No. 84-1656

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

LOCAL 28 OF THE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 28 JOINT APPRENTICESHIP COMMITTEE,

Petitioners,

—against—

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, THE CITY OF NEW YORK, and NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX
JA-1-JA-415

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Petition for Writ of Certiorari filed April 16, 1985
Petition for Writ of Certiorari granted October 7, 1985

INDEX TO JOINT APPENDIX

* Items designated with an Asterisk have been previously reproduced in the Appendix to the Petition for Certiorari.

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Relevant Docket Entries	Filed
Complaint	June 29, 1971
Findings of Fact and Conclusions of Law	January 3, 1972
Opinion Number 38,569	June 15, 1972
Opinion Number 38,646	July 7, 1972
Order	April 11, 1974
Order	July 3, 1974
Plaintiff's Affidavit and Show Cause Order to Adjudicate Defendants in Contempt	October 7, 1974
Stipulation of Facts	December 16, 1974
Opinion Number 42,823	July 18, 1975
Transcript of Proceedings Dated January 13-17, 20-24, 28-30, 1975	July 31, 1975
Judgment and Order	August 29, 1975
Opinion Number 43,357	November 6, 1975
Affirmative Action Program and Order	November 25, 1975
Order of the United States Court of Appeals	June 4, 1976
Revised Affirmative Action Program and Order	January 19, 1977
Order	January 19, 1977
Administrator's Report	February 1, 1977
Order	October 11, 1977
Order	October 25, 1977
Mandate and Opinion of the United States Court of Appeals	November 15, 1977

The Opinion of the Court of Appeals for the Second Circuit Dated Januray 16, 1985 is reprinted at A-1 of the Appendix to the Petition for Certiorari

Letter dated July 27, 1984 from Warren Bo Duplinsky (EEOC) to Second Circuit Court of Appeals

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

July 27, 1984

Honorable Ralph K. Winter
Honorable George C. Pratt
Honorable Walter R. Mansfield

George A. Fischer, Clerk
United States Court of Appeals
for the Second Circuit
United States Courthouse
Foley Square
New York, New York 10007

Re: *EEOC v. Local 638, et al.*, No. 82-6241, etc.

Dear Sirs:

We write in response to letters submited to this Court on July 10 & 24, 1984, by counsel for appellants, regarding the Supreme Court's recent decision in *Firefighters Local Union No. 1784 v. Stotts*, 52 U.S.L.W. 4767 (June 12, 1984). In their letters, appellants state that the decision affects the proprietary of the indenture ratio and fund order provided by the district court. They also submitted a brief filed by the Department of Justice in another case in another court. We strongly believe that the decision in *Stotts* does not affect the disposition of the issues in this appeal. However, if this Court feels that the *Stotts* decision is crucial to its determination, we request the opportunity to more fully set forth our views. We briefly outline our position below.

Although we have argued that the indenture ratio and the fund order are inappropriate under the facts of this case, availability of such remedies in appropriate factual settings is of the utmost importance in eliminating the vestiges of employment discrimination in our workforce. This court has repeatedly recognized this fact. *See e.g. Ass'n Against Discrimination v. City of Bridgeport*, 647 F.2d 256, 278-83 (1981); EEOC Br. at 16-17.

Every court of appeals has similarly held. *See* cases cited in *Stotts*, 52 U.S.L.W. at 4781 (Blackmum, J. dissenting). The *Stotts* decision does not overrule this long-standing principle of law. Indeed, the majority in *Stotts* did not even mention this line of cases.

In *Stotts*, the Supreme Court held that a lower court order overriding a *bona fide* seniority system in order to effectuate the purposes of a Title VII consent decree which made no provision with respect to seniority or layoffs, was inconsistent with §703(h) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(h), and "the policy behind §706(g) of Title VII [42 U.S.C. 2000e-5(g)]." 52 U.S.L.W. 4772.

Appellants acknowledge in their letter that, since there is no seniority system at issue in this appeal, the Court's discussion of §703(h) is clearly irrelevant. Similarly, the court's discussion of §706(g) is not relevant to the relief challenged by the appellants since it relates only to the award of retroactive or "make whole" relief and not to the use of prospective remedies, such as the indenture ratio or the fund order, designed to dismantle prior patterns of job segregation and to insure the prospective integration of unions and workforces by increasing future employment opportunities for blacks and other minorities as a class. This Court has recognized that the two forms of relief —"make whole" and affirmative prospective measures — are distinct and have different objectives. *See, e.g., Ass'n Against Discrimination v. City of Bridgeport*, 647 F.2d at 279-80 The Court in *Stotts* held that the district court's order overriding the seniority system was inconsistent with "the policy behind §706(g) of Title VII", *viz.*, "to provide make whole relief only to those who have been actual victims of illegal discrimination." (Slip op. at 16-17, 19). The Court gleaned this policy from excerpts from the 1964 legislative history of Title VII, primarily from statements relating to the last sentence of §706(g) which provides that "[n]o order of the court shall require ... the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any backpay, if such individual ... was refused employment or advancement or was suspended or dischaged for any reason other than discrimination on account of race, religion, sex, or national orgin ...." 42 U.S.C. 2000e-5(g).

Since the Court's entire discussion is carefully limited to the improper award of *"make whole"* relief, it is clear that the Court consciously avoided addressing the broader question of the availability of *prospective* race conscious relief. Instead, the Court's disagreement with the district court and court of appeals, and with the dissenting Justices, turns on the characterization of the relief awarded in that case. The court of appeals, and the dissenting opinion in the Supreme Court, characterize the order issued by the district court as an adjunct to the prospective, race-conscious relief provided in the underlying consent decree, and, therefore, as permissible under §706(g). The majority opinion, however, views the order as an award of retroactive seniority to specific members of a racial class, and therefore, as impermissible under §706(g) absent a showing that they were victims of discrimination. Because of its characterization of the order in *Stotts* as "make whole" relief, it was unnecessary for the Court to reach the broader question of the availability of prospective, numerical relief, and the Court carefully avoided doing so in its own statements.

Since the effect of the layoffs on individual employees could be readily determined (see 56 U.S.L.W. at 4771), the district court's injunction, which had the effect of shifting the impact of the layoffs to other identifiable individuals, can fairly be characterized as tantamount to a grant of retroactive seniority to those black employees who avoided layoff. By contrast, the typical prospective remedy cannot be so characterized. For example, the indenture ratio and fund order at issue in this case do not by their terms or in effect require the union to indenture or train any particular individual, nor do they have the effect of depriving any particular individual of indenture or training. We believe that this important factual difference between the *Stotts* case and the case presently before this Court adequately distinguishes the two cases.

The last sentence of §706(g), on which the *Stotts* decision is based, deals with "make whole" relief and does not even address prospective relief, let alone state that all prospective remedial orders must be limited so that they only benefit the specific victims of the employer's or union's past discriminatory acts.

Moreover, the language and the legislative history of §706(g) support the Commission's position that carefully tailored prospective race-conscious measures are permissible Title VII remedies. As the dissenting opinion points out (52 U.S.L.W. at 4781), this view has been adopted by every federal court of appeals. Further, the fact that this interpretation was consistently followed by both agencies charged with enforcement of Title VII, the Commission and the Department of Justice, during the years immediately following enactment of Title VII entitles the interpretation to great deference. *See General Electric v. Gilbert*, 429 U.S. 125, 141-42 (1976); *Griggs v. Duke Power Co.*, 410 U.S. 424, 435 (1971).

Thus, appellants' suggestion that the *Stotts* decision calls into question the general availability of prospective Title VII remedies, such as the indenture ratio and fund order in this case, is not supported by the opinion itself. Indeed, if the Court had intended to invalidate the use of prospective race-conscious remedies in general, it could have simply struck down the underlying consent decree in *Stotts*. As the Court noted, that decree, which was still in effect, included a one-for-one hiring ratio. 52 U.S.L.W. at 4768.

For these reasons we believe the *Stotts* decision should have no effect upon the Court's deliberations regarding this appeal.

Sincerely,

WARREN BO DUPLINSKY
Attorney

cc: Counsel

The Amended Affirmative Action Program and Order Entered November 4, 1983 is reprinted at A-53 of the Appendix to the Petition for Certiorari

The Order Entered October 13, 1983 Setting Forth Procedures for Implementing Order Establishing Employment, Training, Education and Recruitment Fund is reprinted at A-108 of the Appendix to the Petition for Certiorari

The Order Entered September 1, 1983 Adopting
Amended Affirmative Action program and
Order is reprinted at A-111 of the Appendix
to the Petition for Certiorari

The Order Entered September 1, 1983 Establishing
Employment, Training, Education and
Recruitment Fund is reprinted at A-113
of the Appendix to the Petition for Certiorari

The Memorandum and Order Entered September 1, 1983
Imposing 29.23% Nonwhite Membership Goal
is reprinted at A-119 of the Appendix
to the Petition for Certiorari

The Order Entered August 24, 1983 Holding
Local 28 and the JAC in Contempt and
Imposing Sanctions is reprinted at A-125
of the Appendix to the Petition for Certiorari

The Administrator's Memorandum Decision Entered
June 9, 1983, Finding Local 28 and the
JAC Violated O&J and RAAPO is reprinted
at A-127 of the Appendix to the
Petition for Certiorari

United States District Court
Southern District of New York

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and THE CITY OF NEW YORK,

Plaintiffs,

— against —

LOCAL 638 ... LOCAL 28 OF THE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 28 JOINT APPRENTICESHIP COMMITTEE ... SHEET METAL AND AIR-CONDITIONING CONTRACTORS' ASSOCIATION OF NEW YORK CITY, INC., etc.,

Defendants.

SUPPLEMENTAL AFFIDAVIT IN SUPPORT OF MOTION FOR AN ORDER OF VIOLATION

71 Civ. 2877 (HFW)

STATE OF NEW YORK
:SS:
COUNTY OF NEW YORK

CHARLES R. FOY, being duly sworn, deposes and says:

1. I am an Assistant Corporation Counsel in the office of FREDERICK A. O. SCHWARZ, JR., Corporation Counsel of the City of New York, attorney for plaintiff City of New York ("City").

2. I am fully familiar with the facts and circumstances herein. I submit this supplemental affidavit in support of the City's motion for an order citing defendants Local 28 of the Sheet Metal Workers' International Association ("Local 28"), Local 28 Joint Apprenticeship Committee ("JAC"), the Sheet Metal and Air-Conditioning Contractors' Association of New York City, Inc. ("Contractors' Association") and eleven (11) individually named Local 28 contractors ("respondents") for violating the Order and Judgment ("OJ"), the Revised Affirmative Action Program and Order ("RAAPO")

and a directive of the Administrator dated November 20, 1981.

Local 28's Failure To Comply With OJ ¶s 2i(e)(xii), 21(i) 21(j) and RAAPO ¶ 33, 33(f) and 34(a)

3. Local 28 claims that it did not violate OJ¶21(j) when it granted membership status to individuals graduating from the JACs of former locals 10, 13 and 55 ("former locals"). Affadavit of Edmund D'Elia, dated April 14, 1983 ("D'Elia Affd.") Rather, Local 28 claims that pursuant to President Carlough's October 16, 1981 and March 23, 1982 merger orders such individuals were "assigned and transferred" to Local 28. As apprentices are not granted membership status in Local 28 until they complete their apprenticeship and pay their initiation fee, it was beyond President Carlough's power to assign or transfer the apprentices in the former local's JACs into Local 28.

4. In addition to improperly granting membership status to graduates of the former locals' JACs and permitting members of the former locals to work within New York City (See Foy Affidavit, dated April 11, 1983, ¶15)("Foy Affd."), Local 28 has failed to comply with reporting requirements regarding its membership.

5. Paragraphs 21(e)(xii) and 21(i) of the OJ requires that Local 28 maintain records of whites and non-whites employed as sheet metal workers by Local 28 contractors and provide yearly reports listing all members of Local 28 with their racial identification. No report submitted by Local 28 contained such information regarding members of Local 28 who were formerly members of the merged locals.

