the additional questions for
23 lieutenant are the same in character as the questions
24 for sergeant?

25 THE WITNESS: They're the same in character, but

1 ultimately the position has a lot more responsibility.

2 THE COURT: The position does --

3 THE WITNESS: Yes.

4 THE COURT: -- but if an applicant is taking the
5 lieutenant's exam, they have to answer the larger number
6 of questions?

7 THE WITNESS: That's correct.

8 THE COURT: A sergeant can cut off at a certain
9 point?

10 THE WITNESS: Well, usually they cut off at 80 and
11 the next 20 go to the lieutenants and then the next 20
12 will go on to the captains.

13 THE COURT: All right. Well, I'm concerned here
14 with lieutenants and so I put it to you.

15 If an applicant's taking that exam and he gets up
16 to a Question 80, but he's an applicant for lieutenant,
17 and then he goes on to Question 81, 81 is not going to
18 be limited to the additional responsibilities of
19 lieutenant, it's going to more thoroughly test the same
20 things that the first 80 questions tested, is that fair?

21 THE WITNESS: No, it's not because there's certain
22 reading material here that wasn't on the sergeant's
23 list, your Honor. Obviously the role of lieutenant has
24 a lot more responsibility and so there were additional
25 material, um, giving different rules for the sergeant

1 and lieutenant positions on this. So there was some
2 differential on what reading material and on what
3 qualifications. So they weren't exactly the same as far
4 as the reading list goes.

5 THE COURT: All right. So adequately to prepare
6 for the lieutenant's exam, you would have to have
7 command of a larger body of reading material?

8 THE WITNESS: That's correct.

9 THE COURT: All right. And you think this exam
10 adequately tested, that is to say it searched out
11 whether the person did have command of that material?

12 THE WITNESS: That's correct.

13 THE COURT: Not only are you giving him an
14 incentive to read more --

15 THE WITNESS: Right.

16 THE COURT: -- but you're testing that more?

17 THE WITNESS: Right.

18 Q. Okay. There has been some testimony that you
19 could just go with the knowledge exam for sergeant and
20 not for lieutenant. Do you --

21 THE COURT: I didn't understand? Say it again.
22 I'm sorry.

23 Q. With regard to the sergeant's exam, since you've
24 already tested as a sergeant on the knowledge --

25 A. Right.

1 Q. -- why do you need to ask the lieutenant the same
2 or similar questions?

3 A. Because the lieutenant has to have a basic
4 knowledge of everything a sergeant does and a lot more.
5 I mean I testified to the responsibilities, the added
6 responsibilities, both rules and regulations regarding
7 prisoners, and so ultimately the lieutenant is the one
8 that's dealing with them, like when you talk about the
9 Jenkins rule or when you talk about emergency
10 restraining orders. You know, obviously the basic first
11 80 can be, but obviously the role of lieutenant requires
12 a lot more knowledge, a lot more skill, and a lot more
13 ability.

14 And also, you know, rules -- the laws are
15 changing, we just had the domestic violence laws change,
16 and so, you know, lieutenants have to be up to date and
17 sometimes 2, 3, 4, 5 years can go by between exams. And
18 so it's very important that when the sergeant's going
19 for the next position, that again he's very
20 knowledgeable in every law that might have changed,
21 every rule and regulation that might have changed, and
22 anything else. And again, like I said, his main
23 responsibility is to make sure the officers are
24 well-trained and that he basically interprets the laws,
25 the rules and regulations for them. So no one, more,

1 has to know the knowledge.

2 And again he determines, at the booking desk,
3 whether the probable cause is there, he determines, in
4 the criminal complaint, well, if the complaint and the
5 elements are there. And so he continually, more than
6 anyone, is the final say on whether someone goes up to
7 the court system.

8 Q. You know, is it sufficient to know how to look it
9 up instead of knowing it by memory?

10 A. I mean, you know, it shows a weakness in the
11 leadership if you have to go into the books. You know,
12 sometimes we have to make split-level decisions. The
13 sergeant on the desk might be looking for some advice
14 and he calls in. You know, our job unfortunately we
15 make decisions on the spur of the moment. No one wants
16 to lead someone who has to go to a book and have to look
17 it up. I always took pride in knowing the laws and I
18 think because of that people are more apt to follow.
19 So, you know, if you have to refer to the book every
20 time someone has a question, I think it erodes the
21 leadership and the confidence of your troops.

22 Q. Now, with regard too that, um, what did you find,
23 um, because you've worked with others, about their
24 ability to do the job after they pass the test and they
25 were selected?

1 MR. LICHTEN: Objection, your Honor.

2 THE COURT: Put the question again. I'm sorry.
3 Say it again.

4 Q. You have worked with others who have taken the
5 exam, correct?

6 A. Correct.

7 Q. And how well do you think that they have been able
8 to do the job of lieutenant?

9 MR. LICHTEN: Your Honor, it's such a general
10 question. I think they're trying to create a criterion-
11 validity study that they've never done before.

12 THE COURT: Well, that goes to its weight, but
13 it's certainly relevant, and he's got the experience and
14 he can answer it.

15 MR. LICHTEN: Well, I object to the form of the
16 question because it's so general.

17 THE COURT: It's not too general. He can answer.

18 A. I found that those who have always done well on
19 the topic exams or on the written exams have always been
20 top-performing supervisors. Myself, you know, I was
21 Number 1 on the sergeant's list when I took it, I was in
22 the top 5 on my lieutenant's, and nobody came close to
23 me on the captain's exam. And I attribute the great
24 success of my career to be based on my knowledge of the
25 laws, my ability to make decisions out in the field and

1 at the desk. And some of my peers who are on my command
2 staff, such as Superintendent O'Roarke, um, you know,
3 they have gotten to their positions based on their
4 knowledge and their experience.

5 And so I've always found -- even in past
6 commanders such as Superintendent Dunford, um,
7 Superintendent Clayborn, an African American who scored
8 very well, um, they were all excellent leaders. So I've
9 always seen a correlation between knowledge and success
10 on this job.

11 Q. Are you in favor of selecting candidates in rank
12 order on the civil service list?

13 A. Yes.

14 Q. Why?

15 A. Because there's always insinuations that politics
16 come into play if you don't have it. You know, the
17 Commissioner and the Mayor, um, and, you know, they owe
18 this person a political favor. If you have an exam like
19 this there's no possibility of politics, of any
20 subjectivity playing into it. I've found -- like the
21 original civil service, that's why it was invented, just
22 to keep the politics out of it.

23 It's fair. Everybody gets the same list of books.
24 People who put in the time, like I always did, people
25 who gave up, you know, details, overtime -- myself

1 running was real important to me, but I'd stop running a
2 month before the exam. People who make the time, who
3 put in the effort, who show the commitment, they're the
4 ones who get the job.

5 Q. And what did you do to prepare for the
6 lieutenant's exam?

7 A. What I did was I read every book meticulously, had
8 a notebook for every book, and I just basically almost
9 verbatim copied each chapter, and I was at it easily, on
10 some days, for a good 12 hours. In fact, my wife
11 basically had had it with me. I went so far as when I
12 was in Disney World I was studying in my room and my
13 kids still hold that over my head.

14 So, you know, it's a long task but it all comes
15 down to how badly you want this position? It's a fair
16 game. It's about effort. It's about commitment. It's
17 about character. And I think that's what it's all
18 about. It builds character that you can sit down and
19 make the commitment. If you really want the job, the
20 material's there, you've just got to put in the effort.

21 Q. Now, what is the position of the Boston police on
22 community policing?

23 THE COURT: What is the position? I didn't hear
24 it. Say it again?

25 Q. What is the position of the Boston police on

1 community policing?

2 THE COURT: Oh, the Boston police, yes.

3 A. We're strongly supportive of community policing.

4 Q. And I believe that one of the experts has opined,
5 has written an opinion regarding the fact that to
6 predict who would be a successful leader within the
7 Boston Police Department, that, um, personality testing
8 would be useful particularly because you're committed to
9 community policing.

10 As the Commissioner, do you have an opinion about
11 that?

12 A. Well, we do personality testing when they come on
13 the job, that's an important component, but not for
14 promotions. Personality basically is important, but
15 knowledge, skills, and abilities is the most important
16 thing.

17 You know, the community policing? We expect all
18 our officers to be into community policing, that's
19 something that is taught in our academies. At this
20 level it's all about paying attention to the laws, the
21 criminal procedures, the rules and regs. Again,
22 knowledge is power.

23 Q. And you've been around the Boston police for a
24 long time --

25 A. Yes.

1 Q. -- and you know that there are challenges. Were
2 you in the Federation, the Superior Officers Federation,
3 as a member?

4 A. Yes.

5 Q. And to your knowledge has the Superior Officers
6 challenged the promotional exams because of what it
7 contained or didn't contain?

8 A. Yes, they have.

9 Q. And can you describe what your, you know, some of
10 those exams?

11 A. Well, this current exam they challenged because
12 they didn't like the weights and the assessment
13 component.

14 Q. Now, when you're talking about the current exam,
15 are you talking about the exam that was just given in
16 2014?

17 A. That's correct.

18 Q. And you said the weights as well as the components
19 of the exam?

20 A. Yes.

21 THE COURT: Well, I'm just a little unclear what
22 that means. Why don't you tell me how they are
23 challenging it?

24 THE WITNESS: Well, they're challenging it based
25 on the fact that, say, for the captain's exam only 35

1 percent of it is based on the books and the knowledge
2 component. Another component is that assessment
3 component and these recent exams have given more weight
4 to how well you can talk basically and how well you can
5 go into a scenario. And that's my problem sometimes
6 with these, that if you're a good talker, you can do
7 well, yet you don't have the knowledge to do the job.

8 And so a lot of the -- well, you know, this is a
9 fair way, you know, you test the ability, the knowledge
10 and skills. Anybody can talk their way up to a
11 position, but for liability purposes, for protection of
12 citizens on the street and my officers, it's more
13 important to be knowledgeable than to be a sweet-talker.

14 THE COURT: So understanding that answer, your
15 personal view is that a written exam is a superior way
16 to get at job performance than this array of personal
17 assessments that makes the written exam less important?

18 THE WITNESS: Yes, and based on my experience I've
19 seen some positions, some promotions of sergeants who
20 all they could do was talk and they've been some of our
21 worst performers in the role.

22 THE COURT: Uh-huh.

23 Q. Do you know a Bruce Smith?

24 A. Yes.

25 Q. He's a sergeant?

1 A. Yes.

2 Q. Is he the, quote, "Commander of the District 13
3 Sergeant-Detectives"?

4 A. No, he's just one of the sergeant-detectives
5 there.

6 Q. Does he have any authority to assign work to other
7 sergeant-detectives?

8 A. No.

9 (Pause.)

10 MS. HODGE: If I could just have a moment, your
11 Honor?

12 THE COURT: Of course.

13 (Pause.)

14 MS. HODGE: I have nothing further.

15 THE COURT: Mr. Lichten, anything for this
16 witness?

17 MR. LICHTEN: Yes, your Honor.

18

19 CROSS-EXAMINATION BY MR. LICHTEN:

20 Q. Good to see you again, Commissioner.

21 A. Good to see you.

22 Q. Congratulations on your promotion.

23 Okay. Now, you started out by talking about the fact
24 that you recently made some promotions to, um, the
25 position of lieutenant and I believe you said Torigian

1 was one of those persons, is that correct?

2 A. That's correct.

3 Q. Okay. And is Torigian white?

4 A. Yes.

5 Q. Okay. And what you told us made perfect sense,
6 which was that Torigian had demonstrated, by the work he
7 had done in the Department, that he would be a superior
8 lieutenant, that was your view, right?

9 A. That's right.

10 Q. Because he had -- um, I think you said that in the
11 district where he was he had already shown himself to be
12 exemplary, is that correct?

13 A. That's correct.

14 Q. And what were some of those examples of his
15 exemplary work that you were so taken with that you
16 decided to promote him from those others?

17 A. Well, I think he's very knowledgeable. I've known
18 Timmy quite a bit. I had the pleasure of working with
19 him when I was a captain in District 14. And so I know
20 he's very sharp in his skills, his knowledge and
21 abilities, but I also know he's very good at community
22 policing. And so he is the ideal candidate, someone who
23 can talk to the community, but also has the ability to
24 sit on that desk and take the responsibility which is
25 paramount to doing that job.

1 Q. And when you promoted Marwin Moss, and you had
2 others that you could have promoted, you made a similar
3 analysis that he was someone, based upon your knowledge
4 of his skills and abilities and knowledges, that you
5 believed was the best person for that promotion?

6 A. Yeah, and for the most part I didn't know Marwin
7 as well as I knew Lieutenant Torigian, but I've heard so
8 many great things about his work ability that I chose
9 him.

10 Q. Right. You would agree that one of the greatest
11 measures of how one is going to perform in the future,
12 in your opinion, is how they performed in the past, is
13 that correct?

14 A. Well, it's a combination of how well they
15 performed as well as, um, their ability to, um, assume
16 the position and all the responsibilities of a
17 lieutenant.

18 Q. Okay. Now, I guess under the old saying, "The
19 apple doesn't fall very far from the tree," you have a
20 brother who is a former police commissioner, is that
21 correct?

22 A. Yes.

23 Q. And you were aware that in 2002 he tried to, um,
24 implement a performance review system, is that correct?

25 A. Yes.

1 Q. Okay. And I'm going to read you -- and did you
2 agree with that idea of implementing a performance
3 review system as part of the promotional process for the
4 position of lieutenant?