6. Local 28 is also required to submit the names of individuals admitted to journeyman status within 5 days of their admission. *See, RAAPO ¶34(a).* If, as the record makes clear and Local 28 now admits, journeymen in of the merged locals were transferred into Local 28 pursuant to President Carlough's merger orders and are full of members of Local 28, then Local 28 should have provided the names of all such individuals within five days of the relevant merger orders. (See. Proposed Stipulated Findings of Fact, dated April 15, 1983, ¶s 17, 30, 47-48; D'Elia Affd., p 2).

7. In violation of RAAPO ¶33 33(f) Local 28 has failed to submit

every 3 months the names of all those individuals who have sought or applied for transfer into Local 28, including those individuals from the merged locals.

JAC's Failure To Comply With RAAPO ¶s 20(c)(iv)(b) and 35(c)

8. Paragraph 20(c)(iv)(b) of the RAAPO requires the JAC submit monthly reports which contain, among other items, the number of hours each apprentice worked. Six months after an apprentice class is indentured the JAC is required to file a summary of the monthly reports submitted pursuant to ¶20(c)(iv)(b). See, RAAPO ¶35(c). The JAC has filed inaccurate reports under ¶20(c)(iv)(b) and has failed to file the required reports under ¶35(c).

9. As detailed in ¶s 17-19 of the Foy Affidavit, a review of CETA contractor vouchers discloses that the Monthly Manpower Reports JAC has submitted do not accurately reflect the hours actually worked by a number of apprentices. The JAC does not deny that there is such an inconsistency between the CETA contractor vouchers and the Manpower Reports. See, affidavit of William Rothberg, dated April 13, 1983, ("Rothberg Affidavit"). Rather, JAC contends that it has no access to information indicating the number of hours an apprentice worked on a particular day, that reports indicating the number of apprentices unemployed are sufficient and that there really is no need for reports concerning manpower hours. See, Rothberg Affidavit, ¶s 21-22. Thus, JAC believes itself to be in "full compliance . . . with all aspects of RAAPO." See, Rothberg Affidavit ¶26. The facts, however, speak differently.

10. JAC can obtain the necessary information from Local 28 contractors. If the contractors fail to supply the number of hours their employees work the JAC can, as the City previously has, bring Orders to Show Cause to obtain such information. While JAC is correct in asserting the plaintiffs are to enforce the OJ and RAAPO, it overlooks its own obligation to obtain required information. See, Foy Affidavit, Exhibit "14." Sending letters, as JAC has done in response to prodding by the City, is insufficient if it fails to result in production of the required information. See, *Id:* Rothberg Affd., Exhibit "C." Failure to provide this information

is especially disturbing when JAC has admitted it can obtain the data from sources other than individual contractors. See, Rothberg Affd., ¶23.

11. The very fact that CETA contractor vouchers do not match the Manpower Reports demonstrates the absurdity of JAC's argument that statistics showing the number of apprentices not working is sufficient. Such an argument ignores 20(c)(iv)(b)'s requirement that manpower hours, and not merely the number of unemployed apprentices, be provided. Nor does JAC's claim that there is no need for manpower hours hold much water. This position ignores the fact that the OJ and RAAPO require equitable distribution of work among whites and non-whites. JAC's position again demonstrates its attitude that JAC, and not the court, should determine what information is required. See, 29 FEP Cases 1146; Foy Affd., Exhibits "13" and "14."

Respondents' Failure To Comply With OJ ¶s 1, 7, 8 and RAAPO ¶s 20(c)(iv)(a)

12. Respondents' attorney claims that there is "no direct requirement for an employer to file . . . manpower reports" or "to furnish the number of hours worked by its employees." See Rothberg Affidavit ¶ 7, 12. Such an assertion disregards this court's orders and the history of this litigation.

13. Paragraphs 1, 7 and 8 of the Order and Judgment enjoin any party in active concert or participation with the defendants from taking any action which would impede or interfere with the operation of the OJ. In order to put Local 28 contractors on notice of this obligation the Administrator required plaintiffs to serve copies of the OJ and the RAAPO upon all such contractors. See, Memorandum and Order, dated July 30, 1979 and Amended Memorandum and Order, dated March 12, 1980, annexed as Exhibit "1-A." The Administrator's intent to have employers submit both journeyman and apprentice statistics and manpower hours is demonstrated by Exhibit 1-A. At the same time he required plaintiffs to serve the OJ and the RAAPO upon Local 28 contractors, pursuant to his authority under OJ ¶s 14(a) and 14(g) the Administrator required defendants to provide data regarding work hours. For defendants to be able to provide the required data and enable the parties to determine the defendants' ability to

comply with the OJ the Administrator required Local 28 contractors to cooperate with the defendants in obtaining the data. Such cooperation includes supplying the JAC with manpower hours.

Time Limitation

14. Defendants and respondents claim that the City's motion should be dismissed in that the motion was brought after more than 30 days after the situation complained of arises. See, RAAPO ¶41(b). In face of prior rulings regarding the effect of ¶41(b) such an argument is without merit. As Judge Werker has stated, the "mere fact that plaintiffs did not register a complaint under ¶41(b) cannot be utilized by defendants to relieve themselves from compliance with the other terms and conditions of the RAAPO and OJ." 29 FEP Cases 1146 (S.D.N.Y. 1982).

Conclusion

15. The evidence establishes that defendants and the eleven individually-named contractors have violated the decrees of this Court, specifically OJ ¶s 1, 7, 8, 21(e)(xii), 21(i), 21(j); RAAPO ¶s 20(c)(iv)(a), 20(c)(iv)(b), 33, 33(f), 34(a), 35(c); and the Administrator's November 20, 1981 directive.

WHEREFORE, to ensure that such violations cease and to compensate those non-whites who have been injured as a result of these violations, the City respectfully requests that this Court grant its motion, find that Local 28, the Local 28 JAC, the Contractors' Association and the eleven individually named contractors have violated this Court's orders, and award the relief requested herein and any other relief the Court may find just and proper.

CHARLES FOY
Assistant Corporation Counsel

Sworn to before me this
25th day of April, 1983

United States District Court
Southern District of New York

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and THE CITY OF NEW YORK,

Plaintiffs,

—against—

LOCAL 638 ... LOCAL 28 OF THE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 28 JOINT APPRENTICESHIP COMMITTEE ... SHEET METAL AND AIR-CONDITIONING CONTRACTORS' ASSOCIATION OF NEW YORK CITY, INC., etc.,

Defendants.

AFFIDAVIT IN SUPPORT OF MOTION FOR AN ORDER OF VIOLATION

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STATE OF NEW YORK
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1. I am an Assistant Corporation Counsel in the office of FREDERICK A. O. SCHWARZ, JR., Corporation Counsel of the City of New York, attorney for plaintiff City of New York ("City").

2. I am fully familiar with the fact and circumstances herein. I submit this affidavit in support of the City's motion for an order citing defendants Local 28 of the Sheet Metal Workers' International Association ("Local 28"), Local 28 Joint Apprenticeship Committee ("JAC"), the Sheet Metal and Air-Conditioning Contractors' Association of New York City, Inc. ("Contractors' Association") and eleven (11) individually named Local 28 contractors ("respondents") for violating the Order and Judgement ("OJ"), the

Revised Affirmative Action Program and Order ("RAAPO") and a directive of the Administrator dated November 20, 1981.

I. Prior Proceedings

3. This action was originally commenced by the Equal Employment Opportunity Commission ("EEOC") in 1971 under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000 *et seq.*, charging *inter alia*, that Local 28, the JAC and the Contractors' Association had engaged in a pattern and practice of discrimination against Black and Spanish-surnamed individuals with respect to recruitment, selection, training and admission into Local 28, admission into membership in the Local 28 Apprenticeship Program, and employment opportunities as sheet metal workers in New York City.

4. On June 6, 1972 the City moved pursuant to Rule 24(a) of the F.R. Civ. Pro. to intervent in this proceeding because the City Commission on Human Rights had pending before it an administrative proceeding against Local 28 which would be affected by a decree in this action. The motion to intervene was granted on June 14, 1972.

5. The action was tried from January 13, 1975 to February 3, 1975. In a decision dated July 18, 1975 Judge Henry F. Werker held that Local 28 and the JAC had illegally denied non-whites access to employment opportunities in the sheet metal trade. (401 F. Supp. 467.) Judge Werker held that Local 28 and the JAC denied non-whites such employment opportunities, by *inter alia*, (a) failing to administer yearly validated journeymen tests; (b) selectively organizing non-union sheet metal shops with few non-white employees, and/or admitting from such shops only white employees; (c) accepting as transfer members whites from affiliated sister locals while refusing transfers of non-whites; and (d) utilizing an apprenticeship examination which had an adverse impact upon non-whites and which was not job-related.

6. On August 25, 1975 an Order and Judgement ("OJ") was entered in this action. The OJ provided, in part, that Local 28 and the JAC undertake a program of advertising and publicity to inform the non-white community of non-discriminatory opportunities in Local 28 and the Apprenticeship Program (¶21 (h)),

established permissable methods of entry into Local 28 and the Apprenticeship Programs (¶s 21 (a), (b)(C) and 22(b)) and required that without court approval Local 28 and the JAC could not, modify the conditions or terms upon which an individual became a member of the Apprenticeship Program or Local 28 or be entitled to work within the jurisdiction of Local 28 (¶ 21 (j)). In addition, the OJ enjoined the defendants from any act or practice which would have the purpose or effect of discriminating in recruitment, selection, training, admission to membership in Local 28, admission to membership in the Apprenticeship Program, or any terms and conditions of employment on the basis of race, color or national origin (¶s 1, 7 and 8).

7. Pursuant to the Order and Judgment, an Affirmative Action Program and Order ("Program") had been entered on November 25, 1975. This Program was required to be modified by the Court of Appeals' decision dated March 6, 1977 (532 F.2d 821). That decision did not affect the provisions of the Order and Judgment relied upon herein, which were affirmed. *Id.* A Revised Affirmative Action Program and Order ("RAAPO") was entered on January 19, 1977. The RAAPO specified methods by which defendants were to comply with the OJ. These methods included complying with City Executive Orders and contractual requirements for the employment of minority trainees on City construction projects (¶s 20(d)(ii), 31(f)) and submitting specified reports (e.g., ¶s 20(d)(iii), 33(k)). On appeal RAAPO was affirmed. (565 F.2d 31 (CA2 1977)).

8. On April 16, 1982 the City and the State moved for an order citing the defendants and one hundred and twenty-one contractors for contempt of court for violating the OJ, the RAAPO and orders of the Administrator. After a hearing, Judge Werker issued a decision dated August 16, 1982 finding that by six separate actions or omissions the defendants violated prior orders of the court (29 FEP Cases 1143 (SDNY 1982)).

9. Subsequently, the parties entered into negotiation of a new affirmative action plan ("AAP"). As a result of these negotiations a Modified Affirmative Action Program and Order ("MAAPO") was presented to the Court. The defendants and the State both supported the adoption of MAAPO, while the City took a position of non-opposition with regard to MAAPO. The EEOC opposed MAAPO.

10. *Since the MAAPO was negotiated a series of violations of this court's orders* HAS COME TO LIGHT *and are detailed below.* These violations lead to the City opposing MAAPO and instituting the instant proceeding. (See Foy April 7, 1983 letter annexed hereto as Exhibit "I").

II. Parties

11. While individual sheet metal contractors are not named parties to this action, they have been enjoined from discriminatory employment practices. (See OJ ¶¶7, 8). By a Memorandum and Order of the Administrator dated July 30, 1979 and an Amended Memorandum and Order ("AMO") dated March 12, 1980, the Administrator directed the City and the E.E.O.C. to serve by certified mail members of defendant Contractors' Association, employers who have a contractual relationship with Local 28 and employers who utilize JAC apprentices, with a certified copy of the Order and Judgment and the RAAPO. By so serving these employers, plaintiffs put them on notice of their obligations under the OJ and the RAAPO, which include filing weekly manpower reports. Eleven of these contractors are named as respondents to this motion for failure to submit accurate manpower reports. (See ¶s 16–19 below).