5 A. Back then I was not in a position to do that.

6 Q. Well, I'm not asking you if you had the --

7 A. No, I'm a strict knowledge-based 80-20.

8 Q. Okay. So you're in the -- while your brother may
9 have been in a different grouping, you're a strict
10 80-20, 80 percent knowledge multiple choice test and 20
11 percent training and --

12 A. Correct.

13 Q. That's the way you were when you started the
14 Department and that's the way you'll probably end up?

15 A. That's correct.

16 Q. So it wasn't your idea to do this 2014 exam with
17 an assessment center and these other components?

18 A. No, it was not.

19 Q. And it wasn't your idea to hire EB Jacobs who
20 determined that 60 or 70 percent of the exam for
21 lieutenant should be not part of the multiple choice
22 test, it should be the assessment center, that was not
23 your idea?

24 A. It was not.

25 Q. And so I take it that if the Court doesn't

1 intervene in this case, you have no intention in the
2 future, for as long as you're a police commissioner, of
3 going with anything but this 80-20 knowledge test for as
4 long as you're Commissioner in the future, is that
5 right?

6 MS. HODGE: Objection.

7 A. No.

8 THE COURT: Wait. Wait. Wait. Wait. Wait.

9 Yeah, I -- well, I have a preliminary question.

10 As Commissioner, is that your choice, do you think?

11 THE WITNESS: Well, unless I see different results
12 here, your Honor, that promote diversity, I think the
13 2002 exam in the **Lopez** case basically said that there's
14 no difference, that we ended up with the same result.
15 So if we're going to end up with the same results, I see
16 the 80-20 far superior. But rather, you know, if we're
17 -- if our goal is to get diversity and the way we did it
18 back in 2002 didn't reap the results we wanted it to,
19 that unless I see dramatically different ones here that
20 says to me, "Yeah, diversity, to increase the ranks,
21 this is the way to go," then I'm a firm believer that
22 the more knowledge, skills, and ability you have, they
23 far outweigh whether you can talk.

24 And so I'm 80-20 right now unless I see the
25 results of this exam change my mind. But nothing to

1 date has shown that that's any superior.

2 THE COURT: Now, since we have the opportunity to
3 talk here, and it's a very real issue whether I ought to
4 be involved in this at all, and I'll have to sort that
5 out, but I follow the law. You must understand that
6 while diversity is certainly a laudable goal and you, as
7 a policy-maker, and I praise it, share in that goal,
8 that's not what I'm doing here.

9 THE WITNESS: I know but --

10 THE COURT: The law the way I must apply it
11 requires me, if I get into this, to see that everyone's
12 got an equal shot. That's -- however this case plays
13 out, if I get into it at all, that's the first thing,
14 should I have anything to say about this case. If --
15 and I'm speaking now because you're the Commissioner and
16 you're going to be the Commissioner, but this is one
17 case to me and I'll do the best I can, but then I'm
18 through with it, and I'll go on to another case.

19 So if I decide to talk about this, I want you to
20 understand that the only reason I'm talking about it is
21 because I've come on this record to find that either we
22 are giving everyone a roughly equal shot or I find we've
23 got to do some other things to give everyone an equal
24 shot. Once we give them an equal opportunity, then on
25 this branch of the law -- because there's no

1 discrimination in this case, we're not concerned about
2 that, but on this branch of the law I have nothing more
3 to say, just to give them an equal shot, to give
4 everybody equally an equal shot.

5 Now, you understand that that's how I think the
6 law is?

7 THE WITNESS: Yes. Okay.

8 THE COURT: All right. Go ahead, Mr. Lichten.

9 THE WITNESS: He asked me for my opinion, your
10 Honor.

11 THE COURT: Oh, I understand.

12 THE WITNESS: Whether I would change my mind?
13 Obviously I have to take that into account. I'm just
14 trying to give an honest answer, your Honor.

15 THE COURT: And I know you are. Well, I shouldn't
16 speak to it. I understand that you recognize you're
17 under oath and you're giving your testimony.

18 THE WITNESS: Yes.

19 THE COURT: I -- well, I've said what I need to
20 say. And he's examined you for a good reason and he
21 wants and we all need your honest testimony.

22 THE WITNESS: Okay.

23 THE COURT: Go ahead, Mr Lichten.

24 MR. LICHTEN: May I approach, your Honor?

25 THE COURT: Yes.

1 Q. I'm going to show you what was Exhibit Number 194
2 in the **Lopez** case, which is part of the record in that
3 case and now it's part of the record in this case.
4 And first let me ask you if you've ever seen this
5 document before?

6 A. I believe I've read it before.

7 Q. Okay. And so just to set the stage, you were
8 aware that in 2002, when your brother was the police
9 commissioner, an exam was given that was going to have
10 multiple components based upon a job analysis that was
11 done by Morris and McDaniel and that as part of that
12 there was going to be a performance review system that
13 was going to have a certain number of points apportioned
14 for lieutenant, is that right?

15 A. Um, I believe so, yes.

16 Q. Okay. And I asked you if you could turn to the
17 fourth paragraph of this.

18 A. Of the first page? Are they both the same?

19 Q. Yes, the first page.

20 A. Okay. Go ahead.

21 Q. Okay. It says: "It was my intention to provide
22 candidates an opportunity to receive credit for the work
23 they do day in and day out." And then it says: "I
24 believe that the best indicator of future performance is
25 past performance, that what you do when you come into

1 work counts. The best supervisors cannot always be
2 identified solely by their performance on the written
3 test and an hour in an assessment center. I wanted to
4 give candidates credit for the work that they do on a
5 daily basis. Quite simply, it is fairer to officers to
6 factor in what they do on the job when they come to
7 work."

8 Now, I'd like to ask you first if you agree with
9 what your brother wrote in that memo?

10 A. To a degree.

11 Q. Okay. And therefore do you -- would you favor or
12 not favor -- as part of the assessment process for
13 promotion to lieutenant, do you favor a system that
14 allows individuals like yourself, reputable people like
15 yourself with integrity, to be able to look at the
16 record of people serving under you and use that as part
17 of the basis to determine whether or not they should be
18 promoted. Do you think that would be a fair system that
19 would get you the better candidates promoted?

20 A. No, I don't think it would be.

21 Q. So you disagree with this?

22 A. No, but it's too subjective. I've been on the job
23 long enough to know that, you know, everyone's going to
24 accuse the Mayor of calling me -- you know, if you don't
25 have a legit system, the subjectivity element comes in.

1 Q. And how about if you have a legit system, that is
2 you have a structured process with outside assessors
3 seeking input from people who are supervisors, if there
4 was a system in place, such as something designed by
5 industrial psychologists, do you think that looking at
6 past record would be important to determining who your
7 better promotees would be?

8 A. Well, we have training and experience, that's 20
9 points of this exam, and so I think that sort of
10 illustrates some of the past performance, whether
11 they're veterans, whether, you know, they've been on so
12 long. So I think we have a component on that already.
13 My big issue is, even with this exam, everybody
14 questions --

15 Q. All right, Commissioner, you've answered my
16 question.

17 THE COURT: No, no, no, I want to hear his answer.
18 Let him finish.

19 MR. LICHTEN: All right. Sorry, your Honor.

20 A. Even with this exam everybody is questioning
21 whether, you know, the assessors -- whether they were
22 even awake when the officers were going in front of them
23 giving their -- um, basically their situation. Now
24 that's not fair to the officers. I heard that one guy
25 wasn't even paying attention. And there's still a lot

1 of whispering out there that somehow I have input, that
2 I favor people. You know, my nephew, Brian, got the top
3 mark on the sergeant's list, you know, and the
4 subjectivity in what I'm hearing out there -- well, that
5 can't happen with a written exam. The subjectivity
6 comes in even when we have assessors come in.
7 So when you ask me if I want to give "Commissioner
8 points" based on someone's past experience, it's so
9 subjective that I don't want any question of my
10 integrity or the organization's. Everybody gets 100
11 questions, they're given books, equal opportunity, all
12 it comes down to is putting in the time, the commitment,
13 and effort, and everybody will do -- based on the effort
14 they put in, as well as they can do. If you bring in my
15 opinion or anyone else's opinion, politics always comes
16 into it. There's no getting around it.

17 Q. Commissioner, you started off your testimony this
18 morning by saying you had six people tied and you
19 exercised exactly that same discretion when you decided
20 to promote Torigian, a white person, over anyone else on
21 the list based upon your knowledge that he had performed
22 well on the job, wasn't that your testimony?

23 A. It absolutely was and I'm very confident in it.

24 Q. So you do -- so you do exercise your discretion --

25 A. Until there's a better system, that's what I have

1 to go on.

2 Q. Okay. And you do it for detectives, too, don't
3 you?

4 A. I haven't -- you know, that exam, the detective's
5 exam, I wasn't in my position for that.

6 Q. But detectives are promoted based upon performance
7 also, is that correct?

8 A. Well, again they have grades and when they're tied
9 I leave it to my Superintendent Murta, who knows them
10 best, he makes the decision, he brings their names
11 forward. I don't know all the detectives.

12 Q. But the detectives are not made detective just
13 based on a written system, there's an assessment center
14 for the detectives, is that correct?

15 A. That's correct.

16 Q. Okay. So do you believe in that system?

17 A. Well, again, a lot of subjectivity. They go in
18 front of three captains and -- the problem with that is
19 if someone messed up in the past, those captains are
20 going in there knowing it. So that system is not
21 perfect either.

22 Q. So you're against that system too, you would go
23 back to the detectives only doing a written exam?

24 A. Well, I didn't say I was against it, but there's a
25 lot of subjectivity in that detective's exam, too.

1 Q. Well, you do the same thing when you decide who's
2 going to be on your command staff, you use your
3 discretion to decide who are going to be the commanders
4 and deputy commanders of the Boston Police Department,
5 is that correct?

6 A. Yes, I do.

7 Q. You don't give them an exam, do you?

8 A. There is no exam for that.

9 Q. And you don't call them in and ask them to recite
10 the various laws or the motor vehicle laws or the search
11 and seizure laws, what you do is say "This person has
12 performed really well on the job, I think they would
13 make a good commander," and you promote them to the
14 position of commander, isn't that right?

15 A. That's correct.

16 Q. (Pause.) Okay. I think you were saying earlier
17 that you had the, um -- you've made one or two captain
18 promotions recently, is that correct?

19 A. I made, um, Lieutenant Hussain.

20 Q. Lieutenant Hussain a captain, is that correct?

21 A. That's correct.

22 Q. Okay. And I think what you were saying is you
23 were very proud of that fact because before you made
24 Hussain a captain there were zero minority captains on
25 the whole Boston Police Department?

1 A. No, I didn't say that, I said there were zero
2 captains in the district, leading command of the
3 district. Now there were two other captains who had
4 been promoted to superintendent and deputy prior to
5 this.

6 Q. Okay. In the position of captain, not
7 superintendent, it is a fact that before Hussain was
8 promoted you had zero individuals who were working as
9 captains in the Boston Police Department?

10 A. That's incorrect.

11 Q. Who else did you have?

12 A. Superintendent Fong, who was a superintendent at
13 the time.

14 Q. I'm not asking you about superintendents, I'm
15 asking you about people who were --

16 A. Well, Captain Fong was a civil service rank.

17 Q. Well, Captain Fong is not black or Hispanic, is
18 he?

19 A. He's Asian.

20 Q. All right. And --

21 THE COURT: I need to sort it out a little bit
22 just so I understand the facts.

23 "Captain" in the Boston Police Department is a
24 civil service rank?

25 THE WITNESS: That's the highest you can go.

1 THE COURT: Okay, in civil service?

2 THE WITNESS: Right.

3 THE COURT: All right. Then, for good and
4 sufficient reason, to give the Commissioner a chance to
5 implement his policies, the Commissioner serves at the
6 pleasure of the Mayor, who's ultimately responsible to
7 the voters, but the Commissioner gets the right to
8 select a command staff.

9 THE WITNESS: That's correct, your Honor.

10 THE COURT: And so -- and you've told us that that
11 is about 21 positions?

12 THE WITNESS: That's correct.

13 THE COURT: And in there there's a superintendent?

14 THE WITNESS: -- in chief.

15 THE COURT: A chief?

16 THE WITNESS: Yes, a superintendent in chief,
17 William McGraw, who is African American. He's my Number
18 2 guy.

19 THE COURT: He's Number 2 to you?

20 THE WITNESS: Yes.

21 THE COURT: Then there are --

22 THE WITNESS: Superintendents.

23 THE COURT: And how many of those do you have?

24 THE WITNESS: There's 7.

25 THE COURT: 7 superintendents?

1 THE WITNESS: Yeah, and 13 deputies.

2 THE COURT: And 13 deputy superintendents?

3 THE WITNESS: Yes.

4 THE COURT: All right. And you pick those people?

5 THE WITNESS: That's correct.

6 THE COURT: And the 13 deputy superintendents,
7 while they serve in that position, do they have the rank
8 of captain?

9 THE WITNESS: No, that's incorrect.

10 THE COURT: Well, that's why I'm trying to learn
11 it.

12 THE WITNESS: No, they don't, your Honor.

13 THE COURT: Okay. So when you are now being --
14 and so that's your command staff?

15 THE WITNESS: That's it.

16 THE COURT: A superintendent in chief?

17 THE WITNESS: A superintendent, deputies --

18 THE COURT: And deputies --

19 THE WITNESS: And the captains, too.

20 THE COURT: And --

21 THE WITNESS: Well, they're civil service rank,
22 but I consider them command staff because of their --

23 THE COURT: Because of their high rank?

24 THE WITNESS: Yes, in running the station.

25 THE COURT: Okay. So a captain is a civil service

1 rank but on the command staff?

2 THE WITNESS: That's correct.

3 THE COURT: Okay. Thank you.

4 And just so I pin it down in my mind, no one gets
5 to be a captain in the Department unless they have
6 achieved that through the civil service procedure?