Violations of the OJ, the RAAPO and the Administrator's November 20, 1981 Directive

12. The OJ as well as the RAAPO require defendants to take affirmative steps to overcome their history of discriminatory acts. This obligation has in no way been lessened by the presentation to the Court of MAAPO. Rather, as the court's August 16, 1982 Memorandum Decision makes abundantly clear, defendants' obligation is a continuing one. However, defendants have continued to engage in violation of this court's orders which directly evidence discrimination. These violations are:

(a) the granting of membership status in Local 28 to individuals whose entry into Local 28 does not conform with the requirements of the OJ and the MAPPO and allowing such individuals to work within Local 28's jurisdiction. See, OJ ¶21(j);

(b) the failure to submit complete and accurate records. See, OJ ¶s 1, 7, 8, 14(a), 14(g); (21)(e)(xii) and 21(i); [RAAPO ¶s *20(c)(iv)(B)* and *33(K);*] and

(c) the failure to serve copies of the OJ and the RAAPO upon contractors or to file proof of such service with the parties as required by the Administrator's November 20, 1981 directive (See Raff November 20, 1981 letter annexed hereto as Exhibit "2").

The net effect of these violations has been the continued denial of the civil rights to non-whites.

Evidence of Violations of the OJ, the RAAPO and the Administrator's November 20, 1981 Directive

(a)

13. The OJ and the RAAPO set forth the conditions or terms by which an individual may be granted membership status in Local 28 or be entitled to work within Local 28's jurisdiction. (See, OJ ¶s 21(a)(b), 22(b)(c); RAAPO ¶ 3). The defendants are prohibited from changing, modifying or amending such conditions or terms. (See, OJ ¶21(j)).

14. In October, 1981 the President of the Sheet Metal Workers' International Association ("International") ordered that former Locals 10, 13, 22 and 559 be merged into Local 28. (See, Carlough October 16, 1981 letter, annexed hereto as Exhibit "3"). Subsequently, the International President issued an order directing that Local 55 be merged into Local 28. (*See*, Carlough March 23, 1982 letter annexed hereto as Exhibit "4"). Discovery has disclosed that as a result of these mergers a number of individuals have become Local 28 members who are entitled to work within Local 28's jurisdiction without having done so in conformity with the OJ and the RAAPO. These individuals include seven apprentices who have graduated from former local 13's Apprenticeship Program ("JAC-13"), five apprentices who have graduated from former Local 55's Apprenticeship Program ("JAC-55") and twenty-nine apprentices who have graduated from former Local 10's Apprenticeship Program ("JAC-10") See, JAC-13's Responses to City's Interrogatories, at 8 ("JAC-13's Resps."),

JAC-55's Responses to City's Interrogatories, at 6 ("JAC-55's Resps.") and Local 28's Responses to City's Second Set of Interrogatories at 8 ("Defs. Second Resps.") annexed hereto as Exhibits "5", "6" and "7"). All of these former apprentices pay dues to Local 28 and are Local 28 members. (Id.).

15. Since the merger of Locals 10, 13 and 55 into Local 28 members of these former locals have paid dues to Local 28 and have been accorded membership status in Local 28. (Transcript of May 20, 1982 Inquest before Administrator at 24, 26 ("Tr. _____"). As a result, they have been entitled to work within Local 28's jurisdiction. Nothing in either Local 28's or the International's Constitution prohibits these former members of former Locals 10, 13 and 55 from working within Local 28's jurisdiction. (See, Exhibits "3" and "4"). In fact, the International has taken the position that the former members of former Locals 10, 13 and 55 may work within Local 28's jurisdiction (See, Exhibits "3" and "4"). By granting membership status in Local 28 by methods which do not conform to the OJ or the RAAPO (e.g., these individuals have not passed a validated hands-on test) and permitting these mechanics to work within Local 28's jurisdiction* Local 28 has violated ¶ 21(j) of the OJ.

(b)

16. In three different ways defendants and respondents have not complied with the OJ and RAAPO's reporting requirements. It is through records provided by defendants and respondents that plaintiffs are able to evaluate defendants' compliance with the OJ and determine what methods can assist the defendants in compliance.

17. All contractors who have a contractual relationship Local 28 or employ JAC apprentices and have been served with copies of the OJ and the RAAPO are required to file weekly manpower reports with the JAC. The JAC compiles these reports and files them with the Administrator on a monthly basis (See, RAAPO ¶33(K)).

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*The City does not take the position, or in any way mean to imply, that Local 28's jurisdiction remains limited to New York City.

18. With the establishment of the CETA training program contractors in the program were required to file with the CETA Project Director, either a contractor voucher (a copy of which is annexed hereto as Exhibit "8") or time cards for each CETA participant. These vouchers or time cards reflect the amount of hours a CETA participant worked in a given week and are the basis for the contractors receiving reimbursement for CETA apprentices' wages.

19. Upon the City's request copies of all contractor vouchers and time records submitted by participating contractors from April, 1982 to February, 1983 were provided the City by the Administrator. Under my supervision, Pauline Roundtrea, a member of the Law Department's clerical staff, reviewed these records and compared them to manpower records submitted by the JAC. **This review disclosed that for eleven contractors, the respondents herein, the hours reported on CETA time records did not match the hours reported on the manpower reports.** (Copies of the CETA time records, the manpower reports and a summary comparison of these records are annexed hereto as Exhibits "9", "10" and "11").

20. During the period RAAPO has been in effect plaintiffs have not received complete Manpower Posting Sheets from the JAC. In violation of both the OJ and the RAAPO Monthly Posting Sheets have contained no information regarding the number of apprentices employed by several contractors. (See, OJ ¶s 8 and 21(e)(xii); RAAPO ¶s *20(c)(iv)(B)* and 33(K) and Exhibit "10").

21. **In order for the JAC to be able to submit complete data for the Monthly Posting Sheets, it is necessary that it obtain such information from individual Local 28 contractors.** (See ¶s 17 above). During the previous three years the JAC has failed to take any action, other than request contractors to file the reports, to ensure that contractors who have failed to file with the JAC the necessary manpower reports do so. (See Abdul-Salaam March 18, 1983 letter, Rothberg March 18, 1983 letter and Foy March 28, **1983 letter annexed hereto as Exhibits "12", "13", and "14"). As a result it has been left to the City and the Administrator to bring orders to show cause against contractors who have failed to submit manpower reports.** The OJ and the RAAPO clearly state that it is

the JAC's, and not the City or the Administrator's, affirmative obligation to obtain the information necessary to submit complete Monthly Posting Sheets. By failing to do so the JAC has violated this Court's orders.

22. The OJ and the RAAPO require Local 28 to Maintain and submit accurate records regarding the number of white and non-white Local 28 members. (See, OJ ¶s 1 and 2(i); RAAPO ¶ 33(K)). In his August 16, 1982 Memorandum Decision, Judge Werker found that Local 28 had violated the OJ and RAAPO by failing to submit required reports, including membership census. (See, 29 FEP Cases 1146). Local 28's failure to comply with this Court's reporting requirements has continued to date.

23. Recently the City's discovered that membership data which Local 28 has submitted has been inaccurate. These inaccuracies consist of Local 28 listing as non-white two individuals, Jose Marquez and Arthur Kaplan, who until February 28, 1983 it has listed as white. (See Raff March 2, 1983 letter, D'Elia March 7, 1983 letter and Foy March 22, 1983 letter annexed hereto as Exhibits "15", "16", and "17"). The correct racial identity of these individuals, who it is believed have been Local 28 members for several years, could have easily been established some time ago. No clerical error or mistake due to the responsible Local 28 official not having met Mr. Marquez can be claimed. Mr. Marquez, as his name clearly indicates, is, and always has been, Spanish-surnamed. Mr. Kaplan, as his name would appear to indicate, is not non-white and should not be listed as a non-white.

(c)

24. In order in insure the parties have an up-to-date listing of Local 28 contractors and are provided accurate weekly manpower reports on November 20, 1981 the Administrator directed Local 28 to serve all contractors who entered into a contractual relationship with Local 28 or employed JAC apprentices with copies of the OJ and the RAAPO, certified-return receipt requested. (See Exhibit "2"). Copies of the certification cards was to be provided to the parties upon their receipt by Local 28.

25. To date, no proof of service of copies of the OJ and the RAAPO has been filed by Local 28. At least one contractor, Robert

Sinkler of County Sheet Metal, has testified that he was not served with copies of the OJ and the RAAPO. (See Transcript of December 22, 1982 hearing, p. 5-6, annexed hereto as Exhibit "18").

26. A request that Local 28 provide proof of service of the RAAPO and the OJ has resulted in a reply that Local 28's attorney had been "unsuccessful in his attempt(s) in securing proof of service." (See, Foy January 6, 1983 and D'Elia February 28, 1983 letters annexed hereto as Exhibit "19" and "20").

The Relief Sought

27. The City is seeking two basic forms of relief pursuant to its instant motion.

(a) a computerized record keeping system developed and maintained by an independent management firm: and

(b) coercive fines to pay for computerized record keeping.

(a)

28. The Court's August 16, 1982 Memorandum Decision and the instant proceeding point up the necessity of obtaining timely and accurate records. As the Court stated in its Memorandum Decision "compliance with [record keeping and reporting requirements] is absolutely vital to the effective monitoring and implementation of the RAAPO". 29 FEP cases 1146. The concept, embodied in MAAPO (See City Comments regarding MAAPO, p. 17), that the defendants can provide accurate records through Local 28's computer must be seriously questioned. Both the defendants' previous contemptuous acts and their continued unwillingness and inability to provide timely records leads the City to believe that record keeping and reporting functions in this litigation must be assumed by an independent firm.

(b)

29. This Court has already stated that coercive fines are necessary "to coerce future compliance with the orders of the court and the Administrator". 29 FEP Cases 1147. Where, as in the instant case, defendants continue to violate the court's reporting and record keeping requirements, the use of coercive fines to pay for independent management of the defendants' records will ensure

future compliance with the court's order.

30. *Costs and Attorneys Fees.* The City also requests that the costs and attorney fees incurred in the prosecution of this motion be taxed against the defendants and the respondents.

Conclusion

31. The evidence establishes that Local 28 of the Sheet Metal Workers' International Association, the Local 28 Joint Apprenticeship Committee, the Sheet Metal and Air-Conditioning Contractors' Association of New York City, Inc. and the eleven individually-named contractors have violated the decrees of this Court. In so doing they have discriminated against non-whites in violation of outstanding Court orders and in violation of Title VII of the Civil Rights Act of 1964.

WHEREFORE, to ensure that such violations cease and to compensate those non-whites who have been injured as a result of these violations, the City respectfully requests that this Court grant its motion, find that Local 28, the Local 28 JAC, the Contractors' Association and the eleven individually named contractors have violated this Court's orders, and award the relief requested herein and any other relief the Court may find just and proper.

CHARLES FOY
Assistant Corporation Counsel

Sworn to before me this
11th day of April 1983

United States District Court
Southern District of New York

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and THE CITY OF NEW YORK,

Plaintiffs,

—against—

LOCAL 638 ... LOCAL 28 OF THE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 28 JOINT APPRENTICESHIP COMMITTEE ... SHEET METAL AIR-CONDITIONING CONTRACTORS' ASSOCIATION OF NEW YORK CITY, INC., et al.,

Defendants.

MEMORANDUM & ORDER

71 Civ. 2877 (HFW)

HENRY F. WERKER, D. J.

A Modified Affirmative Action Program and order ("MAAPO" or "Plan") has been presented to the court in draft form dated December 17, 1982. The Plan was negotiated by the parties to this action.[1] Its stated purpose is to supersede the Revised Affirmative Action Program and Order ("RAAPO") entered on January 19, 1977 and certain provisions of the Order and Judgment ("O&J") entered on August 29, 1975.

At a hearing held on December 30, 1982, the court-appointed Administrator ("Administrator") stated that he was opposed to MAAPO. The court informed the Administrator and the parties that it would accept any written comments they had on MAAPO before deciding whether to approve or disapprove the Plan. As a

result, the court has read and considered the letters dated January 12, 1983 and February 18, 1983 submitted by the Equal Employment Opportunity Commission ("EEOC"), the comments of the City of New York ("City") dated February 7, 1983, the December 29, 1982 letter submitted by the State of New York ("State") and its memorandum in support of MAAPO dated February 7, 1983, the Administrator's objections to MAAPO dated January 6, 1983, the defendants' response to those objections dated February 7, 1983 and the Administrator's reply to the parties' comments on MAAPO dated February 17, 1983.

The EEOC, one of the primary plaintiffs in this action, does not approve of MAAPO. The City, another plaintiff, originally took a position of "nonopposition." In a letter dated April 7, 1983, however, the City stated that it was opposed to the Plan. The State approves the Plan. Although the purpose of RAAPO and the O&J was to put an end to discrimination in the recruitment, selection, training and admission to membership in Local 28 of the Sheet Metal Workers' International Association ("Local 28") or its apprenticeship program, the record of this case discloses a consistent intent on the part of defendants to evade, avoid and disobey these orders. In the court's opinion, MAAPO is further evidence of this policy. It therefore, as a whole, is disapproved.[2] Following are the court's comments and suggestions on an acceptable MAAPO, which should be prepared in conjunction by both plaintiffs and the Administrator and submitted to me on notice of motion for approval.

Section 1

This section should be revised to reflect the appropriate names of all of the parties.

Section 2

This section should be revised to include not only Local 28 as it existed before its merger with Locals 10, 13, 22, 55 and 559, but also to embrace those Locals that have merged with Local 28. In other words, the effect of the merger should not be left open; any Local that has merged with Local 28 is to be covered by the provisions of the Plan. In this regard, it is the court's intention that all

Locals that have merged with Local 28 and, consequently, all contractors now doing business with Local 28 be bound by the provisions of any Plan approved by the court, as well as the O&J and RAAPO.

Section 3

While the first paragraph of section 3 is acceptable, the goal of MAAPO must be measured as against the total membership of Local 28 and any Locals that have merged with it. Thus, the first sentence of the second paragraph should be revised. In drafting this revision, the statements of the Second Circuit in *E.E.O.C. v. Local 14, International Union of Operating Engineers*, 553 F.2d 251 (2d Cir. 1977) should be considered. The fourth paragraph should be redrafted to indicate that MAAPO will not terminate automatically upon a showing that Local 28's non-white membership has reached 29% but that it will terminate only after approval by the court on motion of defendants.

Sections 4–9

These sections are approved in principle. The reason for such approval is that the court finds that the quotas established by these sections are necessary only because of defendants' egregiously poor performance over the past six (6) years. Unfortunately, it is apparent that the goal established in the O&J never will be reached if this temporary method of access for nonwhites is not employed. The court adds, however, that, in its opinion, a "hands-on" test should be used. With respect to paragraph 4(e), the term "Executive Board of Local 28," is deleted. The "Board" should be composed of three (3) persons: one (1) designated by plaintiffs, one (1) designated by defendants and one (1) designated by the court. Any further use of the term "Executive Board" in the Plan should be construed in this light. Finally, with respect to the last sentence of section 5, the word "Arbitrator" should be eliminated and the word "Administrator" substituted. The court is aware that the term "Arbitrator" appears in several sections of MAAPO and directs that, wherever this word appears, the term "Administrator" be substituted.

Section 10

This section is approved with the following revisions. Employers should be required to use a ratio of one (1) apprentice to four (4) journeymen unless the employer can supply the union its reasons for not doing so in writing, subject to the penalty of perjury and if plaintiffs consent to the abandonment of such procedure. In this regard, it is the court's intention that an employer may hire seven (7) journeymen but still would be obligated to hire at least one (1) apprentice. The court notes that these steps are a minimum. If this methodology is not successful, plaintiffs are authorized to request the taking of additional steps.

Section 11

This section is approved except that the provision for the reduction for the number of apprentices to be indentured should be permitted only by the approval and consent of plaintiffs. As noted above and as will not be mentioned further, there will be no Arbitrator for this Plan. Thus, any disputes should be referred to the Administrator for resolution.

Section 12

Section 12 is approved.

Section 13

Section 13 is approved, but the words "make every effort" contained in the second sentence should be deleted.

Section 14

Section 14 is approved.

Section 15

This section should be eliminated.

Section 16

This section is approved.

Section 17

This section is approved.

Section 18

This section is approved except that, in paragraph 18(a), the word "reduced" should be changed to "paid," and the last sentence of paragraph 18(b) should be eliminated.

Section 19

The provision contained in paragraph 19(a) for "the lowest possible" should be changed to a ratio of one (1) to four (4). Furthermore, if there is to be an Appendix E as stated in paragraph 19(b), it will have to be approved by plaintiffs and the court.

Section 20

Section 20 should be revised to read as follows:

20. Local 28 may not issue "permits" or "identification slips" unless

(a) a written request has been made to the plaintiffs justifying the issuance. (Appendix F is insufficient.) Such request must be certified and affirmed by a union officer and the contractor subject to penalty for perjury;

(b) Plaintiffs have consented in writing to the issuance;

(c) If plaintiffs refuse to consent, they must state their reasons for doing so in writing; and

(d) Any part aggrieved by actions taken under this provision may apply to the Administrator for resolution.

Sections 21–29

These sections are approved, but, in paragraph 29(b), the provision for "a reasonable extension of time" should be revised to read "a reasonable extension of time not to exceed ten (10) days."

Sections 30–32

These sections are approved.

Section 33

Paragraph 33 (a) should be redrafted to designate David Raff as the Administrator of the Plan. As to his fees, he should be paid at the rate of $150 per hour plus expenses.

Section 34

This section is approved except that the phrase "question of interpretation" in paragraph 34(a) should be deleted as should the last sentence of this paragraph.

Sections 35–37

These sections are disapproved. In fact, the court finds it inconceivable that defendants would attempt to request nnancing for compliance with MAAPO. As is clearly demonstrated by the record in this case, defendants flagrantly have abused the prior orders of this court. For example, in a decision dated August 16, 1982, the court was compelled to hold defendants in contempt of court for failing to comply with the O&J and RAAPO and fined defendants $150,000 plus reasonable attorney's fees. Although the court stated that the fines should be placed in a fund and used to forward the goals as set forth in the O&J RAAPO, nowhere did the court mention or intend to suggest that defendants were to be rewarded if they complied with the goals of this action as contained in the O&J and RAAPO. Indeed, the court suggested that a further coercive fine might be necessary. Accordingly, the court directs that, if they have not already done so, defendants forthwith deposit $150,000 into the court to the credit of this action and designate the Manhattan Savings Bank and the Dollar Savings

Bank as the depositories for the fines assessed against them in this action. Both plaintiffs and the Administrator are to administer this fund. At such time as defendants apply to this court for relief on the ground that they have complied with the O&J and RAAPO and successfully move for the termination of MAAPO, the court will consider the appropriateness of releasing to defendants some or all of any monies that are remaining.

Section 38

This section is approved. If plaintiffs wish to contribute attorney's fees to the fund, they will be accepted.

Section 39

Apart from paragraph 39(a), this section is approved. Paragraph 39(a) should be revised to provide that all Locals that have merged with Local 28 be sent a copy of MAAPO.

Section 40

This section is approved.

CONCLUSION

It is the court's intention that plaintiffs shall be the parties responsible for monitoring defendants' activities and initiating action to insure compliance with MAAPO, as and when it is approved by the court. While this has not been the case in the past, it will be in the future. Consequently, it is plaintiffs' duty to assign competent personnel to perform these tasks. The Administrator hereby is relieved of those functions.

Plaintiffs and the Administrator are directed to submit a revised Plan that will accord with the provisions and goals of the O&J, RAAPO and the court's comments and suggestions as set forth herein, as well as an appropriate procedure for the utilization of the fund within thirty (30) days from today.

SO ORDERED.
DATED: New York, New York
April 11, 1983

U.S.D.J.

NOTES

1. The court-appointed Administrator was not a party to the negotiations.

2. Although the court has indicated its approval of several individual sections of the Plan, the court notes that its approval is in principle only and not in haec verba because, in the court's opinion, many details of the items covered in the approved sections have not been adequately addressed.

DEFENDANTS COMMENTS ON ADMINISTRATOR'S OBJECTIONS TO MAAPO

INTRODUCTION

This document sets forth the Defendants comments on the Administrator's objections to the proposed Modified Affirmative Action Program and Order.

PURPOSE AND CONCEPT OF MAAPO

In 1975, under the jurisdiction of this Court, the Sheet Metal Industry in New York City began to operate pursuant to the terms of an Affirmative Action Program which set out methods and procedures for the industry to follow in connection with all significant aspects of the Defendants operations, including among other things, recruitment and selection of apprentices and journeymen and extensive record-keeping requirements. This program was modified in January of 1977.

It is clear to all involved that the industry has fallen short of the objectives set forth in the Affirmative Action Programs, namely, the achieving of 29% minority participation in the Union. There are various reasons why this has occurred.

The significant, if not the sole manner in which additional minorities can participate is at the time that there are jobs available for them in the industry. We learned early on that taking people into an industry for which there are no work opportunities was counter-productive. Unfortunately, during the period since the start of the Affirmative Action Program, the Sheet Metal Industry in New York City as well as the construction industry in general have suffered severe down turn which resulted in massive unemployment of journeymen and apprentices. This situation did not ease until 1981. Over that period, the industry, which at one time had 3,500 journeymen working and 550 apprentices, suffered such a set back that in 1978, only 800 journeymen were working and less than 75 apprentices had jobs at that time. It is difficult, if not impossible, to significantly increase minority participation in an industry that is suffering severe

economic cutbacks as was experienced in this industry over most of the period of the Affirmative Action Program.

We also encountered other problems that were unexpected when the Affirmative Action Program was first promulgated. For example, we did not anticipate that the Journeyman Hands-On Test would substantially increase the number of whites in the Union and bearly increase the number of minorities. This was the case for all the journeyman tests given during this period. The same is true with regard to the Apprentice Test. Although this examination had been validated in accordance with EEOC guidelines, each test showed adverse impact with the result being that a higher percentage of whites were indentured than minorities. These were two of the aspects of the Affirmative Action Program that experience has shown us do not help to produce the desired objectives.

Over the years, interim variations have been attempted by the parties with the hope of achieving the desired results. For example, at the Defendants request, four classes were indentured without a test on a ratio basis. This has proven quite effective in meeting the objectives of the Affirmative Action Program. We have also utilized various recruitment approaches for gaining applicants to both the apprentice program as well as directly into journeyman status. We now have the benefit of those various approaches.

At the request of the Defendants, the parties met to see if they could come up with an Affirmative Action Program that had the best potential for meeting the objectives as set forth by this Court. The Defendants approached these discussions in an atmosphere of cooperation and realism. It serves no useful purpose to anyone to have an Affirmative Action Program that does not and cannot work. On the contrary, it serves everybody's benefit to have an Affirmative Action Program that can be implemented in a realistic and practical manner and has the best hope of achieving the objectives required. This is what the parties have accomplished with MAAPO. This is the first time that the Defendants and the Plaintiffs were able to come to agreement on such

a broad and all encompassing program. The agreement represents a constructive spirit of cooperation that can and will make this MAAPO work. We have had the benefit of over seven years of operation under an Affirmative Action Program. We have used that background and our collective understandings of the industry and the directives of the Court in putting together MAAPO. Collectively, we ask the Court to give us the opportunity to make this MAAPO work in an atmosphere of agreement and common cause. We will now address specific areas of MAAPO.