7 THE WITNESS: That's correct.

8 THE COURT: Okay. Thank you.

9 Go ahead, Mr. Lichten.

10 And so we're now talking about -- and so, as with
11 lieutenants, there's vacancies in captains and you've
12 made these various promotions --

13 THE WITNESS: Can I, your Honor?

14 THE COURT: Please.

15 THE WITNESS: Superintendent Fong was an Asian
16 captain who was made a superintendent and he served up
17 there for about 7 years, and deputy superintendent Al
18 Andres, who is a Latino male, was a deputy
19 superintendent. And when I came on board I basically
20 met with each one of them. I thought it was a good
21 idea. Neither one had really ever served as a captain
22 because they were brought up when they were lieutenants.
23 I had a conversation with them that I thought it was
24 best for their career that they go down and -- it was
25 best for the community that they go down to their civil

1 service rank of captain. So I put Superintendent
2 Captain Fong in charge of Area 1 because of the large
3 Asian population in China Town and that whole area, and
4 Al Andres, who was a captain, I put him in Jamaica Plain
5 because that's where he grew up, and he loves the
6 community over there, they know him well, and they both
7 have thrived in their positions. But at one time they
8 were brought up by Commissioner Davis to the command
9 staff. But when I came in I saw their value more as a
10 captain and asked them to step down and they both
11 voluntarily went down. They were very good about it.

12 THE COURT: And the African American captain, he
13 was a lieutenant serving as a lieutenant and you --

14 THE WITNESS: Yes, about three months ago I
15 promoted him, I promoted him to civil service captain
16 and put him in charge of the Mattapan station, and I
17 moved the current captain, who was a white male, to put
18 him in charge of our police academy.

19 THE COURT: All right. Let me follow up with the
20 African American.

21 Was he next up in rank order or was he in a tie
22 and you selected from --

23 THE WITNESS: He was in a tie.

24 THE COURT: Of how many?

25 THE WITNESS: Well, I don't know exactly, but

1 there was like --

2 THE COURT: More than two?

3 THE WITNESS: I think there were like three or
4 four.

5 THE COURT: Three or four.

6 Go ahead, Mr. Lichten.

7 MR. LICHTEN: Okay. I don't know where to begin.

8 Q. Just to close this part of the conversation, in
9 2013 when you took over and just after that when you
10 promoted Hussain to be a captain, you had no African
11 American captains on the Department, is that correct?

12 A. No, we didn't.

13 Q. And you didn't like that fact, that concerned you
14 that in the whole Boston Police Department you didn't
15 have one minority captain, so you were glad to make
16 Hussain a captain, isn't that right?

17 A. Yes.

18 MS. HODGE: Objection.

19 THE COURT: No, overruled. Overruled.

20 MS. HODGE: Your Honor, I'd like to speak to this,
21 if I could?

22 THE COURT: You may.

23 MS. HODGE: And that is I think it's unfair to say
24 you have no minority captains when he's already
25 testified that there were two captains --

1 THE COURT: Oh, if that's your concern, I have
2 that in mind.

3 MS. HODGE: And one was Asian, so.

4 THE COURT: Yes, I have it in mind, the entire
5 testimony.

6 MS. HODGE: Yes, your Honor.

7 Q. Just so we're clear, when Hussain was appointed
8 there were no African American captains in the police
9 department, isn't that right?

10 A. Not at this time, no.

11 Q. Right.

12 THE COURT: Yeah, that of course is a different
13 question and that's Ms. Hodge's point. But go ahead.

14 Q. And the judge has already explained this and we
15 already know this from the case but in order to be a
16 captain you have to choose from the pool of lieutenants,
17 you have to be a lieutenant in order to take the
18 captain's test and be a captain, isn't that correct?

19 A. That's correct.

20 Q. And at the time you assume your position there
21 were only four or five African American lieutenants in
22 the Department if that, isn't that right?

23 A. That's correct.

24 Q. Okay. Now, you mentioned someone that you
25 promoted, I think you said to chief of staff, I think

1 you said, was "Gross," is that correct?

2 A. No, he's the superintendent in chief, Willy Gross.
3 I have a chief of staff who's Superintendent Buckley.
4 So he's the chief of the department. He runs the
5 day-to-day operations.

6 Q. And his name is "Gross"?

7 A. "Gross," G-R-O-S-S, Willie.

8 Q. And he's a captain?

9 A. No, he's a sergeant.

10 Q. He's a sergeant?

11 A. Yes.

12 Q. So he's an African American individual who you
13 promoted to chief of staff and he had --
14 Did he take the lieutenant's exam?

15 A. No, he didn't.

16 Q. He's never taken the lieutenant's exam?

17 A. I don't know if he's ever taken it.

18 Q. Well, did you ever --

19 THE COURT: I'm losing this because I do
20 understand that the Commissioner gets the right to
21 appoint his command staff without regard to -- or at
22 least let me ask and see if I understand.

23 You can appoint your command staff without regard
24 to rank?

25 THE WITNESS: That's correct.

1 THE COURT: You could appoint a patrolman?

2 THE WITNESS: Yes.

3 THE COURT: Whether or not that's wise would be
4 your responsibility?

5 THE WITNESS: Yes.

6 THE COURT: But you are the Commissioner, you get
7 a command staff and you put it together?

8 THE WITNESS: Right.

9 THE COURT: I have nothing to say about this. So
10 what difference does it make?

11 MR. LICHTEN: Well, I'll get right to the point,
12 your Honor.

13 Q. My question is, if you put so much stock in how
14 much knowledge someone has as reflected by how high they
15 score on the civil service test for the position of
16 lieutenant or captain, why did you appoint as the second
17 in command in the whole department someone that only
18 held the civil service rank of sergeant and someone you
19 don't even know what they scored on the lieutenant's
20 exam let alone the captain's exam?

21 A. Because of what we've seen happen recently in
22 Ferguson is all about not having ample minority
23 representation throughout the Department.

24 Q. Exactly, that's the --

25 THE COURT: Well, just a moment, let him answer,

1 he's testifying and you're asking another question.

2 A. Well, when I got on we wanted the diversity of the
3 city, um, you know, to be reflected and, you know, so I
4 have to bring people up. But do I like this system?
5 You know, unfortunately, you know, this has become a
6 minority/majority city and we have to reflect the
7 community that we represent. Now that being said, you
8 know, um, I don't know if Willy has taken the exam at
9 all, but, you know, that's -- unfortunately in today's
10 modern policing, one of the things the community wants
11 is for the police department to reflect the diversity of
12 the people they serve.

13 Q. All right. Now, I'm really unclear. I assumed
14 that when you --

15 MS. HODGE: Objection, your Honor.

16 THE COURT: His comment is stricken.

17 MR. LICHTEN: I'm sorry, your Honor.

18 THE COURT: Go ahead. Ask a question.

19 Q. I assumed that when you promoted Mr. Gross to this
20 very very important position of second-in-command --

21 A. Right.

22 Q. -- of the whole Boston Police Department, are you
23 saying that you did so simply because he was black or
24 are you saying that you did so based upon his merit as a
25 sergeant?

1 A. I based it on Willie's experience out there. I
2 know he has grown in his position in knowledge and
3 skills and ability. So it wasn't just because of the
4 diversity factor. He has 27 years on the job. He's
5 experienced. I think, you know, from my seeing him out
6 there, I believe, you know, he has the knowledge, he has
7 the skills and ability. And, you know, given, um, you
8 know, that I want more representation of the diversity
9 of the city, he was a good choice.

10 Q. And you did that based upon his proven record of
11 performance not because of any scores he received on any
12 civil service exam, isn't that correct?

13 A. I made it on his ability. I've seen him out there
14 at crime scenes, he has a good knowledge of the laws, he
15 has a good knowledge of the rules and regulations, so he
16 is pretty knowledgeable. So my command staff is very
17 knowledgeable and very diverse.

18 Q. Okay. Are you aware that Mr. Gross took the
19 lieutenant's exam and did not score well on it?

20 A. I don't think he took it. I'm not sure.

21 Q. You're not sure?

22 A. I didn't even inquire. It's none of my business.
23 You know, I don't want to embarrass anyone as far as if
24 they have to tell me what their grade is. I try to
25 remain impartial and I don't get involved in what anyone

1 did or whether they took the exams or not.

2 Q. So it wasn't that important to you what his score
3 was on the civil service exam if he took it at all?

4 MS. HODGE: Objection. Your Honor, if he --

5 THE COURT: I'll hear you.

6 MS. HODGE: It seems to me --

7 MR. LICHTEN: I'll withdraw the question, your
8 Honor.

9 THE COURT: Withdrawn. Withdrawn.

10 MS. HODGE: Fair enough.

11 MR. LICHTEN: Your Honor, would it be okay now to
12 take -- I was going to move on to another subject.

13 THE COURT: I'd like to get done with the
14 testimony and excuse this individual and move on to
15 final argument. So, no, let's go on for a while.

16 MR. LICHTEN: Okay.

17 (Pause.)

18 Q. All right. Now, I just want to understand some of
19 your testimony.

20 You were aware, were you not, that in the year 2000 the
21 firm of Morris and McDaniel conducted a job analysis for
22 the Department, is that correct?

23 A. When was that held?

24 Q. In 2000.

25 A. Yeah.

1 Q. Okay. And were you aware that they devised at
2 that time what they believed to be 147 knowledges,
3 skills, and abilities that they thought were critical
4 for the job?

5 A. Yes.

6 Q. Okay. Now, when you were working -- you were not
7 a subject matter expert in 2000 when they were doing
8 this, is that right?

9 A. That's correct.

10 Q. Okay. So you weren't involved in ranking each of
11 these knowledge, skills, and abilities in order as to
12 whether they were important or whether they would
13 differentiate who would be a good lieutenant or not, is
14 that right?

15 A. In what year are you talking about?

16 Q. In 2000.

17 A. No.

18 Q. Okay. In 2008, did you rank each of these
19 knowledge, skills, and abilities again?

20 A. I did rank skills, knowledge, and abilities, yes.

21 Q. You did. And do you remember what you put down,
22 do you remember what you wrote for each one? You
23 probably don't, is that right?

24 A. I don't. I know what I would have focused on,
25 though.

1 Q. But in fact you were asked to rank each one of the
2 knowledge, skills, and abilities, is that correct?

3 A. That's correct.

4 Q. And were you aware that of the 147 knowledge,
5 skills, and abilities, about 100 of them were skills and
6 abilities?

7 A. I'm not sure what -- I know they were knowledge,
8 skills, and abilities, but I wasn't sure what the
9 numbers end up.

10 Q. Okay. And you ranked them in order of importance,
11 is that right?

12 A. For the position, yes.

13 Q. Right. And you didn't -- and just so we're clear,
14 and I can go over them if you want, but you didn't say
15 that the only thing that -- that you ranked high were
16 knowledges and then when you got to skills and abilities
17 you didn't say, "Well, those are unimportant, I'm not
18 ranking them as being important," right, you ranked many
19 of these skills and abilities as being highly important,
20 is that right?

21 A. Yeah, if they related to the lieutenant, based on
22 my experience sitting there, I rated them high.

23 Q. Yeah, like questions about whether you have to
24 respond to citizen's complaints, you ranked that as
25 "highly important," right?

1 A. It's a major responsibility of a lieutenant.

2 Q. Absolutely. And "provides advice to people who
3 may be emotionally distraught," you ranked that as
4 important, is that correct?

5 A. That's correct.

6 Q. Okay. Now, were you aware that in 2002 these
7 skills and abilities were attempted to be evaluated by
8 the exam by the use of an assessment center and an
9 in-basket exercise and things of that nature?

10 A. I wasn't aware of that. I wasn't involved in
11 that.

12 Q. You had no involvement in the 2002 exam?

13 A. Exactly, no. I was a lieutenant back then. Oh,
14 no, I'm sorry, I was a captain, but I wasn't involved.

15 Q. And were you aware that in 2008 the Commonwealth
16 of Massachusetts Human Resources Division decided that
17 for all but two of all those 100 skills and abilities
18 they would not attempt to test for them on the written
19 exam, were you aware of that?

20 A. I wasn't aware of that.

21 Q. (Pause.) So let me see if I understand what
22 you're testifying here today. Let me ask it this way.
23 Have you been an assessor in other cities and towns?

24 A. No.

25 Q. But you've sometimes seen advertisements to become

1 an assessor somewhere else, is that right?

2 A. That's correct.

3 Q. Okay. And have you ever yourself been part of an
4 assessment center, either participating in or as an
5 assessor, where you have to judge people by how they
6 respond to scenarios let's say that are videotaped or
7 given to them orally?

8 A. I did as a captain, um, on the detective's exam,
9 that's the only time. No outside departments. No rank
10 above lieutenant have I ever participated in.

11 Q. Okay. So as a captain you sat on a detective's
12 interview system?

13 A. Yes.

14 Q. Okay. And just tell us about that, what year was
15 that?

16 A. Um, I'm not sure when the exam was, probably 2004.
17 I'm not sure when our last exam was. But when I was a
18 captain I remember sitting at TD North in --

19 Q. At the TD North?

20 A. The TD North Garden and that's where they held it.

21 Q. Right.

22 THE COURT: Mr. Lichten, have in mind that if you
23 run out of time -- you have about a half an hour left,
24 if you want a half an hour for final argument.

25 MR. LICHTEN: Okay.

1 THE COURT: Go ahead.

2 MR. LICHTEN: May I have a moment, please, your
3 Honor?

4 THE COURT: You may. I meant to say you've got a
5 half an hour of examination left before you cut into
6 oral argument.