ROLE OF THE ADMINISTRATOR

All the parties concede that the Affirmative Action Program that had been in existence since 1975 did not work. Throughout this period of time, there was an active and involved Administrator in every phase of the proceedings. That Administrator now wishes to absolve himself from any of the shortcomings of both the Affirmative Action Program as written, as well as the difficulties encountered in its implementation.

It is interesting as well as distressing to read the Administrator's analysis indicating that for an extensive period of time, RAAPO was not being complied with by the Defendants. He dates their non-compliance as early as January, 1979. He does not specify, however, the manner in which he claims RAAPO was being violated. In all the years that he has been the Administrator, since the summer of 1975, never once has he used the authority vested in him to find any fault with the Defendants' compliance. It would seem that if in 1979, as the Administrator states: "It was evident that RAAPO was not being complied with.", why didn't he issue specific orders insuring compliance; why didn't he go to Court for enforcement; why didn't he bring proceedings against the Defendants, and so on.

The Administrator reports that as Administrator, the Court specifically elected to grant him broad authority and ability of independent action. The Administrator defends the concept and role of the Administrator and wishes to continue the role with broad, independent powers, and yet at the same time, complains

of Defendants and Plaintiffs alleged inaction over seven years. The Administrator cannot have it both ways. There is no question that he has been ineffective while being a tremendous financial burden to the Defendants. To date, the Administrator has collected from the Defendants the sum of $245,803.00 for his services.

If there was a lack of compliance by the Defendants, why didn't the Administrator do something about it. If the Administrator felt that RAAPO could not work as such, why didn't he make specific suggestions, other than suggestions as to interim goals.

The role of Administrator may have served a useful purpose in the initial stages of RAAPO when many new areas had to be explored and developed. Procedures had to be adopted for the implementation of various provisions of RAAPO. All this work has now been completed; all the groundwork and the foundation for the entire program has been laid over the past seven years. That role of the Administrator is no longer necessary or required. In fact, MAAPO is self-executing and there is no need for the continuing oversight of an Administrator as originally conceived. The parties still have all their rights to go to the Court, if in fact the Affirmative Action Program is not being complied with.

It is interesting that Mr. Raff now seeks to expand the Administrator's role to go beyond the reaching of the goal. He would continue his role and i.e., the Court's role, forever. He specifically states that even when the goal is reached, he would have "serious problems" about eliminating the arbitrator and monitor at that time. The Administrator must realize that in this type of litigation, he is not a Federal District Judge with lifetime tenure, which is what he appears to be seeking to do.

Finally, it should be noted that the Court originally permitted the parties the opportunity, for ninety (90) days, to draft an Affirmative Action Program without an Administrator. When this appeared to be unsuccessful, it was the Defendants who came forth and advised the Court accordingly. Now the parties have prepared a MAAPO without an Administrator, and it is respectfully urged that it be approved by the Court.

A. *USE OF AN APPRENTICE TEST*

Much to the Defendant's surprise, the Administrator now proposes the continued use of an entrance exam as the screening mechanism for entrance into the Apprentice Program. He seems to think, without any supporting evidence, that if in fact there was a different kind of recruitment, or some sort of pre-test orientation, that that would overcome the history of adverse impact of these tests. He is incorrect when he states that the test that showed adverse impact did not have any tutorial or pre-screening approach. The most recent outreach program for the June, 1982 apprentice test had a significant and well organized pre-test orientation and tutoring for the minorities. It did not help the results.

To overcome the problem of the adverse impact of the test, and based upon the actual experience of four classes that were selected by another method, MAAPO contains a defined and standardized screening mechanism, without a test. It will give a preference for entrance to those people who have prior experience or vocational training. When the Administrator hypothetically poses, why couldn't a person who has completed a sheet metal program in a vocational high school, enter as an apprentice without a test, the answer is, that is precisely what MAAPO provides for. When the Administrator speculates that an individual need not go through that process of a test if his educational work experience indicates competency above entry level, that is exactly what MAAPO provides. MAAPO sets forth a fair and equitable method of meeting the objectives of an Affirmative Action Program.

B. *THE RATIO QUESTION*

The Administrator has now reversed his position and suggests that a fixed ratio be utilized in MAAPO for assigning of apprentices to employers. It is difficult to comprehend what has transpired to change his fixed position over the years, other then the reading of a Department of Labor document that was first prepared in *1947*, and enclosed in the *1955* edition of a booklet entitled, "National Apprenticeship & Training Standards." In addition, the Administrator cites a few collective bargaining

agreements that mention a ratio. What the Administrator does not appear to understand is that ratios in collective bargaining agreements do not represent a mandatory approach, but rather are bargained for by unions in order to insure that employers do not demand more apprentices ("cheap labor") than that ratio would permit. In point of fact, in all the locals cited, none of them have the stated ratio in practice. So actually nothing really has changed since the Administrator conducted relevant hearings in 1976 and determined that a ratio was inappropriate. Those same reasons still exist.

There are many contractors in signed agreement with Local 28 that are not in the position to train apprentices because of the nature of the work they do. For example, there are many small roofing contractors who use sheet metal workers for miscellaneous sheet metal work incidental to the installing of roofs; there are a number of testing and balancing contractors who are basically engineers who test and balance air conditioning systems after they are installed; there are a number of specialty contractors who manufacture particular products which do not lend themselves to proper apprentice training; there are a number of acoustic ceiling contractors who only use sheet metal workers when installing metal pan ceilings and accordingly, do not lend themselves to the training of apprentices. In point of fact, there are more of these types of contractors than those that do employ apprentices.

A second factor has been the problem of directing employers to employ more people than they need. It has been held by the Court that unless the employer is seeking to circumvent the Court's order, it can for business and economic reasons, choose not to hire a particular employee at a particular time and further, it cannot be directed to lay off white employees and replace them with minority employees. Given all this, the use of ratios becomes an arbitrary, artificial, cumbersome and futile approach that serves no purpose. The MAAPO sets forth a very positive and direct approach to maximizing job opportunities.

C. *TRAINEES*

The Administrator totally misreads MAAPO in regard to Executive Order 50 and a trainee program. MAAPO provides an effective solution to this situation through two approaches. The employer can participate in a training program with an agency or group who has received the approval of the Bureau of Labor Services (permitted by Executive Order 50) or the industry as a whole may set up its own training program, with more stringent requirements. It would, in effect, not be outside of the apprentice program but would be equivalent to and integrated into the apprentice program. There was never any intent to have a "Separate but equal approach to trainees." It was always the position of all parties that all trainees, once taken into the program, would become integrated into the apprentice program. The Administrator knows this; this is the very procedure that has been applied to the advanced apprentices and CETA people. There have never been any problems. Accordingly, the relevant provisions of MAAPO are the best approach for achieving compliance with the Mayoral Executive Order.

The Administrator raises additional questions concerning whether or not it applies to non-city contractors. Obviously, Executive Order 50 applies only to those contractors who are doing work covered by Executive Order 50. There was never any need or intent to go beyond that point.

D. *PUBLICITY PROGRAM*

We do not understand why the Administrator declares that the publicity of MAAPO is a retreat, and is in effect no program at all. First, MAAPO requires a direct outreach to the vocational and technical schools seeking applicants. Second, MAAPO mandates a mailing to various community organizations that are involved in recruiting people for entry of minorities into the construction trades, and in addition, there is advertising in the minority community and on the minority radio stations so as to advise the non-white community about sheet metal and methods of entry.

E. APPRENTICE TO JOURNEYMAN PROGRESS

The Administrator expresses a concern that we are only taking in numbers, and there is no guarantee of any follow through in the program. He is wrong again. Anyone who completes the four year program is automatically admitted into journeyman status in Local 28. There is no entrance test or any other qualifications aside from initiation fees which have been addressed in other sections of MAAPO. Secondly, in 1981, and in early 1982, four classes were indentured without an apprentice test, using criteria similar to what is being proposed in MAAPO. In those four classes, 192 were indentured (105 white, 87 minority) and 175 are still in the program. Of the 175, 96 are white and 79 are non-white. This has maintained the exact ratio of 55 - 45 of those who were originally indentured. Those who remain in the program appear to be doing as well as those who came into the program through the test in previous years. Further, the proposed MAAPO calls for the replacement of those who drop out during the first year so as to maintain the racial composition of that class. Our experience is that most of the apprentices who do drop out, do so during their first term and MAAPO provides an effective mechanism to deal with this occurrence.

F. RECORD KEEPING

The Administrator's proposal and comments regarding the record keeping is somewhat baffling. It appears that the Administrator likes technology and wishes to take and make this into a major statistical and computor based system. It is really not necessary. Even a cursory reading of MAAPO demonstrates that all record keeping that is reasonably required to properly monitor and oversee the program is provided for in a timely and effective fashion. The Administrator has not cited any particular record keeping that has not been included in MAAPO and talks in very vague, generalized terms about exploding record keeping. This is sheer nonsense and he is making out a lot more than really exists in this situation.

G. USE OF THE FUND

The parties attempted to set down programs in accordance with the Court's direction regarding the use of the Fund. We think we have done that. We have provided for a simple mechanism to put in additional programs that would be in conformance with the objectives of the Fund. Some of Mr. Raff's suggestions are worthy and could readily be incorporated into the existing programs. That is why MAAPO with its flexibility in this regard, is the most progressive approach.

H. THE ARBITRATOR

Based upon a track record of seven lean years of achievement, it is evident that an administrator is unnecessary and undesirable. MAAPO substitutes an arbitrator for dispute resolutions regarding MAAPO, raised by the parties or interested persons, with appeal to the Court. This provision covers all disputes concerning the operation of MAAPO, its interpretation, and any claimed violations. The Administrator's apparent pejorative references to labor arbitrators is misguided and misplaced. The arbitrator will be bound by the provisions of MAAPO and the orders of the Court, and he will draw the essence of his authority and power from MAAPO and the Court. It is proposed that the designation of the arbitrator be reserved for the Court. However, the Defendants respectfully suggest that the Court consider for such appointment such eminently qualified and publicly respected persons as Judge Marvin Frankel, Judge Harold Tyler, and Honorable Basil Paterson.

CONCLUSION

It is hereby respectfully requested that the Court approve the Modified Affirmative Action Program and Order as submitted.

Dated: Brooklyn, New York
February 7, 1983

RESPECTFULLY SUBMITTED,

WILLIAM ROTHBERG, ESQ.
Attorney for the Employers
Association and Co-Counsel to the JAC

EDMUND DELIA, ESQ.
Attorney for Local 28 and
Co-Counsel to the JAC

SOL BOGEN, ESQ.
Of Counsel

The Decision of the District Court for the Southern District of New York Entered August 19, 1982 Holding Petitioners in Contempt is reprinted at A-149 of the Appendix to the Petition for Certiorari

Plaintiffs' Motion For Contempt Dated April 16, 1982.

United States District Court
Southern District of New York

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, and THE CITY OF NEW YORK,

Plaintiffs,

— against —

LOCAL 638 ...
LOCAL 28 of the SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 28 JOINT APPRENTICESHIP ... SHEET METAL AND AIR-CONDITIONING CONTRACTORS' ASSOCIATION OF NEW YORK CITY, INC., etc.,

Defendants.

LOCAL 28,

Third-Party Plaintiff,

— against —

NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Third-Party Defendant.

LOCAL 28 JOINT APPRENTICESHIP COMMITTEE,

Fourth-Party Plaintiff,

— against —

NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Fourth-Party Defendant.

THE CITY OF NEW YORK, and NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Plaintiffs,

— against —

ABBOTT-SOMMER, INC., A.A.B. CO. SHEET METAL CO., ACOUSTECHS SHEET METAL CORP., AIR DAMPER MFG. CORP., AIRITE VENTILATING CO. INC., ALLEN SHEET METAL WORKS, INC., ALLIED SHEET METAL WORKS INC., ALPINE SHEET METAL & VENTILATION, CO., INC., ARCHER SHEET METAL INC., ARROW LOUVER & DAMPER CORP., BAYCHESTER ROOFING & SHEET METAL, INC., BRUMAR INC., BUNKER INDUSTRIES, INC., CENTER SHEET METAL, COASTAL SHEET METAL CORP., COLONIAL ROOFING CO., INC., COLUMBIA VENTILATING COMPANY, INC., CONTRACTORS SHEET METAL, INC., CRAFT SHEET METAL WORKS, INC., DELTA SHEET METAL CORP., DORITE SHEET METAL, ESSEX METAL WORKS, INC., FASANO SHEET METAL CO., INC., J.J. FLANNERY, INC., GENERAL FIREPROOF DOOR CORP., GENERAL SHEET METAL WORKS, INC., GENTLEMAN SHEET METAL LIMITED, GLOBAL SERVICES & INSTALLATION, INC., HARRINGTON ASSOCIATES, INC., HOWARD MARTIN CO., INC., IMPERIAL DAMPER & LOUVER CO., INDUSTRIAL METAL FABRICATORS, DARO SHEET METAL CORP., KAY ROOFING COMPANY, INC., KENMAR SHEET METAL CORP., K.G. SHEET METAL, INC., L.P. KENT CORP., MODERN KITCHEN EQUIPMENT CORP., A. MUNDER & SON, INC., NATIONAL ROOFING CORP., NATIONWIDE ACOUSTIC FOIL NOISE CONTROL PRODUCTS, NEW YORK SHEET METAL WORKS, INC., W.H. PEEPELS COMPANY, INC., PENTA SHEET METAL CORP., PERFECT CORNICE & ROOFING CO., INC., PHOENIX SHEET METAL CORP., DANIEL J. RICE, INC., HUGH RICHARDS ASSOCIATES, INC., ROMAR

SHEET METAL, INC., JOHN SCHNEIDER ROOFING CONTRACTORS, INC., SHAPIRO EQUIPMENT CO., INC., SIMPSON METAL INDUSTRIES, INC., SOBEL & KRAUS, INC., SPRINGFIELD SHEET METAL WORKS, INC., STEELTOWN SHEET METAL & IRON WORKS, INC., SUMAR SHEET METAL, INC., A. SUNA & COMPANY, INC., LOUVER LITE CORP., ASCO ROOFING CORP., SUPREME FIREPROOF DOOR CO., INC., SWIFT SHEET METAL CO., INC., SWIFT SHEET METAL CORP., TEMPCO COMPANY INC., HERMAN THALMAN CO., TRIANGLE SHEET METAL INC., TROPICAL VENTILATING CO., INC., TUTTLE ROOFING COMPANY, INC., UNIVERSAL SHEET METAL CORP., UNIVERSAL ENCLOSURES, WOLKOWBRAKER ROOFING CORP., AIR-BALANCING & TESTING CO., AIR CONDITIONING & BALANCING CO., INC., ALL TYPES STACKS & CHUTES, AMSCO SYSTEMS (AMERICAN STERILIZER), ARCHITECTURAL ACOUSTICS, ASSOCIATED TESTING & BALANCING INC., BAL TEST CORP. CHIMNEY & CHUTES CO., CIRCLE ACOUSTICS CORP. COLLYER ASSOCIATES, INC., EASTERN ACOUSTIC CORP., EFFICIENT TOWERS INC., ENSLEIN BLDG. SPECIALTIES, INC., ESS & VEE ACOUSTICAL CONTRACTORS, INC., FISHER SKYLIGHTS INC., INTERNATIONAL TESTING & BALANCING CORP. JACOBSON & COMPANY, INC., JERMIAH BURNS INTERIOR SYSTEMS, INC., JOHNSON CONTROLS, MECHANICAL BALANCING CORP. JOHN MELEN, INC., MORSE BOULGER, INC., R.H. McDERMOTT CORP., NAB TERN CONSTRUCTION, NATIONAL ACOUSTICS, QUALITY ERECTORS, WILLIAM J. SCULLY ACOUSTIC CORP., SUPERIOR ACOUSTICS, SYSTEMS TESTING & BALANCING, INC., U.S. CHUTES, WETZEL CONTRACTING CORP., WILLOPEE ENTERPRISES, WOLFF & MUNIER INC., APEX CHUTES & MANUFACTURING, INC., MODERN SHEET METAL WORKS INC., CALMAC-MANUFACTURING CO., COOLENHEAT, DE SAUSSURE EQUIPMENT CO., INDUSTRIAL

ACOUSTICS CO., INC., INDUSTRIAL IRON & STEEL, INSUL-COUSTIC/BERMA CORP., JERSEY STEEL DRUM MFG. CORP., KENCO PRODUCTS CORP. MARATHON INDUSTRIES INC., PHOENIX STEEL CONTAINER CORP., RICH MANUFACTURING CORP., STERNVENT.,

Respondents.

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71 Civ. 2877

(HFW)

PLEASE TAKE NOTICE, that upon the annexed affidavits of Charles R. Foy and Sheila Abdus-Salaam, sworn to the 16 day of April, 1982 respectively, the City of New York and the New York State Division of Human Rights will move this Court at the Courthouse at Foley Square, New York, New York on June 10, 1982 at 10:00 a.m. or as soon thereafter as counsel may be heard for an order citing defendants and respondents for civil contempt and granting the following relief:

1) require defendants to pay compensatory fines in the amount of $182,500 ($100 dollars a day from July 1, 1977 through June 30, 1982);

2) require defendants to pay coercive fines in such amounts as this Court deems appropriate to ensure prompt compliance with this Court's orders;

3) establish a central job reporting system which would require, *inter alia*, the respondent contractors to notify Local 28 of each Local 28 member hired, and to state for each such hire: name, address, phone number, race, contractor's name, and length of job for which hired; and which would require the union to report quarterly to plaintiffs and the Court on all such new hires;

4) require the defendants to conduct an effective publicity and outreach campaign;

5) enjoin enforcement of the age requirement in the present collective bargaining agreement because of its discriminatory impact on non-whites;*

6) increase the non-white union membership goal to reflect the increased non-white minority labor pool;

7) award the City and State their attorneys fees and costs; and

8) award such other and further relief as will ensure prompt compliance with this Court's orders and equal employment opportunities for non-whites in the sheet metal trade and industry.

*For purposes of this case the term "non-whites" is used to refer to Black and Spanish surnamed individuals. 401 F. Supp. at 470, n. 1.

Dated: New York, New York
April 16, 1982

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the State
of New York
Attorney for the State
Division of Human Rights
Two World Trade Center
Suite 46-57
New York, N.Y. 10047
Tel. (212) 488-7510

DEBORAH BACHRACH
Bureau Chief, Civil Rights Bureau
Assistant Attorney General

SHEILA ABDUS-SALAAM
Assistant Attorney General
of Counsel

FREDERICK A. O.
SCHWARZ, Jr.
Corporation Counsel
Attorney for the City of New
York
100 Church Street
Room 6-C-14
New York, N.Y. 10007
Tel. (212) 566-2309/2191

JUDITH A. LEVITT
CHARLES R. FOY
MERYL R. KAYNARD
Assistant Corporation Counsels
of Counsel

The Affidavit of Charles R. Foy in Support of
Motion for Contempt is reprinted
at A-447 of the Appendix to the
Petition for Certiorari

The Affidavit of Sheila Abdus-Salaam
in Support of Motion for Contempt
is reprinted at A-468 of the Appendix
to the Petition for Certiorari

PLAINTIFFS' EXHIBIT 51 IN CONTEMPT I PROCEEDING —AGE DISTRIBUTION OF LOCAL 28 MEMBERS, WHITES AND NON-WHITES, AS OF DECEMBER 31, 1980

DISTRIBUTION OF SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL 28 MEMBERS BY RACE AND AGE: 1980

	All Members	*Non-white*	*White*
<20	17	0	17
20 – 24	94	21	73
25 – 29	125	39	86
30 – 34	276	44	232
35 – 39	264	28	236
40 – 44	278	10	268
45 – 49	239	1	238
50 – 54	189	7	182
55 – 59	138	1	137
60 – 64	89	1	88
65 +	11	0	11
TOTAL	1720	152	1568

SOURCES: 1981 Pension Fund Annual Report, Table 6, Page 12
Membership Files and Ledgers
Pension Fund Files
"Green Cards"
JAC Apprenticeship Records

Proportion of Whites 50 Years of Age and Over: 0.251
Proportion of Non-whites 50 Yrs. of Age and Over: 0.059

Number of Standard Deviations between These Proportions: 5.65
Probability: Less than 1 in 10,000
Conclusion: The proportion of whites 50 years of age and over is significantly greater than the proportion of non-whites 50 years of age and over.

PLAINTIFFS' EXHIBIT 52 IN CONTEMPT I PROCEEDING—AGE DISTRIBUTION OF ALL METAL CRAFTSMEN IN NEW YORK CITY

DISTRIBUTION OF METAL CRAFTSMEN EXCEPT MECHANICS[1] BY AGE AND RACE NEW YORK SMSA:[2] 1970

Age	*All Workers*	*Non-white*	*White*
16 – 17	73	0	73
18 – 19	394	56	338
20 – 24	1,992	328	1,664
25 – 29	2,914	709	2,205
30 – 34	2,709	653	2,056
35 – 44	6,238	1,128	5,110
45 – 54	7,933	712	7,221
55 – 59	2,954	222	2,732
60 – 64	2,370	82	2,288
65 +	1,122	69	1,053
TOTAL	28,699	3,959	24,740

SOURCE: United States Census of Population, Volume 34D, Table 174.

Proportion of Whites 50 Years of Age and Over: .3914
Proportion of Non-whites 50 Years of Age and Over: .1841

Number of Standard Deviations between these proportions: 25.1841
Probability: Less than 1 in 10,000

Conclusion: The proportion of whites 50 Years of Age and Over is significantly greater than the proportion of Non-whites 50 Years of Age and Over.

[1] Data limitations required us to derive this category of Non-whites by adding the category labelled "Machinists" to the category labelled "Metal Craftsmen, except Mechanics and Machinists."

[2] "SMSA" denotes Standard Metropolitan Statistical Area. The New York SMSA includes New York City, Rockland and Westchester Counties (New York), and Bergen County (New Jersey).

Census Report on or about April 12, 1982 from Wilton to Raff

PLAINTIFFS' EXHIBIT 45 IN CONTEMPT I PROCEEDING — LETTER FROM WILTON TO RAFF

Sheet Metal Workers' International Association
Local Union No. 28 AFL-CIO
1790 BROADWAY • NEW YORK, N.Y. 10019 • (212) 541-62

David Raff, Esq.
49-51 Chambers Street
Room 220
New York, New York 10007

Re: E.E.O.C. and City of New York
vs.
Local 28, et. al.

Dear Mr. Raff:

In accordance with the provisions of Paragraph 34(b) of RAAPO the following data, as of April 12, 1982, is submitted concerning Local Union 28 (New York City).

		White	*Non-White*	*% of Non-White*
Journeyman	* 1,975	1,853	122	6%
Apprentices	** 291	169	122	42%
TOTAL	2,266	2,022	244	11%

*Includes 5 white and 3 non-white journeymen in Pike Industries—NLRB certification.
**Includes 5 non-white and 2 white apprentices from Pike Industries and 12 CETA people.

Very truly yours,

Daniel Wilton
Financial Secretary-Treasurer

DW: pf
cc: Charles Foy, Esq.
✓ Sheila Abdus-Salaam, Esq.
Sandy Hom, Esq.
William Rothberg, Esq.