7 MR. LICHTEN: Oh, I'm sorry. That's an important
8 distinction.

9 THE COURT: It is an important distinction.

10 MR. LICHTEN: All right.

11 THE COURT: But that's not an invitation to take
12 another half an hour, I'm just fairly keeping the time.

13 MR. LICHTEN: Well, your Honor, what I would
14 greatly appreciate is -- because in fairness
15 Commissioner Evans went over a lot of material about
16 these documents that I, you know, I had no advance
17 notice of, if we could take a break I could synthesize
18 what I have left down to 5 or 10 minutes, but otherwise
19 I can't.

20 THE COURT: Well, here's the problem, I have a
21 short hearing at 11:00, so I can take the break till 10
22 minutes after 11:00, if you guarantee me you're not
23 going to be more than 10 minutes, and then I'll take
24 another 20 minutes and that will take us up to quarter
25 to 12:00, and that gives us an hour for oral argument.

1 MR. LICHTEN: That's fine, your Honor.

2 MS. HODGE: I may need some time for redirect.

3 We'll see.

4 THE COURT: Well, you have time, I'm just
5 calculating his time. He's now given me the promise of
6 10 minutes. I didn't say you couldn't redirect, but of
7 course the rules mercifully require that your redirect
8 be within the scope of his cross, a rule that I will
9 enforce. So now we'll take a recess for one half hour
10 until 10 minutes after 11:00. It's important to me that
11 I conclude this today. That's all I'm seeking to do.
12 Very well, we'll take a half an hour recess. We'll
13 recess.

14 (Recess, 10:40 a.m.)

15 (Resumed, 11:10 a.m.)

16 THE COURT: Go ahead, Mr. Lichten.

17 MR. LICHTEN: I do have a few more questions.

18 Q. Okay. And on your resume you list that you are
19 currently responsible for the management of a 3,000
20 employee department, is that correct?

21 A. That's correct.

22 Q. And that's the Boston Police Department?

23 A. Yes.

24 Q. And a budget of \$280 million, is that correct?

25 A. Yes.

1 Q. And in fact you do yourself an injustice,
2 according to the FY 2015 budget, the police department
3 budget is up to, um, about \$319 million, is that right?

4 A. I believe so.

5 Q. Okay. And just one last question about Willie
6 Gross.

7 Mr. Gross does not have a college degree, is that
8 correct?

9 A. That's correct.

10 Q. And then finally if I could ask you to turn to
11 Exhibit 55, that you were asked some questions about by
12 your counsel.

13 A. (Turns.) Yes.

14 Q. Do you see that?

15 A. I do.

16 Q. Okay. And I believe you identified this as these
17 were ratings that you did for certain tasks that were
18 presented to you by HRD, is that correct?

19 A. Yes.

20 Q. And we know who you are because if we go 1, 2, 3,
21 4 over, you're the "RT SME WE"?

22 A. That's right.

23 Q. So if we look down that column, that's how you
24 rated things, is that correct?

25 A. Yes.

1 Q. And you were aware, were you not, that a "1" was a
2 low rating and a "3" was a high rating, is that correct?

3 A. Yes.

4 Q. Okay. Now, just so we know what the tasks were
5 that you were evaluating, if you would turn to Exhibit
6 39, which I think is in another volume.

7 A. (Turns.) All right. I've got it.

8 Q. Do you have that?

9 A. Yes.

10 Q. And if you go to Exhibit 39, Page 30.

11 MS. HODGE: Excuse me. If I could just grab mine?

12 THE COURT: Well, go ahead.

13 Go ahead, Mr. Lichten.

14 MR. LICHTEN: Thank you.

15 Q. Now, if I understand your testimony here today --
16 well, let me ask you, do you think an important task of
17 a lieutenant is to lead and inspire?

18 A. Yes.

19 Q. Okay. And do you think an important -- and I take
20 it from your testimony you think it's very important,
21 that an important task of a lieutenant is to instruct
22 subordinates on the laws and regulations, is that right?

23 A. Yes.

24 Q. It's very important, is that correct?

25 A. It's very important, yes.

1 Q. All right. If you would turn to Exhibit 39, Page
2 30, keep going a couple of pages, go to Task 131, that's
3 on Page 37. Do you see that?

4 A. (Turns.) Yes.

5 Q. Okay. And if you then go to Exhibit 55.

6 A. (Turns.)

7 Q. And you go to the second page of Exhibit 55.

8 A. Yes.

9 Q. So if we look at 131, Task 131, which is "leads
10 and inspires," you gave it the highest rating of "3," is
11 that correct?

12 A. That's correct.

13 Q. Okay. Now, if you could go back to the task,
14 which is Exhibit 39, and look at Page 47.

15 A. (Turns.) Okay.

16 Q. Do you see that?

17 A. Yes.

18 Q. And one of the tasks is "instructs subordinates in
19 laws and regulations," is that correct?

20 A. That's correct.

21 Q. And then if you would go to Exhibit 55 and go to
22 like the fourth or fifth page, can you go to Task Number
23 291.

24 A. (Looks.) Okay.

25 Q. You gave this task a "1," the lowest rating, did

1 you not?

2 A. Obviously I did, but I don't agree with it now. I
3 don't know why I did it.

4 MR. LICHTEN: I have no further questions.

5 THE COURT: All right.

6 Anything more, Ms. Hodge?

7 MS. HODGE: Yes.

8 THE COURT: You may.

9

10 REDIRECT EXAMINATION BY MS. HODGE:

11 Q. Commissioner, I believe that Mr. Lichten asked you
12 questions with regard to the detective's exam and what
13 was in it?

14 A. Yes.

15 Q. Is the detective's exam a promotional exam?

16 A. No, it's not.

17 Q. And what is the role or the position of
18 "detective"?

19 A. "Detective" is sort of a patrolman who makes a --
20 who becomes an investigator. It's actually not a
21 promotion as far as what we're concerned with, it's a
22 separate type of exam, and they work alongside the
23 patrolmen. It doesn't bring you up into the supervisory
24 level.

25 Q. So is it a separate assignment that they have?

1 A. Yes.

2 Q. All right. There were a lot of questions about
3 superintendent in chief?

4 A. Yes.

5 Q. And I'm going to ask you, um, in terms of the
6 position of chief, um, how often does he get involved in
7 being actually the backstop to a sergeant or a
8 lieutenant in terms of giving out -- making decisions
9 about day-to-day events?

10 A. Not very frequently. Like myself, most of the
11 time if we go to a scene, we're there just to oversee
12 the operation, not making decisions, and mostly to deal
13 with the media and being the face of the Department. So
14 as a superintendent in chief, you're sort of taken out
15 of the day-to-day activities, it's more of a, um, you
16 know, an administrative position, not out on the street
17 dealing with the day-to-day operations.

18 Q. Who is the highest ranking person who's in charge
19 of day-to-day operations?

20 A. That's Superintendent Bernard O'Roarke.

21 Q. And what is his role?

22 A. His role is overseeing the day-to-day deployment
23 of our resources, putting them in locations and putting
24 the amount of personnel in each district at, um, what
25 the district times show they call for services. He

1 oversees special events. When he gets to the scene,
2 he's the commander. All these protests, everything
3 else, he's actually the day-to-day man on the street.

4 THE COURT: And contrast what he does with what
5 your chief of staff does.

6 THE WITNESS: Yeah, um, Superintendent O'Roarke is
7 basically out there --

8 MR. LICHTEN: Your Honor, he corrected me that
9 it's not his chief of staff, Mr. Gross.

10 THE WITNESS: No, I'm sorry, it's the
11 superintendent in chief.

12 THE COURT: Sure. All right. Compare him to
13 Mr. Gross.

14 THE WITNESS: Superintendent O'Roarke is out on
15 the street dealing in the day-to-day operations such as
16 the recent protests we've had around Ferguson. Myself
17 and Chief Gross have been out there, but the person who
18 draws up the operational plan, the person who is
19 monitoring the march, the person who is doing the
20 deployment, who is basically carrying out the plan is
21 Superintendent O'Roarke.

22 THE COURT: All right. And, Gross, what does he
23 do on a day-to-day basis?

24 THE WITNESS: Well, he assists me in the
25 administrative. A lot of it is internal administrative.

1 We deal with personnel moves. We deal with discipline
2 issues. A lot of community -- Willie does a great job
3 working with the community, he's at numerous community
4 events during the day and numerous community events at
5 night. Willie is well-respected by the troops, he's
6 well-respected by the community, and he's continually
7 out there representing the Department the best he can
8 possibly be.

9 THE COURT: If I were to characterize it, and you
10 correct me now, Superintendent O'Roarke is your top line
11 officer in --

12 THE WITNESS: Right, he's chief of patrol.

13 THE COURT: Right, in deployment and law
14 enforcement?

15 THE WITNESS: Exactly.

16 THE COURT: That of course is only part of what a
17 police department does and Superintendent Gross is your
18 --

19 THE WITNESS: Community piece.

20 THE COURT: -- community-plus administration,
21 internal?

22 THE WITNESS: Exactly. Like myself.

23 THE COURT: Understood. Go ahead.

24 Q. And so if a sergeant or a lieutenant or a captain
25 even had a question about a law or a regulation and how

1 it applies, who would they go to?

2 A. They would go to the person in charge at the
3 scene, um, and ultimately at most of those scenes, and
4 whether we have a barricaded suspect, whether we have a
5 hostage situation, um, usually the person they go to who
6 runs that scene is the -- the "Yankee C-3" was the
7 Superintendent of the Bureau or Field Services, the
8 chief of patrol, which I did for four years.

9 Q. And that would be, in this case, who?

10 A. Yes, Superintendent Bernard O'Roarke.

11 Q. Now, you were asked about, in 2008, that they only
12 tested 13 areas of knowledge, do you remember that
13 question?

14 A. Yes.

15 Q. And I'm going to direct your attention to Exhibit
16 Number 60.

17 MR. LICHTEN: Your Honor, I never asked that
18 question.

19 THE COURT: That's true.

20 Isn't it beyond the scope?

21 MS. HODGE: I'm sorry, I had all but two were
22 tested and I thought that that related to Exhibit
23 Number -- you know, just what was tested on the -- well,
24 never mind. I'll withdraw the question.

25 THE COURT: Yeah, move on.

1 MS. HODGE: I have nothing further then.

2 THE COURT: Nothing further then for this witness?

3 MR. LICHTEN: Nothing further for this witness.

4 THE COURT: Thank you. You may step down.

5 THE WITNESS: Thank you, your Honor.

6 THE COURT: And that is the defense's case?

7 MR. BOK: Yes, it is, your Honor, just with the
8 minor formality of the defense moving for judgment on
9 the evidence. I know in a jury-waive case the rule is
10 not entirely clear, but just to make sure we're not
11 waiving anything, your Honor.

12 THE COURT: You are not waiving anything.

13 MR. BOK: And we're renewing our earlier motion,
14 which I think your Honor will either deny it or take it
15 under advisement.

16 THE COURT: Well, I want you to have every right
17 in further proceedings. So I think for the record we'll
18 say that your renewed motion now before the Court is
19 denied and that sets you up to move for a judgment as a
20 matter of law after I make my findings and rulings.

21 MR. BOK: Thank you, your Honor.

22 THE COURT: There is one thing about the record
23 here that -- and we're going to take a 20-minute recess
24 and then we'll get to final argument, that Ms. Hodge
25 raised at the end of our formal discussions yesterday,

1 "What about this 2014 exam?" The case is now over. I'm
2 going to have final argument and based upon what you
3 tell me I'm going to start working on it, but I think it
4 makes sense to hold the record open for such further
5 submissions about the 2014 exam as either side may wish
6 to submit, and the proper way to do that is to file a
7 motion to supplement the record with whatever,
8 statistical data, whatever you need to say, and then if
9 that's undisputed, as statistical data largely is, fine,
10 but if it's disputed, the other side says, "Well, that's
11 in dispute," and then of course I'll have to deal with
12 it. Don't think I'm waiting for such further
13 supplements. Unless you ask me to wait, I'm going to
14 get busy on this once we've had the final arguments.
15 But that's how we'll deal with that.

16 MR. LICHTEN: Your Honor, may I be heard on that?

17 THE COURT: Yes.

18 MR. LICHTEN: I strenuously object to that. We've
19 asked in discovery months ago for this data and we have
20 not gotten the data. We don't know how the exam was
21 constructed, we haven't seen the validity report, we
22 haven't seen the job analysis, we don't know what the
23 actual components were, we don't know how they were
24 scored, we haven't seen any data from the results of the
25 oral assessment center, we haven't shown it to our

1 experts as a result of that, and so at this point with
2 trial being over and having requested the information,
3 the exam was given back in October, and not gotten that
4 information, for whatever reason, I think it's highly
5 inappropriate and prejudicial to now say they can
6 just -- and now with all the incentives they have to
7 skew the results, to say that they can just slide in
8 some results in a couple of months that we haven't
9 analyzed.

10 THE COURT: Your characterization is not mine. I
11 stand on my order. We'll see if they submit anything
12 and then of course your points have significant force.
13 But we live in the real world. But we won't get there,
14 we won't even get to the 2014 exam being relevant
15 unless, um, we are on the third prong. I have no idea
16 whether we're going to get to the third prong. So this
17 is on the assumption we get to the third prong. I want
18 to deal in the real world.

19 MR. LICHTEN: But your Honor would require us to
20 reopen discovery because we know nothing --

21 THE COURT: Maybe. Maybe. We'll see if anyone
22 does anything.

23 MR. LICHTEN: I just think it's highly
24 inappropriate when this case has been going on for so
25 long.

1 THE COURT: I understand that that's what you
2 think. But that's my order. That's how I'm going to
3 proceed. I see lots of reasons for expedition. I can
4 think of one reason, and we've discussed it informally,
5 why I ought to stay my hand, and only for that reason
6 would I do so.

7 All right. 10 minutes of 12:00 for final
8 argument. The fact that we'll take an hour is not an
9 invitation to take an hour, simply we have that time.
10 We'll recess until 10 minutes of 12:00. We'll recess.