JA-51

E 493

PLAINTIFFS' EXHIBIT 46 IN CONTEMPT I PROCEEDING–CONTRACT FOR ON-THE-JOB TRAINING/APPRENTICE TRAINING

STATE OF NEW YORK
DEPARTMENT OF LABOR
CONTRACT FOR ON-THE-JOB TRAINING/ APPRENTICE TRAINING

JOB SERVICE DIVISION

JOB SERVICE

RECEIVED
FEB 1 ? 19??
APPRENTICE TRAINING
REGIONAL OFFICE

CENTRAL OFFICE USE ONLY	
P No.	
$	
AT Sponsor No.	10485
ATP Code	15-201
Effective Date of AT	1-1-82

☒ Apprenticeship
☐ CETA _____ ☐ WIN _____ ☐ SMTA _____ ☐ OTHER _____

Name of Employer/Sponsor SHEET METAL WORKERS' L. U. #28

Address 34-14 64th ST., (Number & Street) WOODSIDE, (City) NY (State) 11377 (Zip Code) Queens (County)

3a. Phone 212/476-2571 (Area Code) 3b. SIC Code ☐☐☐☐ 3c. D.O.T. Code (AT Only) ☐☐☐ ☐☐☐-☐☐☐

4. Occupation or Trade (AT Only) SHEET METAL WORKER 5. Length of AT Program 4 8 (months)

6. No. of Employees _____ /No. Trainees (OJT Only) _____ /No. Journeymen (AT Only) _____ /No. Apprentices (AT Only) _____ 7. AT Ratio: (AT Only) _____

8. Minimum Journeymen Rate (AT Only) $ 14.56 per hr 9. Effective Date of Wages (AT Only) 01/01/81 10. Probationary Period (AT Only) _____ (months)

11. PROGRESSION OF WAGES FOR EACH PERIOD : (AT Only) of 6 months/1000 hours.

1ST	2ND	3RD	4TH	5TH	6TH	7TH	8TH				
40%	48%	50%	55%	60%	65%	70%	80%				

12a. Date OJT Contract Commenced _____ 12b. Date OJT Contract Terminates _____

13. (If an On-The-Job Training Contract) the contractor shall provide the training described herein and in strict accordance with the following attached documents which are part of this contract:

Part I, On-The-Job-Training Program Data consisting of _____ pages.

Part II, General Provisions consisting of _____ pages.

Part III, _____ consisting of _____ pages.

14. Contract payments will be made to the Contractor in accordance with the provisions in the attachments hereto upon the receipt of a properly prepared voucher and upon audit by the State Comptroller.

15. ☐ Check here if any training under this contract is to be carried out by subcontractors. The requirements and provisions of this contract must be included in any subcontract pursuant to this prime contract and it shall be the duty and obligation of the prime contractor to assure that the conditions enumerated herein are being complied with by all subcontractors to whom this prime contract pertains.

16. If Apprentice Training, the Employer/Sponsor agrees to comply with the provisions on the attached form JT-400.

17. _____ (Signature of Employer/Sponsor) 18. _____ (Signature of Union Representative)

ROBERT SCHLUTER, COORDINATOR (Print Name & Title) _____ (Print Name & Title)

_____ FEB 20 1981
19. Signature—New York State Department of Labor

ATTORNEY GENERAL'S APPROVAL COMPTROLLER'S APPROVAL

PLAINTIFF'S EXHIBIT 8 IN CONTEMPT I PROCEEDING

Sheet Metal Workers' International Association
Local Union No. 28 AFL-CIO
1790 BROADWAY • NEW YORK, N.Y. 10019 • (212) 541-6200

May 7, 1981

David Raff, Esq.
49-51 Chambers Street
Room 220
New York, N.Y. 10007

Re: REOC and City of New York
V.
Local 638 ... Local 28, etc.
71 Civ. 2877 (HFW)

Dear Mr. Raff:

In accordance with the provisions of Paragraph 34 (b) of the revised AAP & O herein below in the census of Local 28's membership as of May 7, 1981.

		White	Non-White	% of Non-White
Journeymen	1922	1825	97	5%
Apprentices	199	132	67	33%
Total	2121	1957	164	7.7%

Very truly yours,

Daniel Wilton
Financial Secretary-Treasurer

DW:ibp
opeiu/153
cc: Ricardo Montano, Esq.
Ellen Fishman, Esq.
Arnold D. Dleischer, Esq.
William Rothberg, Esq.

EXCERPTS FROM LOCAL 28 AND JAC'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR A CONTEMPT ORDER AND IN SUPPORT OF DEFENDANT'S

purposes of this memorandum, the active members as defined above, will be called Group I members. Those actually working will be called Group II employees. The identity of Group II members might vary from day-to-day, or month-to-month, but it is certain that all "active" members were not working each work day of the year. This can be seen by reviewing the total number of hours worked per year, as established by Exhibit K.

Year	Total Number of Covered Hours Worked By All Active Members During This Year	Average hours Per Member	Average weeks of Employment for each active employee-35-hour work week
1975	2,671,400	1066	30.45 weeks
1976	1,988,200	1017	29.06 weeks
1977	1,819,300	1118	31.94 weeks
1978	1,950,800	1245	35.57 weeks
1979	2,263,500	1466	41.86 weeks
1980	2,815,100	1666	47.6 weeks

Records have been maintained by defendants indicating precisely how many persons had worked in any particular month. These are the "Manpower Control Reports," Exhibit L. These records indicate as follows:

Year	Active Members "Group I"	The number of active members who had actually been working during the average month during this year. Group II members	Average Number of Unemployed "Active" Members	% of "Active" Members Unemployed
1975	2506	1694	812	32.4%
1976	1955	1193	762	38.9%
1977	1672	1081	591	35.3%
1978	1567	1050	517	30.3%
1979	1544	1053	491	31.2%
1980	1720	1303	417	24.2%

PART II

PART II

A Review of Activities Toward Achievement of the Quotas During The Term of the Judgments

The Court found that since the 1960's there had been four methods of entry into Local 28: 1) the apprentice program; 2) written and practical examination; 3) transfer from a sister local; 4) employment with a newly organized contractor who certified as to the ability of the person to work in accordance with journeyman standards. 401 F. Supp. 467, 474, opinion of July 18, 1975. The Court-ordered remedial provision related to all these methods of entry and created new ones to facilitate the entry of nonwhites into Local 28 and its JAC. The additional means of entry were by experience and an interview and by having defendants offer membership opportunity to members of Local 400.

1. *Entry through the apprenticeship program.*

During the course of their operations under the Court's judgments defendants Local 28 and the JAC have indentured apprentices at the following times and in the following numbers:

	Class	Non-White	White	Total
1	January 1976	27	26	53
2	July 1976	-none-	-none-	-
3	January 1977	4	6	10
4	July 1977	13	12	25
5	January 1978	6	15	21
6	July 1978	13	15	28
7	January 1979	6	7	13
8	July 1979	9	8	17
9	January 1980	7	29	36

	Class		Non-White	White	Total
10	July	1980	14	27	41
11	January	1981	15	20	35
12	April	1981	16	20	36
13	July	1981	32	40	72
14	January	1982	24	26	50
			186	251	437

In addition, 12 persons, all nonwhites, commenced training under the CETA program in April, 1982, and a total of 7 apprentices were added through the organization by defendants of Pike Industries in 1982. Of these seven persons, 5 were nonwhite and 2 were white.

The first apprenticeship class indentured under the Court's judgment was the class of January, 1976. That class was too large and, as a result, there were insufficient employment opportunities for all the apprentices taken in. The impact of a large apprenticeship class at this particular time can be seen from the chart below:

Year	Avg. No. of Apprentices	Average No. Unempl.	Avg. Hrs. Per Wk.	Avg. Weeks Worked	Comments
1965	230	5%	35	[illegible]	-
1966	165	5%	35	46	-
1967	110	5%	35	46	-
1968	180	5%	35	46	-
1969	360	3%	35	41	5 wk. strike
1970	500	3%	35	46	-
1971	540	3%	35	46	-
1972	575	6%	35	36	8 wk. strike
1973	450	7%	35	46	
1974	340	20%	32.5	32.5	35 hr. wk. for 6 mos.; 30 hr. wk. for 6 mos.
1975	269	40%	30	44	2 wk. strike

See Exhibit M

DEFENDANT'S EXHIBIT C IN CONTEMPT I PROCEEDING — 1970 CENSUS REPORT FOR THE NYSMSA

OCCUPATION	TOTAL	WHITE	BLACK	OTHER	HISPANIC
D. *Clerical and Kindred workers*	1149906	966992	170981	11933	45681
	100.0	84.1	14.9	1.0	4.0
Bookkeepers	120627	109553	9674	1400	2721
	100.0	90.8	8.0	1.2	2.3
Secretaries and Stenographics	327042	293678	30622	2742	9707
	100.0	89.8	9.4	0.8	3.0
Other Clerical workers	702237	563761	130685	7791	33253
	100.0	80.3	18.6	1.1	4.7
E. *Craft and Kindred workers*	506835	444[illegible]	59229	3322	25578
	100.0	87.[illegible]	11.7	0.7	5.0
Auto Mechanics and Body Repairers	39409	31412	7721	276	2596
	100.0	79.7	19.6	0.7	6.6
Other Mechanics and Repairers	70686	62707	7435	544	3657
	100.0	88.7	10.5	0.8	5.2

DEFENDANT'S EXHIBIT C IN CONTEMPT I PROCEEDING

Machinists	11823	10469	1301	53	680
	100.0	88.5	11.0	0.4	5.8
Metal workers except above	17816	16323	1427	66	797
	100.0	91.6	8.0	0.4	4.5
Carpenters	31503	28564	2820	119	939
	100.0	90.7	9.0	0.4	3.0
Other Construction workers	84233	75510	8368	355	3114
	100.0	89.6	9.9	0.4	3.7
Other Craft and Kindred workers	251365	219299	30157	1909	13795
	100.0	87.2	12.0	0.8	5.5
F. *Operatives except transport*	455439	356441	87047	11951	60883
	100.0	78.3	19.1	2.6	13.4
Durable Goods Manufacturing	118418	92197	24905	1316	17878
	100.0	77.9	21.0	1.1	15.1

Nondurable Goods Manufacturing	212945 100.0	171102 80.4	34910 16.4	6933 3.3	32669 15.3
Non-Manufacturing Industries	124076 100.0	93142 75.1	27232 21.9	3702 3.0	10336 8.3
G. *Transport Equipment Operatives*	169628 100.0	128306 75.6	40324 23.8	998 0.6	11663 6.9
Truck Drivers	48979 100.0	36693 74.9	12112 24.7	174 0.4	3055 6.2
Other Transport Equipment Operatives	120649 100.0	91613 75.9	28212 23.4	824 0.7	8608 7.1

Attachment C

DEFENDANT'S EXHIBIT C IN CONTEMPT I PROCEEDING

The data in this report is from the 1970 Census of Population. The tape was produced by the United States Department of Commerce, Bureau of the Census. Questions relating to occupation, employment status, and industry were asked on questionnaires which sampled both 15% and 5% of the population for a total of 20% of the population. What is known as the Fourth Count of the Census is a tabulation of the responses to this 20% sample. Subsequently, other tabulations were made of the 15% sample. In either case, the statistical confidence is high because of the large random sample questioned. For the characteristics described, all sex and racial detail tabulated has been reproduced.

Table 1 of the following report is from the Second Count of the 1970 Census of Population, 100% questionnaire. All other tables in the report are from the Fourth Count sample tabulations. Minority detail shown for each occupational category includes, for the total employed population, data for the Total, White, Black, Other, and Hispanic populations. Similarly for females, Total, White, Black, Other, and Hispanic data is included. Because this data is available for relatively small pieces of geography (census tracts, for example, contain only about 4,000 people), the Bureau of the Census released this racial detail for only 42 job titles for the total population and 27 job titles for females. (For purposes of this report, the job title 'Nurses' has been consolidated into the 'Medical & other health workers' category.) A separate table of statistics for the male/female compatible categories is also included. All tables within this report are numbered and carefully titled in a manner which explains their content. Please note the universe used for each table, specified in its corresponding title.

The data in this report is available for any arbitrary piece of geography equivalent to or larger than a census tract, as well as for standard geographical units, such as Standard Metropolitan Statistical Areas (SMSA's), counties, cities with a population of 50,000 or more, entire states, and the U.S. as a whole.