11 (Recess, 11:30 a.m.)

12 (Resumed, 11:50 a.m.)

13 THE COURT: All right, Ms. Hodge, I'll hear you.

14 MS. HODGE: Thank you, your Honor.

15

16 CLOSING ARGUMENT BY MS. HODGE:

17 It's been a very long eight days on behalf of
18 myself and Jeffrey Bok and John Simon and the City of
19 Boston and it is the position of the City of Boston that
20 this case must be dismissed.

21 Now I am, in many respects, as I began, and that
22 is that this is a disparate impact race discrimination
23 case. Both the plaintiffs and the Boston Police
24 Department want to enhance diversity of its lieutenants
25 ranks. In this case --

1 THE COURT: But that's not the issue.

2 MS. HODGE: But that's not the issue.

3 In this case the plaintiffs seek to challenge the
4 2008 HRD Civil Service exam --

5 THE COURT: But, you know, on the first prong, in
6 **Lopez**, as Judge O'Toole aptly observed, the City
7 conceded that there was disparate impact and it's the
8 same test. How should I come to a different conclusion?
9 I admit you haven't conceded it, but why should I come
10 to a different conclusion where the City itself
11 addressed the merits in **Lopez**?

12 MS. HODGE: Well, your Honor, because I think the
13 difference is that one dealt with a -- I mean obviously
14 statistically -- the reason for the statistical
15 examination in Prong 1 is that you got a look at those
16 who are available to take the test, those who took the
17 test, and you've got to evaluate whether or not that
18 test had a disparate and adverse impact, if you will, on
19 blacks.

20 THE COURT: Correct.

21 MS. HODGE: The fact of the matter is is that in
22 the sergeant's exam the numbers available made it
23 statistically significant. In the lieutenant's case --

24 THE COURT: But the problem with that is that the
25 smaller sample size the less validity to the statistical

1 analysis. I mean you can apply these same tests to come
2 out with the results that trigger or preclude further
3 examination, but as your sample size diminishes, the
4 validity of those statistical tests is less persuasive.

5 MS. HODGE: Your Honor, I would quarrel a little
6 and I think this is significant with your use of terms.
7 "Validity" goes to Prong 2, it is "significant" that is
8 important in Prong 1, as a statistical matter.

9 THE COURT: Oh, I agree. I agree. I was using
10 "validity" not in the sense of relationship to the job,
11 but in the sense of the value of statistical analysis.

12 MS. HODGE: And that's exactly what the Jones case
13 talked about and there is -- there is established
14 authority within this circuit.

15 Now, I do appreciate that they're always
16 interested in hearing a different opinion, however I
17 would suggest that your Honor spend some time looking at
18 Jones in which the Court clearly looked at what
19 statistical sampling basis would be used to determine
20 statistical significance and they went with essentially
21 looking at the P value, and in that particular regard I
22 would point out that the -- that we had two experts who
23 spoke about the statistical significance, they were both
24 Dr. Jacinto Silva and Dr. Joel Wiesen, and as a legal
25 matter I would say we should be using, under *Jones vs.*

1 ***the City of Boston***, which is a 2014 case, essentially
2 the Fisher Exact Test, and this is relating back to some
3 of the very first days, and I would argue it ought to be
4 the two-tailed test. And the question then is whether
5 or not we are above 5 percent, which is necessary for
6 statistical significance? And the importance of that,
7 your Honor, is very simply this. That what -- that
8 there has to be a factual predicate before the Court
9 gets involved in disparate impact cases and you've got
10 to look through this very narrow lens, which is the
11 statistical lens, to determine whether or not it applies
12 here or it does not apply. And we would argue that
13 there is -- that it's absolutely clear that if you use
14 the Fisher two-tailed test, that in fact there is no
15 statistically significant difference and therefore this
16 court must stay its hands for the reasons set forth in
17 our motion for summary judgment and under the existing
18 case law.

19 Now, in this regard I recognize and I would put
20 before your Honor that there is a question, but the
21 question is not the math. Dr. Wiesen clearly agreed
22 that Dr. Silva's math is correct, that under the
23 two-tailed test this is not statistically significant,
24 the numbers for the lieutenant's exam. What we did with
25 the sergeant's is because of those numbers and here we

1 are in a slightly different arena. But the question is
2 whether you use the one-tailed or the two-tailed and I
3 would suggest to your Honor the following.

4 It is my understanding -- and I'm just a lawyer.
5 There's a reason I did not move to become a
6 statistician.

7 THE COURT: Don't ever say you're "just a lawyer,"
8 that is a very respected profession.

9 MS. HODGE: Well -- and so what you've got is a
10 bell curve and a one-tail is only looking at one part of
11 the bell curve whereas the two-tails looks at both.

12 THE COURT: Well, you don't say that Jones
13 requires that there be a two-tailed test?

14 MS. HODGE: Well, what I would say is it strongly
15 supports a two-tailed test, but I'm going to give you
16 yet another analysis of that and that is this. I would
17 think it would be an error, particularly where you were
18 looking at the question of discrimination, to begin the
19 analysis with the assumption -- with the assumption that
20 blacks are going to be disadvantaged over whites,
21 because the whole point of a two-tailed set is that it
22 could go either way.

23 THE COURT: Now, just a moment. I understand,
24 from this evidence, that it is universally agreed that
25 there is going to be a disparate impact from a multiple

1 choice test, blacks versus whites. Whether that's
2 statistically different is -- and you're arguing that,
3 that is something I have to wrestle with. But everyone
4 who appeared here said, "Yes, on those tests we don't
5 know why but blacks are disadvantaged." And the first
6 prong is out there and I think you're right to emphasize
7 it. The first prong is out there because there has to
8 be a hurdle before Federal judges get themselves
9 involved willy-nilly in every personnel decision of
10 public authorities. Granted.

11 But you don't say that there's no evidence that,
12 um, blacks perform less well than whites on multiple
13 choice tests?

14 MS. HODGE: Your Honor, that is not what I'm
15 saying, what I am saying is that at this stage you must
16 determine that there was statistical significance in the
17 group that is being sampled, which are the people who
18 took the lieutenant's exam. The purpose is not to
19 decide --

20 THE COURT: I must determine that there is
21 legally-significant disparate impact.

22 MS. HODGE: Correct.

23 THE COURT: You're arguing that that is a
24 statistical test and the plaintiffs fail?

25 MS. HODGE: Yes.

1 THE COURT: And there is evidence that would
2 warrant such a conclusion. I grant you that. Go ahead.

3 MS. HODGE: And I would also argue that because
4 this is a discrimination case, and there are cases that
5 they are not -- and they have not necessarily been cited
6 to you yet, but there are cases that suggest very
7 strongly that a two-tailed test is the appropriate test.
8 They have not gone to the Supreme Court nor were they
9 decided in Jones, but that a two-tailed test is the
10 appropriate test for some of the reasons that I'm
11 suggesting to your Honor. Because it seems to me -- and
12 it's more because I'm a lawyer as opposed to a
13 statistician, more is a matter of logic than anything
14 else, but it just doesn't make sense that one would use
15 an assumption that clearly runs afoul even though there
16 is some evidence that you must leave open always the
17 other alternative, otherwise I do believe that those who
18 are white taking this exam, um, you know, are given an
19 opportunity where everybody else besides blacks would
20 argue that maybe it's not that. And you do have
21 evidence before your Honor, and I would strongly urge
22 you to think about it and I don't believe it's at all
23 questioned, that how well and how hard you study is in
24 fact, you know, may have a bearing on whether or not you
25 do well or not among this particular population. And I

1 would suggest to your Honor that we're not talking about
2 folks who came out with PhDs or with graduate degrees or
3 whatever, I mean we had evidence from Commissioner Davis
4 that he went to school while he was a police officer and
5 I believe the same is true with Commissioner Evans.

6 THE COURT: Well, I'm telling you straight out, on
7 the basis of the evidence I have before me, I'm not
8 going to conclude that what every expert says is -- this
9 is not on the issue of statistical significance, but
10 what every expert says is a racial disparity in multiple
11 choice tests is because I draw some inference on the
12 basis of race that they don't study hard enough.
13 Nothing supports that. That would be a flight of fancy
14 on this record.

15 MS. HODGE: Well, your Honor, I would argue that
16 we have -- that what the individuals -- the
17 statistical -- what the experts have testified to is a
18 couple of things and it is important. One is that
19 there's a high degree of correlation between the
20 knowledge-based tests and that really does predict, you
21 know, there's a very close validity and correlation
22 between the knowledge-based tests and the fact that they
23 are able to perform using that knowledge going forward.

24 THE COURT: On the second prong?

25 MS. HODGE: On the second prong.

1 THE COURT: So if we're now on the second prong,
2 I'll have some questions to the plaintiffs about that.

3 MS. HODGE: In any event I would just suggest to
4 your Honor that on the first prong the focus at the
5 stage of the first prong is to look at the statistics
6 and whether or not something is statistically
7 significant or not, and I would argue that the evidence
8 is that its statistically insignificant and remind your
9 Honor that the expert for the plaintiffs used a
10 two-tailed test when given -- there was a tabula rasa
11 beforehand, but used a two-tailed test and only moved to
12 the one-tailed test because it didn't achieve the result
13 that he wanted, and I would argue to your Honor that
14 that essentially supports the sort of view, if you will,
15 if nothing else, that somehow "Oh, we'll just make an
16 assumption that X is true."

17 There's also -- and I would also point out that
18 the test may have a disparate impact certainly on
19 certain minority groups, but I'm not sure of the level
20 of -- there was general testimony with regard to that,
21 but I'm not sure that the record was fully developed in
22 that regard.

23 THE COURT: As to what? As to what? The point
24 that there is -- I'm not saying it's statistically
25 significant, but there is a disparate impact, blacks

1 versus whites, on multiple choice tests?

2 MS. HODGE: Well, you see the problem is a lot of
3 the data that I'm aware of frankly, your Honor, does not
4 distinguish just blacks versus everybody else, and while
5 there may be certain ethnic groups that may do better,
6 racial groups, there are others that may be equivalently
7 in the same boat, and the fact of the matter is that
8 that has to be considered when one considers what's
9 going on.

10 THE COURT: I bring to this no background in this
11 area, I'm telling you what I have received and it
12 appears undisputed from these experts, that there is
13 that disparity.

14 MS. HODGE: Your Honor, and I would argue that it
15 has --

16 THE COURT: You've got to point me to something in
17 the record.

18 MS. HODGE: And I would argue to you that it has
19 no bearing on your determination of Prong 1.

20 THE COURT: All right. And suppose I agree with
21 that?

22 MS. HODGE: And I would move on to Prong 2 which
23 goes to validity.

24 THE COURT: All right.

25 MS. HODGE: And the government, in deciding on

1 Prong 2, whether or not something is or is not valid,
2 leaves it to the employer or leaves it to, in this case,
3 the testing officials, regarding whether or how it's
4 going to validate the test or the instrument being used.

5 THE COURT: But subject to what they have to say
6 it seemed you did pretty well with evidence on that
7 point, but on -- with respect to that, are you really
8 pushing this cost aspect?

9 MS. HODGE: Your Honor, the cost aspect is merely
10 one of the reasons -- well, see, the way I understand
11 the plaintiffs' case is, "Well you knew about all these
12 other things so you should have gone ahead and used it,"
13 and I think that whatever you do it's always a balance.
14 Cost is a piece of it. Cost is a piece of it. There
15 are other things which is that it's got to be -- it's
16 got to have a less discriminatory result. And the whole
17 issue of the assessment center, I would suggest to your
18 Honor that we will have, at the conclusion of this, the
19 -- you know, how much the 2014 test has cost us, and I
20 suspect it's going to be even more expensive because
21 additional --

22 MR. LICHTEN: Your Honor, I hate to interrupt but
23 --

24 THE COURT: You may, but I've made my rulings on
25 this and she can argue it.

1 MR. LICHTEN: No, but you didn't permit her to put
2 in evidence of the cost.

3 THE COURT: She can argue it. I'm letting her
4 argue it. Now I'm listening to her now.

5 MS. HODGE: Your Honor, that only goes -- that
6 only goes if you get to the third prong and I would
7 suggest --

8 THE COURT: But you're skating right over to the
9 third prong, it seems to me.

10 MS. HODGE: I'm not, oh, no, no, no, I'm staying
11 on the validity. We have shown, by a matter of content
12 validity, that no one has disputed that content validity
13 is "Look at the job, look at the KSAs, look at the
14 various tasks, and sort of relate them to the job
15 functions, have a reading list," et cetera. All of
16 that's through Commissioner Evans certainly, but also
17 through the documents that you have, of both the 2008
18 and the 2005 examinations, establish that HRD and the
19 City of Boston did in fact content-validate this test.

20 THE COURT: You'll agree with this. I'm asking
21 you. You don't have to agree.

22 If I find, um, legally-significant disparate
23 impact, it is not enough for the City to say, um, "We
24 gave a multiple choice" -- "We gave the test we gave
25 because it was cheaper," isn't that correct?

1 MS. HODGE: If you don't take into account the
2 second issue which is that we had not, having spent the
3 money, achieved any greater diversity. They're twin
4 requirements.

5 THE COURT: I understand that position.

6 MS. HODGE: So therefore it's not just the money,
7 it's --

8 THE COURT: So in answer to my question, here's
9 what I hear you saying, "I agree with your proposition,
10 Judge, but that's only a piece of it"?

11 MS. HODGE: Indeed, that is in fact what I would
12 say.

13 THE COURT: Uh-huh.

14 MS. HODGE: And I would further go on and say in
15 many respects -- and this becomes sort of the trickier
16 part -- well, let me deal with content validity for just
17 a minute and then the second issue.

18 With regard to the content validity, I don't think
19 the regulations -- and you can read them, I've read them
20 over and over again, I don't believe it says that
21 employers can be penalized or can be found guilty if
22 they don't follow each and every sort of nitpicky thing
23 that needs to be done. And the --

24 THE COURT: You know, one of the things that
25 strikes me on this, and I really disagree, and I say

1 this with respect, with your word choice, um, but this
2 is not, in the Court's mind, a discrimination case, it
3 is an aspect of our laws seeking to remedy, um, really
4 our tortured racial history, but this is -- it begins
5 and ends as an equal opportunity case. So, you know,
6 "nitpicky" and the like are -- this is largely -- once I
7 get over that first hurdle, if I get over it -- and
8 you're right to argue it, but if I get over the first
9 hurdle, the Court is largely sitting in equity here, so
10 I have to balance a great number of factors.

11 MS. HODGE: And, your Honor, I'm not denying it,
12 I'm just taking the very narrow legal question of
13 whether or not we have content validity and I would
14 argue that what they have said is, "Well, but it" --
15 and, you know, "There's no clarity that this particular
16 number, 137, was in fact shown throughout." And I think
17 that what we have is that if you look at all the
18 documents, particularly those documents that are the
19 2008, if you will, outline, which do identify major
20 categories, those are the major categories under which
21 many of the knowledge, skills, and abilities are
22 subsumed, and I think you have that with the
23 Commissioner today, I think in all -- and I think that
24 there is no question but that the 2008 exam, along with
25 the E & E, was in fact content-valid.

1 Now, that being said I think the next question is
2 you can't conflate it -- and you asked me the question
3 of whether or not you take into consideration how much
4 money? I don't think it becomes then conflated to be
5 the burden of the defendant in this case, in the second
6 prong, to suddenly be able to justify all of the reasons
7 it didn't do "dada-dada-dada-dada-dada." I think the
8 difference is because that's where you get into that
9 other reason. It's not just money. Money is a part of
10 it. But there are other aspects of which diversity and
11 whether or not it -- in the words of the Uniform
12 Employee Selection Guidelines, there are "less
13 discriminatory alternatives," but we could use in this
14 parlance "less AI" or "adverse impact." But in addition
15 what you have or how that plays itself out in the case
16 law is frankly under Prong 3, having shown that what we
17 did was job-related, consistent with business necessity,
18 we go on to Prong 3.

19 THE COURT: And that makes sense to me. All
20 right.

21 MS. HODGE: That under Prong 3 the next question
22 becomes, um, whether or not there were any existing
23 alternative tests or alternative selection procedures
24 that we knew about that would be equally valid that we
25 never -- that would lead to a less discriminatory result

1 and that still met our business purposes? And I suggest
2 to you, on this particular subject, I think there was
3 general agreement. And I would say --

4 THE COURT: Well, no, I thought -- again, if I
5 were drawing inferences in favor of the plaintiffs, up
6 until Dr. Hough testified, I couldn't see any evidence
7 that it would be a -- that it would reduce the disparate
8 impact.

9 MS. HODGE: All right.

10 THE COURT: There is that one chart there that
11 shows that adding those things, um, it suggests that it
12 might reduce the disparate impact, in cross-examining
13 Champion, but he stuck to his position that, um, it might
14 not reduce it -- it would reduce it from the two added
15 together, but it might not -- that there's no evidence
16 that it shows that it would reduce it below either one
17 taken separately, and I think that's significant. But
18 certainly Dr. Hough, if this were a jury case, gets them
19 to the jury. So let's address that.

20 MS. HODGE: So I would like to address that in
21 just a moment, if I could?

22 I would point out though that it isn't just
23 Dr. Champion, it was Dr. Champion, Dr. Silva, and
24 Dr. Wiesen, all agreed that if you have a paper and
25 pencil -- if you have the written test and you add these

1 on, that there's no guarantee that it's going to reduce
2 adverse impact. And that is clear. And I just want to
3 be clear, it's not --

4 THE COURT: Except it's not clear because now I
5 have Dr. Hough.

6 MS. HODGE: No, no, no, and I would say now you
7 have a single, what I would argue is an outlier, in
8 Dr. Hough, who is saying, "Oh, no, no, that's
9 different."

10 Now let me just start with a couple of points here
11 because I want to make sure that we don't lose sight of
12 them and the first one is that the exams that are given
13 for police officers are controlled by the civil service
14 law as you know, and just so we don't lose sight of it,
15 Section 16 of Chapter 31 says "examinations shall be
16 conducted and it must fairly test knowledge, skills, and
17 abilities which can be practically and reliably
18 measured, which are actually required to perform the
19 primary or dominant duties of the position for which the
20 examination is held."

21 So that gets to -- just talking about Dr. Hough
22 for a moment, that gets to the fact that you've got to
23 have this exam. It is buttressed by Section 59.

24 THE COURT: It gets to the fact that you have to
25 have an exam --

1 MS. HODGE: Of some type, yes.

2 THE COURT: -- of some kind.

3 MS. HODGE: And -- but Section 59 says, "It must
4 be a competitive examination." Okay?

5 Now, let us get to Dr. Hough. Not only is
6 Dr. Hough -- does her testimony differ from the other
7 experts, but let me just talk about it for a minute.
8 The fact of the matter is, is Dr. Hough's suggestions,
9 while there were many, do not meet the Prong 3
10 requirement that she must identify a specific -- she
11 said, "I could devise one," but she didn't provide, you
12 know, any specific -- well, specifics about what it
13 would contain.

14 But she threw out a lot of ideas. "We have used
15 situational -- situational exams before." Well, you
16 heard about them, they've been videotaped, they've been
17 examined, and that was a part of the 2002 exam, and it
18 did not lead to any less discriminatory -- well, she
19 says, "Well, I know that it would be less
20 discriminatory." But the facts are that we had a 2002
21 exam that did not lead to less discrimination and did
22 not reduce AI.

23 Now let's go to the next issue. She then moves to
24 personality tests, "integrity tests," "personality
25 tests," they're all of a certain kind.

1 THE COURT: 5 more minutes. Go ahead.

2 MS. HODGE: The fact of the matter is that all of
3 those tests, by the way, failed because we have to give
4 a competitive examination. And once you get into that
5 arena what you're talking about is "my personality, what
6 I bring to the table," and the number of questions that
7 were asked --

8 THE COURT: So you think as a matter of law -- as
9 a matter of Massachusetts law, you can't do personality
10 tests?

11 MS. HODGE: No, I think you might be able to if
12 you weighted it so that it did not outweigh the
13 competitive piece, if you could get it through the --
14 it's not just the law, it's also the unions. And
15 remember the unions in these cases, as **Lopez** discerned
16 clearly and as that one exhibit from the previous
17 Commissioner Evans reveals, would not even allow what
18 Dr. Hough says is the most reliable, which is looking at
19 performance evaluation as the basis.

20 THE COURT: Well, with all respect to the unions,
21 they're not part of the legal framework within which I
22 must make the determination.

23 MS. HODGE: Well, that's where I would differ,
24 your Honor, because I do think that it has to be
25 realistic and practical and it has to be implementable.

1 The idea that, "Well, go talk to the union" -- you know,
2 "It doesn't matter, I'm going to order you to do X even
3 though you may have a collective bargaining
4 responsibility" --

5 THE COURT: No, wait a minute because you've
6 touched on something that's really very important, um,
7 and we may never get there, but now you're wrestling
8 with an issue that seems to me to be in the second part
9 of the case.

10 If the plaintiffs win the first part of the case,
11 I will have to, um, address that in the second part of
12 the case. At least that's how it seems to me. If there
13 is proof -- and you frame it just like I do. If there
14 is proof of a competitive examination that is equally
15 valid but results in less discriminatory -- or less
16 adverse impact, then I've got to explain that in the
17 first part and then I have to cooperatively, with you
18 all, reach out for that remedy. Now that's what I think
19 the law is.

20 You're arguing that -- well, to pick up what's
21 left of the time, why shouldn't I adopt Dr. Hough's
22 testimony?

23 MS. HODGE: Well, I would argue that it would not
24 comply with Chapter 31. I would also argue that it --

25 THE COURT: But we're not there yet.

1 MS. HODGE: But I do think it is important. If
2 you read the case law under Prong 2 --

3 THE COURT: Oh, we are with respect to
4 personality. I hear you as to personality.

5 MS. HODGE: And to personality. All the other
6 things she suggested is reliance on performance
7 evaluations and all of that, we have definitive evidence
8 about the roadblock, if you will, or hurdle that had to
9 be overcome and that it was almost impossible to do so.

10 Issue 2, you have the issue of how you weight and
11 make this a competitive examination.

12 So once you get rid of all the personality
13 testing, the situational evaluation, the performance
14 evaluation, finally at the end of the day Dr. Hough
15 provided no evidence, none, except for her general,
16 "Well, that component was less AI." Okay, let's accept
17 that as a given. She is adding that component to a
18 paper and pencil test, that's not what her "industrial
19 experience," if you will, or her private sector
20 experience with big corporations is all about, they're
21 not giving paper and pencil tests, but we are
22 unfortunately doing that here. She did not provide us
23 with a single example.

24 And if this were an article I would end by -- to
25 some extent where we began, to say that all the experts

1 besides Dr. Hough -- and with all due respect to her,
2 she is a genius, she would be the person that everyone
3 would hire and she would be a multimillionaire because
4 she can do what I believe Dr. Wiesen, the expert for the
5 plaintiff, said is a "vexing problem," and under Exhibit
6 78 where he goes through and he says, "Well, we think we
7 could do this, but we really need to study it more
8 because it hasn't proved itself yet in terms of reducing
9 AI." What Dr. Silva talked about is that "There's no
10 silver bullet." What Dr. Champion talked about is "We
11 haven't cracked that nut yet." And yet she testified,
12 "Absolutely, I can do it." Well, you know what? I
13 think that that's correct probably if you have no civil
14 service and you had no real exam and you know why?
15 Because what she's talking about is moving all these
16 cases into disparity treatment because she's talking
17 about "Let's just have interviews and let's just have"
18 -- you know, "Let's just look at your prior job
19 performance and your prior experience, et cetera, and
20 I'll make a judgment," but that leaves the employer
21 there for -- you know, susceptible to a challenge under
22 disparate treatment. But second of all, and perhaps
23 more important, you have unrefuted testimony from both
24 the current Commissioner and the previous Commissioner
25 about the need for there to be integrity, about the need

1 that people lead by example, that people be able to get
2 the confidence and loyalty and support of those who they
3 lead.

4 THE COURT: I understand.

5 MS. HODGE: And finally I would end with
6 Commissioner Davis's comment.

7 THE COURT: Your time is up.

8 MS. HODGE: I will just end with his comment.
9 When he went into the 2014 exam he had no information or
10 facts that would show that any of these would be less
11 discriminatory or lead to lower AI.

12 THE COURT: Thank you.

13 MS. HODGE: He relied on --

14 THE COURT: I thank you. I'm sticking to my time.
15 I understand you folks are going to divide up your
16 time. Is it half and half or what?

17 MR. CHURCHILL: Not necessarily half and half,
18 your Honor.

19 THE COURT: Well, do you want warnings or shall I
20 just cut it off at half an hour?

21 MR. CHURCHILL: No, I'm going to stop well before.
22 Probably 10 minutes.

23 THE COURT: Very well. Mr. Churchill, I'll hear
24 you.

25

1 CLOSING ARGUMENT BY MR. CHURCHILL:

2 I'm addressing Prong 1, your Honor, and the two
3 things I want to focus on or address are the standard
4 and then the evidence here.

5 THE COURT: Well, let me put this to you.

6 The defense is right, aren't they, on the
7 statistical evidence? If -- you're below the required
8 threshold and that's not disputed here, you're close,
9 but you're below?

10 MR. CHURCHILL: But I think the problem with that,
11 your Honor, is that assumes there's one way to prove
12 adverse impact, which is to look at one measure which is
13 promotion rates, and that is not the law. The First
14 Circuit has indicated, and it's clear from other courts
15 around the country, that there's no one way to prove
16 adverse impact. And as this court has correctly noted
17 throughout this trial, this is about equal opportunity.
18 The First Circuit has expressly recognized that on
19 multiple times the Uniform Guidelines make that exact
20 same point and what they said is that the bottom line
21 statistics, the bottom line promotions is not
22 determinative, what matters is whether the candidates
23 had an equal opportunity to compare on a fair and level
24 playing field.

25 And so here what we have -- and I have a chalk

1 just so I don't have to go through all the numbers, to
2 recite all the numbers, it's just a one-page summary of
3 the evidence in this case.

4 (Hands up.)

5 MR. CHURCHILL: The second page has the record
6 references.

7 THE COURT: Yes, thank you. This is helpful.
8 Thank you.

9 MR. CHURCHILL: So this summarizes the evidence --
10 here I would actually argue there's a mountain of
11 evidence starting with what, as you recognized, is
12 universally acknowledged that African American
13 candidates, for whatever reason, historically have
14 performed worse on these types of tests. And that's our
15 starting point. The First Circuit recognized that years
16 ago in the *Beecher* case.

17 And so here these are all statistically-
18 significant showings of adverse impact. Even if we
19 accept that it must be statistically significant, there
20 must be a P value of above or below .05, all of these
21 different ways of looking at it demonstrate a
22 statistically-significant showing of adverse impact.
23 And starting with passing rates, which in *Richie* the
24 Supreme Court easily found adverse impact looking at
25 passing rates, here we have a statistically-significant

1 showing, highly-statistically significant, of adverse
2 impact at the passing rate.