This report was prepared by National Planning Data Corporation, a Summary Tape Processing Center, recognized by the Bureau of the Census.

DEFENDANTS' EXHIBIT K IN CONTEMPT I PROCEEDING — INFORMATION SHEET LOCAL 28

STATISTICS RE: EMPLOYMENT

INFORMATION SHEET

Pension credit year ended December 31	*Number of active employees during year*	*Average age*	*Average years of pension credit*
1975	2,506	39½	15
1976	1,955	40	16
1977	1,672	41	17
1978	1,567	41½	17½
1979	1,544	42	18½
1980	1,720	42	18

	Pension Credit year ended December 31	
	1979	*1978*
Active employees included in valuation:		
Total number	1,544	1,567
Number eligible to retire on:		
regular pension	44	20
early retirement pension	159	168
Number with vested right to deferred pension who are not eligible for immediate benefits	986	924
Inactive vested employees	560	535

DEFENDANTS' EXHIBIT K IN CONTEMPT I PROCEEDING

The following table compares the assets with the value of total vested benefits:

Comparison of Vested Benefits and Assets[1]

1. Present value of benefits to active employees eligible for immediate or deferred benefits		
Regular retirement	$ 1,912,600	
Early retirement	5,545,100	
Vested deferred retirement	10,747,800	
Total		$18,205,500
2. Present value of benefits to inactive employees eligible for immediate or deferred benefits		6,923,900
3. Present value of benefits to pensioners and beneficiaries		29,136,000
4. Present value of all vested benefits: (1) + (2) + (3)		54,265,400
5. Assets at adjusted cost value		17,464,500
6. Percent of value of vested benefits funded: (5) ÷ (4)		32%

[1] Based on Plan provisions and actuarial assumptions used to determine the minimum contribution requirements.

Last year-end, the assets also represented 32% of the vested benefit liability.

DEFENDANTS' EXHIBIT K IN CONTEMPT I PROCEEDING

Progress of Pension Rolls Through June 30, 1980

Year ended June 30:	*Awards*	*Deaths*	*Suspensions*	*Reinstatements*	*In force at end of year*	
					Number	*Monthly amount*
Cumulative through June 30, 1980	1,773	842	164	158	925	$304,169
Cumulative through						
1971	964	447	142	128	503	121,683
1972	51	37	12	12	517	141,497
1973	118	28	4	12	615	190,186
1974	119	43	—	3	694	224,967
1975	119	49	—	1	765	251,343
1976	106	45	—	1	827	273,918
1977	137[1]	43	—	—	921[1]	303,502
1978	59	54	1	—	925	304,856
1979	63	48	2	1	939	311,736
1980	37	48	3	—	925	304,169

[1] Includes two pensioners who were not reported in year ended 1977.

DEFENDANTS' EXHIBIT K
IN CONTEMPT I PROCEEDING

Fiscal year ended June 30:	*Hours of Covered Employment*	
	Total	*Average per active employee*
1976	2,671,400	1,066
1977	1,988,200	1,017
1978	1,869,300	1,118
1979	1,950,900	1,245
1980	2,263,500	1,466
1981	2,865,100	1,666

DEFENDANTS' EXHIBIT L
IN CONTEMPT I PROCEEDING —
MANPOWER CONTROL MONTH END SUMMARY

STATISTICS RE: EMPLOYMENT

MANPOWER CONTROL REPORT

MONTH END SUMMARIES

	Total	*Assoc.*	*Ind.*	*O/T*
Aug. 27, 1974	1,845			
Sept. 24, 1974	1,830			
Oct. 29, 1974	1,941			
Nov. 26, 1974	1,981			
Dec. 31, 1974	1,845			
Jan. 28, 1975	1,715			
Feb. 25, 1975	1,752			
March 25, 1975	1,761			
April 29, 1975	1,970			
May 27, 1975	1,801			
June 24, 1975	1,835			
July 25, 1975	1,708			
Aug. 29, 1975	1,725			
Sept. 26, 1975	1,571			
Oct. 31, 1975	1,575			
Nov. 28, 1975	1,522			
Dec. 26, 1975	1,390			
Jan. 30, 1976	1,356			
Feb. 27, 1976	1,328	857	425	46
March 26, 1976	1,279	790	451	38
April 30, 1976	1,147	739	383	25
May 31, 1976	1,149	707	414	28
June 25, 1976	1,187	732	430	25
July 30, 1976	1,181	732	425	24
August 27, 1976	1,210	775	399	36
September 24, 1976	1,184	629	511	44
October 29, 1976	1,160	621	505	34
November 26, 1976	1,081	568	475	38
December 31, 1976	1,056	565	461	30
January 28, 1977	1,051	549	470	32

	Total	*Assoc.*	*Ind.*	*O/T*
February 25, 1977	1,050	531	484	35
March 25, 1977	1,114	582	505	27
April 29, 1977	1,062	565	473	24
May 27, 1977	1,085	563	497	25
June 24, 1977	1,067	571	485	11
July 29, 1977	1,142	606	497	39
August 26, 1977	1,107	611	459	37
September 30, 1977	1,086	596	439	51
October 28, 1977	1,123	632	438	53
Novemer 25, 1977	1,095	589	451	55
December 30, 1977	984	505	425	54
January 27, 1978	1,040	526	473	41
February 24, 1978	1,062	548	474	40
March 31, 1978	1,042	568	439	35
April 28, 1978	937	489	422	26
May 26, 1978	1,000	497	480	23
June 30, 1978	1,034	475	534	25
July 28, 1978	1,077	486	563	28
August 25, 1978	1,084	463	592	29
September 29, 1978	1,098	450	622	26
October 27, 1978	1,129	468	636	25
November 24, 1978	1,099	496	580	23
December 29, 1978	992	478	489	25
January 26, 1979	1,002	486	500	16
February 23, 1979	974	459	498	17
March 30, 1979	991	447	517	27

DEFENDANTS' EXHIBIT L
IN CONTEMPT I PROCEEDING

SUMMARY OF HOURS AS REPORTED TO INDUSTRY PROMOTION FUND

	Period	*Hours*	*Daily Average*
1975	July	98,401	12,300
	August	299,531	11,981
	September	223,366	11,756
	October	271,729	11,322
	November	175,631	10,331
	December	189,608	9,979
1976	January	202,755	8,448
	February	156,599	8,700
	March	166,047	8,302
	April		
	May	154,893	7,744
Week end	June 4	35,098	8,775
	June 11	38,746	7,749
	June 18	42,210	8,442
	June 25	42,598	8,520
	July 2	36,353	7,271
	July 9	35,111	8,778
	July 16	37,924	7,585
	July 23	41,522	8,304
	July 30	39,823	7,965
	August 6	43,630	8,726
	August 13	39,770	7,954
	August 20	40,823	8,164
	August 27	40,581	8,116
	Sept. 3	38,938	7,788
	Sept. 10	36,643	9,161
	Sept. 17	39,655	7,931
	Sept. 24	38,637	7,727

Period	*Hours*	*Daily Average*
Oct. 1	37,511	7,502
Oct. 8	34,759	6,952
Oct. 15	30,568	7,642
Oct. 22	34,428	6,886
Oct. 29	31,487	6,297
Nov. 5	29,444	7,361
Nov. 12	28,924	7,231
Nov. 19	35,003	7,001
Nov. 26	26,687	6,672
Dec. 3	31,965	6,393
Dec. 10	32,919	6,584
Dec. 17	32,246	6,449

DEFENDANTS' EXHIBIT O IN CONTEMPT I PROCEEDING — LETTER DATED MARCH 16, 1978

ROSENTHAL & GOLDHABER
COUNSELORS AT LAW
44 COURT STREET
BROOKLYN, N.Y. 11201
(212) 868-8000

March 16, 1978

David Raff, Esq.
49-51 Chambers Street
New York, New York 10007

Dear Mr. Raff:

The JAC at its meeting held on March 15, 1978, discussed the current selection process. Considering the extraordinary expense involved in validating and administrating an apprentice test, not to mention the general dissatisfaction of the Plaintiffs and their experts with the testing procedure, the JAC proposes the following:

1. Not give an apprentice examination for selection of January and June, 1979 classes.

2. Take in a fixed percentage of minorities for each of the above classes.

3. The aforementioned would be subject to agreement by all parties on an acceptable selection procedure to replace the test.

Comments from you and the other parties would be most appreciated.

Very truly yours,

William Rothberg

pr

cc. William Glover Esq.✓
Gerald Dunbar, Esq.
Johnny J. Butler, Esq.
Dominick Tuminaro, Esq.

National Apprenticeship and Training Standards for the Sheet Metal Industry, U.S. Department of Labor, Bureau of Apprentice Training - Excerpt From Plaintiff's Exhibit 48 in Contempt I Proceeding

18. Ratio of Apprentices to Journeymen

The ratio of apprentices to journeymen in any local union as set forth in the Standard Form of Union Agreement shall be one apprentice for every four journeymen regularly employed throughout the year. Any other ratio must be agreed upon and set forth in the negotiated labor agreement or adenda. The local joint apprenticeship committee shall allocate these apprentices to the employers.

Page 22 of Defendants' (Petitioners')
Reply Memorandum is reprinted at
A-478 of the Appendix to the Petition
for Certiorari

Page 19 of Plaintiffs' (Respondents')
Reply Memorandum is reprinted at A-482
of the Appendix to the Petition
for Certiorari

PLAINTIFFS' MEMORANDUM IN REPLY TO DEFENDANTS' MEMORANDUM IN OPPOSITION, PAGE 17

CHART C

Year	*Average Number* of Apprentices*	*Average Hours Per Year Per Journeyman Member*
1970	500	2,036
1971	540	2,017
1972	575	1,406
1973	450	1,222
1974	340	1,121
1975	269	1,066
1976	134	1,017
1977	81	1,118
1978	108	1,245
1979	111	1,466
1980	125	1,666
1981	199	Data not submitted
1982	291	Data not submitted

* Figures for average number of apprentices were derived from the following:

1970 – 1975 — Defendants Memorandum In Opposition ("Memo"), pp. 21-22.
1976 — Census of Local 28 Membership ("Census"), dated January 15 and September 1, 1976.
1977 — Census dated October 6, 1977, and December 28, 1977.
1978 — Census dated August 17, 1978, January 30, 1979 and October 29, 1979.
1979 — Census dated March 3, 1980.
1980 — Affidavit/Report of Edmund D'Elia, ¶ 17, dated December 15, 1980. (Exhibit 11)
1981 — Census dated May 7, 1981.
1982 — Census, submitted on or about April 15, 1982. (Includes 12 CETA apprentices and 7 Pike Industries apprentices).
1970 – 1975 — Defendants Memo p. 38.
1976 – 1980 — Defendants Memo p. 18. It appears that these figures are a continuation of data reflecting journeymen hours worked per year on p. 38 of defendants' memo. 1975 hours are found on pp. 18 and 38 of defendants' memo.

TRANSCRIPT OF THE JULY 22, 1981 CONFERENCE,
PAGES 3, 6–7, 14–15, 17–22

to paragraph number 17 of the revised Affirmative Action Program and paragraph 22 F of the order and judgment.

MR. RAFF: What is the basis of the application?

MR. ROTHBERG: The basis of the application is that the parties have made every attempt to meet the manpower needs of the employers through the vehicles at hand, namely, the Apprentice Program, the use of the Journeyman's test, the use of four years' experience, and have not been able to fulfill the manpower requirements for the industry at this time.

And the parties have been advised that there are unemployed sheetmetal journeymen in neighboring locals that are available to work.

MR. RAFF: How many people are you talking about?

MR. ROTHBERG: I don't have an exact number at this point —

MR. RAFF: I am not going to give a blanket written permission.

MR. ROTHBERG: I understand that. I understand that. It's a situation where I think a certain amount of flexibility is required, and we are not looking for blanket permission, but maybe we can establish