3 The lower exam scores, and this is significant,
4 all the experts talked about evaluating adverse impact
5 based on average scores because that tells you, "Is this
6 a fair test or not?" And here the evidence was there
7 was this on-average 6-point difference between how
8 African American candidates did and how white candidates
9 did. And in the context of a strict rank order
10 promotion device like this, that makes all the
11 difference in the world. And then it's not surprising
12 that when you looked at what happened after the 2008
13 exam, there were no promotions of any black candidates
14 for well over three years. And if this had been used
15 like a regular test, there would have been no promotions
16 of black candidates.

17 The only -- there's one piece of evidence they
18 focused on here, which is the promotion rate, using a
19 two-tailed test, as of November 18th, 2014. There
20 simply is no law saying that this court should look to
21 that one single number and close its eyes to the
22 mountain of evidence that blacks, in this case, were
23 unable to compete on an equal footing.

24 And I think the final point I would make there,
25 and this is the final piece of evidence on delayed

1 promotions, your Honor noted the other day that you saw,
2 as I saw, the picture in the Globe of Marwin Moss, who
3 was promoted recently, and he is one of our plaintiffs,
4 and he did finally get promoted. If he had had a
5 6-point-higher score he would have been promoted years
6 ago. And I think it's undisputed that there's a real
7 harm that results from delayed promotions. So he
8 suffered very significant harm even though he ultimately
9 got promoted. And there are others who haven't been
10 promoted who would have been promoted if they also had a
11 score that was 6 points higher.

12 THE COURT: Where are you getting the 6 points? I
13 don't --

14 MR. CHURCHILL: In Dr. Wiesen's report, which is
15 in evidence, the -- what he did is he analyzed the
16 average score of white candidates and the average score
17 of black candidates and it was about a 6-point
18 difference on the 100-question exam.

19 THE COURT: So if you -- oh, I follow. So based
20 upon that analysis, if you simply assumed the black
21 candidate scored 6 points higher and then you follow out
22 what would have happened?

23 MR. CHURCHILL: Correct.

24 THE COURT: All right. Thank you.

25 MR. CHURCHILL: And what is notable is that that

1 difference, that 6-point difference, is highly, highly
2 statistically significant at the P point 0015 level.

3 So I think I'll turn it over to Mr. Lichten,
4 unless you have any further questions.

5 THE COURT: No, go right ahead.

6 MR. LICHTEN: Thank you, your Honor.

7

8 CLOSING ARGUMENT BY MR. LICHTEN:

9 As you've said, this case is profoundly important
10 and if you were to adopt what the defendants are arguing
11 it is essentially that, "It's not worth trying, let's
12 just give it up, let's go back to a written multiple
13 choice test all over the country and give up on the idea
14 of getting minority supervisors in the police
15 department," because that's exactly what they're saying.
16 If there is no way to do it, if they're correct that you
17 can't do it, then what we're saying is, "Why spend the
18 money, go back to multiple choice tests, and let's stay
19 with the system we've had for all these years that have
20 caused all these problems in all these cases and give up
21 on it," and that is what they're saying.

22 Now, in the City of Boston you've been involved in
23 prior cases and there are many other cases and we will
24 cite them to you in our brief because there's a long
25 history in the City of Boston of knowing that their

1 multiple choice exam discriminates or has disparate
2 impact upon minority candidates and in a number of
3 cases, in a series of decisions, one which was by
4 yourself and some by the First Circuit, the Department's
5 response to that was to try to take a minority out of
6 order and for a couple of years that was permitted based
7 upon the fact that they had to do so and in order not to
8 violate Title VII, but with the most recent decision of
9 the Supreme Court in *Richie vs. DeStefano*, that would no
10 longer be permitted.

11 So Boston has tried to get along by promoting
12 minorities out of turn, but they now can't do that under
13 the recent SJC decision in the *Abben* case and under
14 *Richie*. And I ask that when you go back and study this
15 case you look at the *Massachusetts Association of*
16 *Minority Law Officers* case that you were involved in and
17 *Stewart vs. Roach*, um, and -- and I think there are a
18 couple of other cases. And in all those cases -- and
19 the *Cotter*, I'm sorry, the *Cotter* case, which you
20 recall.

21 THE COURT: I recall the *Cotter* case. It's my
22 case.

23 MR. LICHTEN: And in all of those cases the
24 Department tried to correct what it had done, the
25 effects of the exam by promoting out of turn, um, with

1 limited success, and clearly it would be illegal now.
2 So they've known for years that this test has a severe
3 disparate impact on minority candidates.

4 The second thing I want to do, your Honor, very
5 quickly is to clear up some points that the defense made
6 that are just plain wrong, factually wrong. For
7 example, they claim that the, um -- that in 2008 that
8 injunction against using banding -- remember their
9 expert, Dr. Jacobs, recommended, based upon his analysis
10 of the test scores, that you band in 6-point spreads,
11 which would allow them to go into the mix, many
12 candidates who would never get the chance, and then he
13 recommended that those bands be broken by looking at the
14 performance of the individual, the exact same thing that
15 Commissioner Davis and I really think Commissioner Evans
16 and Commissioner O'Toole, who testified in favor of the
17 plaintiffs in the **Lopez** case, all say was something they
18 thought was important. And we now know that
19 Commissioner Evans thinks that looking at performance is
20 very important because he tried to go to a performance
21 review system. And all the Court said -- remember there
22 was an injunction and then the Department decided not to
23 go forward, too much trouble with the unions -- so maybe
24 the City of Boston does need some help by the Federal
25 court if they're afraid to do anything against the will

1 of the unions.

2 THE COURT: But am I not correct that as -- we're
3 not going to -- I don't see writing this up with any
4 particular concern or nod to the unions because either
5 you're going to lose it or you're going to, at least at
6 this stage, win it, and if you win it, then there's the
7 remedy phrase and then we are going to live very much in
8 the real world and figure out what to do.

9 But you agree with that, that's downstream?

10 MR. LICHTEN: Absolutely. I used to represent the
11 Superior Officers Union and I had stopped representing
12 them because I had to choose between this case and that
13 case and I chose -- or that organization, and I chose
14 this case. And I don't believe under Federal law a
15 union has the right to try to impose itself -- its will
16 on a Federal court under Title VII.

17 THE COURT: But for now I don't have to address
18 that. So let's --

19 MR. LICHTEN: Correct, your Honor.

20 THE COURT: If we slide over to Prong 3, I gave
21 you, in order to focus her argument, I think Hough does
22 it for you, but she's the only one.

23 MR. LICHTEN: I disagree, your Honor.

24 THE COURT: All right. Go to that.

25 MR. LICHTEN: You want me to go to that right now?

1 THE COURT: Well, it's your argument. I'm just
2 telling you that's concerning me.

3 MR. LICHTEN: Well, then I'll go to that right
4 now.

5 What I would say to that is first they have raised
6 a straw dog with Dr. Hough. Dr. Hough didn't come
7 before you and say, "I want a personality test," that
8 just happened to be something that she's published
9 widely on as an expert on and she explained to you have
10 a lot less disparate impact. What she really testified
11 before you was -- she testified before you about
12 situational judgment tests, structured interviews, and
13 structured performance review systems, all of which she
14 testified, and so did Dr. Wiesen, and so did Dr. Campion
15 in cross-examination, they all testified that these are
16 highly valid, that they have much less disparate impact
17 on minority candidates, and have been shown to be
18 predictive of good job performance. And she highly
19 endorsed those methods. Dr. Campion makes his living
20 devising structured interviews for private corporations
21 and Dr. Wiesen testified that he had successfully
22 implemented this in a number of places. And we know
23 that Dr. Jacobs and Dr. Silva make their living coming
24 in and devising these multicomponent systems which have
25 validity for police and fire departments.

1 So for Ms. Hodge to say, "Oh, we only have one
2 witness who endorsed something and there's very little
3 evidence that they don't have disparate impact," that's
4 not true. We spent our whole case proving that there
5 are these alternative procedures that in 2008 were known
6 about, they were reasonable, they had been used, in fact
7 the Boston Police Department had used them, and they
8 reduced adverse impact.

9 Now --

10 THE COURT: Well, let me ask -- and this is a very
11 simplistic question and you don't need to spend much
12 time on it, but if I am persuaded of that, in order to
13 be persuaded of that I'm going to have to write this up
14 different than Judge O'Toole. What's the matter with --
15 I know you've appealed and you say he's legally wrong,
16 but what's the matter with that analysis?

17 MR. LICHTEN: What's the matter with his analysis?

18 THE COURT: Judge O'Toole's analysis on this prong
19 in *Lopez*.

20 MR. LICHTEN: Judge O'Toole is simply incorrect
21 with respect to his analysis that there were not
22 reasonable less discriminatory alternatives out there.
23 I don't think he spent much time on it. It's a very
24 short opinion. I think the evidence was voluminous in
25 that case that that wasn't true. The witnesses in that

1 case, including Dr. Silva, admitted that every exam that
2 he and Dr. Jacobs had ever given had these multiple
3 components exam. In fact we demonstrated in **Lopez** and
4 we've demonstrated here, to some extent, that there
5 really is no big city in the country that only gives a
6 multiple choice job knowledge test. Nobody does it
7 anymore. It's not the standard. It's not heard of.
8 Many give it in conjunction with these other components,
9 but no one gives it in and of itself.

10 Now I do want to point out, while we're on Judge
11 O'Toole's opinion, something which I think is critical
12 to this case, which is Judge O'Toole did not find that
13 the test as demonstrated -- as created for that exam,
14 was valid, what he found -- and this is very important,
15 that based upon the expert evidence of their expert, who
16 they're not using in this case, Dr. Outtz, Dr. Outtz
17 testified that the sergeant's exam was not valid under
18 Prong 2 because it didn't test for enough of the
19 knowledge, skills, and abilities necessary for the
20 position of police sergeant. Dr. Outtz went on
21 basically to say that because he believed that the T & E
22 rating had enough of these other skills and abilities,
23 that it passed the threshold. And Dr. -- sorry, Judge
24 O'Toole, in his opinion, properly quotes Dr. Outtz on
25 that and so finds. And in this case you've had no

1 testimony from any of their experts that the T & E does
2 anything and there's no evidence before you that it does
3 anything to test for skills and abilities that Dr. Outtz
4 found were missing in the *Lopez* case.

5 I submit to you, under Prong 2, that that analysis
6 is directly applicable here. You cannot find for the
7 defendant on Prong 2 -- and, by the way, you are right,
8 that's an all-or-nothing proposition, cost is not
9 relevant to Prong 2, you either -- it's like being
10 pregnant, it either is valid or it's not valid. Judge
11 O'Toole said it was minimally valid because that T & E
12 takes it over. Now there are a lot of differences
13 between the sergeant's exam where people haven't taken a
14 job knowledge test before and the lieutenant's exam.

15 In any event, in this case the bottom line is that
16 you have a job, the position of lieutenant, that based
17 upon a very well-documented job analysis performed by a
18 professional firm, Morris and McDaniel, in 2002, found
19 that about 60 to 70 percent of the job were skills and
20 abilities that could only be tested for by an assessment
21 center and about 30 percent of the job maybe was
22 attributable to job knowledges and they made it 30
23 percent of the test. And here they're trying to say
24 that in 2008 they can take that 30 percent of just the
25 job knowledges and that is sufficient to test for all of

1 the necessary attributes necessary to be a police
2 lieutenant. But in fact, your Honor, the law is clear.
3 If you look at the Uniform Guidelines and the SIOP
4 principles, particularly where you're trying to use the
5 testing device as a ranking in strict rank order, that
6 it has to test for a sufficient representative sample of
7 the abilities, skills, and knowledges necessary for the
8 job to be a representative sample, and that's
9 particularly true when you rank order, and they cannot
10 meet that.

11 THE COURT: So let me say it back to you.

12 MR. LICHTEN: Yes.

13 THE COURT: So your argument is -- your argument
14 need not take issue with the construction of the
15 examination that Commissioner Evans testified to today,
16 that it was constructed in good faith and it seeks to
17 test appropriately and the like, your point is given all
18 of that it still doesn't capture enough of the skill-set
19 of a Boston police lieutenant to be valid. Is that it?

20 MR. LICHTEN: That's exactly right, your Honor,
21 and you made the point on the first day of trial, you
22 called it "the pie." You have this pie and they're
23 testing for a very small part of the pie, but here's the
24 great irony and the sad irony, they're taking the
25 smallest part of the pie and testing for it in a way

1 which it is known from Day 1 would have the biggest
2 disparate impact on minority candidates and the method
3 by which they're testing these knowledges -- because you
4 can test knowledges in situational judgment, in video
5 exercises that minorities do much better on, they're
6 testing it through a multiple-choice forced-answer
7 system that everyone knows has the greatest adverse
8 impact on minorities.

9 So if you were looking at this huge pie and you
10 have various ways of testing for various things, they
11 take the one thing which is most certain to have
12 disparate impact and that's all they test for in a
13 manner that they know will have the most discriminatory
14 effect upon minorities.

15 And I would ask you to look at a series of cases,
16 but a case that's right on point is **Firefighters for**
17 **Racial Equality vs. the City of St. Louis**. It's a case
18 by the Eighth Circuit. It's been followed many times by
19 other cases and the cite to is, um -- it's 549 F.2d 506,
20 1977, and this was a fire battalion captain's position.
21 And the Eighth Circuit reversed the district court
22 holding that where a job analysis had identified skills
23 and abilities and supervisory abilities to be necessary
24 for the performance of a captain's position, a job test
25 that was based on a written multiple choice test was

1 unlawful under the Uniform Guidelines.

2 Now, ironically it wasn't only the Eighth Circuit
3 and the Federal courts that have said something like
4 this, if you remember there was evidence about a
5 decision called the **Carr** decision, and that's a decision
6 by the state Civil Service Commission of Massachusetts,
7 and in that case, contrary to what Ms. Hodge said, the
8 state Civil Service Commission said -- and I was
9 involved in that case and it was affirmed by the appeals
10 court, that a test for police lieutenant in the City of
11 Boston that excluded a test for supervisory abilities
12 did not meet the test that Ms. Hodge quoted to you that
13 it be a fair test of the abilities necessary for the
14 job.

15 So a very quick background. In that case there
16 was a test given in the 1980s, it had multiple
17 components, including a supervisory component. There
18 was an allegation that part of the test had been
19 compromised and so the Commissioner of the DPA threw out
20 that supervisory component and a group of white officers
21 appealed saying "We think we did quite well on that."
22 And the Civil Service Commission said in that case, and
23 I'll read you it: "Since supervisory skills are
24 recognized as an important part of the job of
25 lieutenant" -- and this is a Boston police lieutenant,

1 "it follows that a valid promotional exam for lieutenant
2 must test for such skills. The DPA and the intervenors
3 claimed that the multiple choice and training and
4 experience components of this exam do that, in fact test
5 for such skills. This claim is not persuasive. While
6 it's true that several of the multiple choice questions
7 derive from Iannone textbooks, 'Principles of
8 Supervision,' a textbook that we've seen in this case,
9 "the ability to answer these questions involves rote
10 memory not the application of supervisory principles."
11 Now this is a decision that is final by the appeals
12 court, has not been appealed further, and the Boston
13 Police Department is clearly on notice of this, and yet
14 they continued for years after that to use a multiple
15 choice test.

16 Finally, your Honor, I want to talk about, um, the
17 issue of Prong 3 and some of the questions that you had
18 about Prong 3 and where to go with that. And this is
19 what I would suggest to you.

20 We've heard a lot in this case about this question
21 of, um, what happens when you have individuals who have
22 already taken a series of exams and I think the experts
23 called it "range restriction," and "range restriction"
24 means that if you keep giving a certain kind of test to
25 people and people keep doing well to get to the next

1 level, at some point when you give that test you're not
2 getting much of a bang for your buck because these are
3 already people who have identified themselves as pretty
4 good because you're going to have a pretty close range
5 and you're not going to have the large distribution that
6 you have when you first give them under the bell curve.
7 And Dr. Champion testified about range restriction, in
8 fact he had written about it, and Dr. Hough testified
9 about that as did Dr. Wiesen.

10 Well, in this case let's look at what you have
11 here, you have police officers that became police
12 officers in the City of Boston only because they scored
13 in the 90s, the high 90s on their entry-level exam, and
14 that's a cognitive-ability test, as well as passing some
15 other psychological tests, so they distinguish
16 themselves that way, and then they went on to study for
17 the sergeant's exam, which is 80 percent of the
18 lieutenant's exam, and they've distinguished themselves
19 by getting high-enough scores, in the 80s or 90s, so
20 they could get promoted on that, and so now you have
21 people who have already shown the technical knowledge.

22 So when you look at other alternatives and whether
23 the City of Boston was on notice that other alternatives
24 could have been used, one alternative that was presented
25 to you by Dr. Wiesen and others is that you don't have

1 to make a test a scored test, it can be a hurdle test, a
2 pass/fail option, and in fact that's very common. In
3 fact most of the Uniform Guidelines relate to tests that
4 are used as hurdles, not as scored.

5 For example, the Uniform Guidelines describe this
6 and you were involved in the physical agility test for
7 the Department of Corrections. They don't score people
8 by how much they can lift or how much of the "dumb
9 idiots" they drag across, they simply say, "Okay, you've
10 passed the requisite ability or skill or knowledge and
11 then we're going to start to hire you based upon other
12 considerations." Well, let's think about this in this
13 case.

14 If you kept a job knowledge test but you scored it
15 on the basis that you had to get a score that was
16 determined by SMEs to be the level of knowledge that you
17 have and then you went to other factors, and let me give
18 you three simple ones, you went to performance review,
19 you had a structured system for seeing who were the
20 people who had proven themselves through exemplary work
21 of being good candidates, and you had a situational
22 judgment test which does test for knowledges but you
23 basically give video scenarios or you have an interview
24 panel and you say, "Okay, this is what's going on, this
25 is your in-basket, this is what's happening, what would

1 you do?" and we know that minorities will do much much
2 better, and if you had structured interviews where we
3 know that the adverse impact for structured interviews
4 is in the .15 or .2 range, much less than the 1.0
5 standard deviation we know for knowledge tests.

6 THE COURT: You've got 5 minutes left, but you're
7 spelling it out for me, and my question is this.

8 Suppose we know that the -- we knew back in 2008
9 that there were these techniques and you set things up
10 as you are now positing, you're assuming, at least as I
11 listen to your "effective advocacy," a word choice,
12 you're assuming you're going to have less adverse
13 impact. I don't -- I'm finding it difficult to draw
14 that assumption.

15 MR. LICHTEN: I have two answers and I think I can
16 demonstrate to you to the contrary.

17 First, if you look at the police lieutenant
18 assessment center validity report for the City of Boston
19 from 2002 -- and this was done by Morris and McDaniel,
20 they did the job analysis then they gave the exam that
21 had multiple components, they say, on Page 18 -- now,
22 remember what Mr. Churchill just told you, that the
23 standard deviation on average test scores between
24 minorities and nonminorities on the 2008 exam is 6
25 points and it has huge statistical disparity,

1 significant to I think it's the .0015 level, and you
2 can't get any more statistically-significant
3 differences. But when they gave the assessment center
4 they say, in their report: "No
5 statistically-significant differences exist between the
6 mean overall assessment center scores of Caucasians and
7 African Americans." Your Honor, that is proof positive
8 --

9 MR. BOK: Your Honor, could you read the last
10 little bit of that because he left off part --

11 THE COURT: No. No. No. This is final argument.

12 MR. BOK: I apologize, your Honor.

13 THE COURT: Now this interrupting does not commend
14 itself to me. You'll have a chance to file post-
15 argument memoranda.

16 MR. BOK: I apologize, your Honor.

17 THE COURT: Go ahead, Mr. Lichten.

18 MR. LICHTEN: I submit to you that if you go with
19 the one test in 2008 that we're challenging here it had
20 overwhelming statistical significance with respect to
21 the standard deviation scores of blacks and now
22 minorities and in 2002 when they gave the assessment
23 center, it didn't. But I won't rest on that, your
24 Honor, because what you did hear from Dr. Hough,
25 Dr. Wiesen, Dr. Champion, and even Dr. Silva, is that if

1 you -- that we know, because of the meta analytic
2 studies and the specific studies relative to police
3 work, that if you give these other types of tests,
4 situational judgment, um, structured interviews,
5 performance appraisal systems, to name three important
6 ones, we know that they have significantly less adverse
7 impact, and the experts testified that they're in the .2
8 range at most as opposed to the 1.0. They're 80 percent
9 less adverse impact.

10 What they were saying, however, the confounding
11 here is that if you continue to use a poorly-designed
12 multiple choice job knowledge test and you combine it
13 with that you're going to have less adverse impact, but
14 whether you're going to have enough less adverse impact
15 to have more minority hires depends upon how long you
16 let the list go. They let the 2008 list go for six
17 years, but usually it goes two or three years. And you
18 may not always see it, but you know you're going to get
19 it if you do it correctly --

20 THE COURT: You're going to want to point out to
21 me, post hearing, where in the evidence you've got
22 experts saying that. That seems to have alluded me.
23 But go ahead. Only a couple more minutes, but go ahead.

24 MR. LICHTEN: Your Honor, as you remember I
25 cross-examined Dr. Campion with article after article.

1 THE COURT: And so you did and I found the
2 articles very interesting, but only one of them's in
3 evidence.

4 MR. LICHTEN: No, but he agreed that they're
5 authoritative articles and that's what the articles say.
6 In addition, Dr. Hough and Dr. Wiesen both testified as
7 to the same point.

8 So in closing, your Honor, you know I've been at
9 this a long time, in this case and other cases, and in
10 this day and age given what's gone on in the world and
11 what's gone on with **Ferguson**, I can think of nothing
12 more important than trying to fight and work hard to get
13 minority police officers in supervisory positions for
14 the City of Boston, and it was clear to me from
15 Commissioner Evans' testimony today that the City of
16 Boston is not going to do it on their own.

17 THE COURT: Sum up. Go ahead. Your time's up.
18 Go ahead.

19 MR. LICHTEN: If the Court does not intervene it
20 seems apparent that the City of Boston only gave this
21 2014 exam an assessment center because they were worried
22 about the **Lopez** case that was still pending at the time,
23 but that we're going to go back to the way it's been for
24 25 years and we're going to go back to a system where
25 there are very few if any minorities in supervisory

1 ranks in the City of Boston and that would be a shame.
2 Thank you.

3 THE COURT: All right. That's final argument.
4 And I've got a question for Mr. Lichten.

5 This is not the time to extend the argument, but
6 I'm thinking more about the further management of this
7 case and only that, and this is the question I said I
8 would ask and you should draw no conclusions whatsoever
9 from this.

10 If the plaintiffs lose, the opinion will explain
11 that and that's it as far as this level. If the
12 plaintiffs win this portion of the case -- and here's my
13 question and I'm just talking about scheduling but I'll
14 ask it straight out, what do you want me to do?

15 MR. LICHTEN: I have thought about that, your
16 Honor, and I do want to remind you that you, when you
17 denied class certification, you actually denied it
18 without prejudice to be taken up again if you ever got
19 to the issue of remedy, and to be quite honest, in a
20 case like this --

21 THE COURT: That's what I'm always asking, right.

22 MR. LICHTEN: Right -- that a class, at least for
23 injunctive purposes, may in fact be appropriate because
24 there's both 23(b)(iii) issues and 23(b)(ii) issues.
25 But I think to answer your question, in the *Bradley vs.*

1 ***The City of Boston*** litigation and ***Deleo vs. The City of***
2 ***Boston***, which were the entry-level challenges to the
3 multiple choice test given by the City of Boston, Judge
4 Saris wrestled with how to devise a remedy having found
5 that the test was discriminatory and what she relied on
6 was a system that has been used by a number of experts
7 called "the shortfall system" and what it says is that
8 you statistically try to calculate that if the test had
9 not had adverse impact to the .80 level, to the four-
10 fifths level, how many more minorities would have been
11 promoted, and then you try to give future relief in some
12 fashion, maybe not all at one time, to that number and
13 then also there may be a back pay component to that.
14 And I'm not saying that that is the answer here --

15 THE COURT: And I'm not asking.

16 MR. LICHTEN: But you're asking me are there ways
17 to devise remedies and there are.

18 In the New York City firefighter case, which was a
19 huge case that was just concluded, there was a similar
20 type of analysis and a similar remedy.

21 THE COURT: And I appreciate that.

22 All right. Again on the assumption that the
23 plaintiffs win, and don't make that assumption, um, I
24 render my decision, let's say, and then how much time
25 after that decision before we commence hearings on those

1 issues, if we ever got that far?

2 MR. LICHTEN: I would think very -- it could be
3 done very quickly, your Honor, because we have -- I
4 think the parties have all the data they need.

5 THE COURT: All right.

6 MR. LICHTEN: And in addition the parties might at
7 that time be able to resolve matters because --

8 THE COURT: Okay, but now I'm not getting into
9 that.

10 MR. LICHTEN: But the answer is "short," not long.

11 THE COURT: And now to the defense. And don't
12 take anything from this, I'm simply trying to manage the
13 caseload and fairly decide the matters before me. But
14 should that be the result and an opinion as to the
15 matters -- the three prongs before the Court resolve in
16 a way that the plaintiffs, quote, "win," then what?

17 MS. HODGE: I think we move to the next phase,
18 your Honor.

19 THE COURT: How fast?

20 MS. HODGE: It really depends on what you say in
21 many respects. I mean it depends on the --

22 THE COURT: And that's fair, but he said it won't
23 take long because the data is largely known then and the
24 findings of fact have been made.

25 MS. HODGE: I think that may be correct, but

1 they're going to be implications that there would be a
2 hearing and have to be implications --

3 THE COURT: Well, there may have to be more than
4 one hearing, there may have to be a series of hearings.

5 MS. HODGE: Well, part of the issue here is --

6 THE COURT: I'll tell you what I'm thinking here,
7 I'm thinking 2 to 3 months after this opinion enters,
8 should the plaintiffs win. Fair?

9 MS. HODGE: I think that's fair.

10 THE COURT: All right.

11 And you agree, Mr. Lichten?

12 MR. LICHTEN: Yes.

13 THE COURT: All right. Now we recess. The Clerk
14 will stay here until 1:00, or faster than that. You
15 tell her if you want me to stay my hand. There's only
16 one reason why I should stay my hand and that's the
17 reason we discussed at sidebar. If either side doesn't
18 want me to stay my hand, and she won't tell me which
19 side, I'll be told that. If you both want me to stay my
20 hand, for that reason and no other, you'll tell me that
21 and you'll tell me how long and as I've explained to
22 you, that's what I'll do.

23 It is fair to say, on the record, two things.

24 One, this is an extraordinarily important case, but that
25 does not in any way presage a result. Two, counsel have

1 in fact stepped up and in the finest traditions of trial
2 advocacy laid before the Court the data that it needs to
3 perform its difficult job, and I sincerely appreciate
4 having you all before me in this matter. And we'll
5 stand in recess.

6 (Ends, 1:00 p.m.)

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T E

I, RICHARD H. ROMANOW, OFFICIAL COURT REPORTER,
do hereby certify that the foregoing record is a true
and accurate transcription of my stenographic notes
before Judge William G. Young, on Wednesday, January 7,
2015, to the best of my skill and ability.

/s/ Richard H. Romanow 02-19-15

RICHARD H. ROMANOW Date